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Dear Readers,

In this edition, we have come up with an article on analysis of value of land that should be deducted while arriving the value of supply of services. Everyone is aware that the GST law provides 1/3rd of total amount received towards deduction of land. Off late, there are judicial trends which endorsed the view that the deduction on deemed basis cannot be resorted if the assessee can show the original value. However, there are certain short-comings in such judgments which we have dealt in this article.

The next article on the interplay between Article 12 and Article 14 of DTAA. We have taken case studies to understand the interplay between both the articles and the instances when a particular income is taxable under Article 14.

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

THE STORY OF DEDUCTION OF VALUE OF LAND – DEEMED VS. ACTUAL

Contributed by CA Sri Harsha

The real estate industry is often subjected to a harsh tax measure. The Government aims only at the collection of taxes often leaving the complexities surrounding the collection of tax unaddressed. This outlook has always left the industry to a constant upheaval.

Though there are many issues at the moment troubling the real estate industry, we like to concentrate on the issue of quantum of deduction of land while arriving at the value of supply in the case of services provided by developer to his customer, in this article. Before embarking on the discussion on the core issue, let us discuss the basic aspects of the transaction.

Para 5(b) of Schedule II to CT Act[1] state that construction of complex intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier as supply of services. Hence, any consideration received by developer from his customer prior to completion certificate, then there amounts a supply of service from the developer to the customer.

The rate of tax is fixed by Notification No 11/2017 – CT (R) at 7.5% for residential real estate project. However, if the project is commercial, then the rate of tax is 18%. Vide Para 2 of Notification No 11/2017 – CT (R), it is specified that for specified entries which involve transfer of land or undivided share of land, as the case may be, the value of such supply shall be equivalent to the total amount charged for such supply less the value of transfer of land or undivided share of land, as the case may be, and the value of such transfer of land or undivided share of land, as the case may be, in such supply shall be deemed to be 1/3rd of the total amount charged for such supply. Vide Explanation the expression 'total amount' means the sum total of consideration charged for aforesaid service and amount charged for transfer of land or undivided share of land.

By virtue of Para 2, the effective tax rates for commercial and residential real estate project are at 12% (18%*2/3) and 5% (7.5% - 7.5%*1/3) respectively. For ease of communication, the trade state that the rate of tax applicable for residential real estate project is at 5%, that is after deducting the 1/3rd of total amount towards land or undivided share of land.

Let us take an example. Say, Mr Ahmed buys a flat from developer at a total cost of Rs 1.5 Crore. The developer would be collecting 5% on the total amount towards GST. Ideally, the developer should have deducted 1/3rd of Rs 1.5 Crores, that is Rs 50 lakhs towards the value of land and pay GST @ 7.5% on the balance value that is Rs 1 Crore. However, for ease of communication, the developer would say that GST is at 5% on the total amount. Whatever is the way, the GST portion remains the same, i.e., 5% on Rs 1.5 Crores or 7.5% on Rs 1 Crore. Now that, we are armed with basics, we shall proceed to examine the core issue.

The question that arises is, whether is it mandatory to take the standard deduction of 1/3rd of total amount towards land as provided in Para 2 or is developer at liberty to take any other value?

[1] Central Goods and Services Tax Act, 2017

Let us say, in the above example, the sub-registrar's value of undivided share of land is Rs 75 lakhs (as on the date of sale deed/agreement of sale), then the developer can deduct Rs 75 lakhs from the total consideration of Rs 1.5 Crores and pay tax on the balance of Rs 75 lakhs? (or) Is the developer mandatorily deduct the standard deduction of 1/3rd from the total amount, whereby he gets only deduction of land to the tune of Rs 50 lakhs?

We shall try to answer the above with the help of judgments in this context both under the service tax law and GST laws.

In the matter of Suresh Kumar Bansal[2] – Delhi High Court:

The Delhi High Court was considering a question under the service tax regime as to whether there can be any service tax on the sale of flats (immovable property) made by the developer under the provisions of service tax law? The petitioner contended that since the agreements were made for sale of immovable property, the parliament was not competent to charge service tax on such transaction. Apart from the main challenge, the petitioners have also challenged that since the act or rules have not provided any machinery for computation of value of services, there cannot be any imposition of service tax.

The Delhi High Court after negating the challenge on the competence of parliament to levy service tax on sale of flats made by developer has considered the additional question. The Delhi High Court stated that under the scheme of service tax law, there can be only tax on the services. There cannot be any tax on the supply of materials and supply of land. Hence, in composite transactions (which the developer enters with customers), there should be a mechanism under the law to arrive at the value of services. In simple words, the act or rules should be providing a mechanism to deduct the value of supply of materials and value of land and thereby arrive at the value of services. Since, under the service tax law, there was no mechanism stipulated under the law or prescribed under the rules to deduct the value of land involved, the levy fails. The High Court rejected the prescription of abatement of 75% of total amount provided for developer for arriving at the service value, since it was forming part of notifications and neither the act nor rules. The High Court placing reliance on the judgment of Supreme Court in the Larsen and Toubro Limited[3] has held that charging provisions as well as machinery provisions for its computation must be provided in the statute or rules framed under the statue and if not, such levy fails. Basis above, the Delhi High Court disregarded the prescription of abatement for land which was available in a Notification.

Post the above judgment, two things happened. One, the Revenue challenged the above decision before the Supreme Court and the same is pending as on date. Two, there was a retrospective amendment made to Rule 2A of Service Tax (Determination of Value) Rules, 2006, wherein the mention of land for deducting it and arriving at the service value is brought in.

[2] 2016 (43) STR 3 (Del)
[3] 2015 (39) STR 913 (SC)

In the matter of Munjaal Manishbhai Bhatt[4] – Gujarat High Court:

The Gujarat High Court in this case was dealing with validity of Para 2 of Notification No 11/2017 – CT (R). The brief of issue involved was that the petitioner has entered an agreement with Navratna Organisers & Developers Private Limited (4th respondent) for the purchase of plot of land admeasuring 1021 square meters. The said agreement also encompassed construction of bungalow on the said plot of land by 4th respondent.

Separate and distinct considerations were agreed upon between the parties to the agreement for sale of land and construction of bungalow on the land. The agreement stated that the petitioner is liable to pay all taxes including GST and the petitioner believed that GST is required to be paid only on the construction services qua bungalow, because that would only constitute supply under GST laws.

However, the 4th respondent relying upon the Entry 3(if) of Notification No 11/2017 – CT (R) read with Para 2 informed the petitioner that he would be liable to pay tax at the rate of 18% on the entire consideration payable for land as well as construction of bungalow after deducting 1/3rd of value towards land as stipulated in Para 2 and accordingly raised invoice on the petitioner. The petitioner challenged the above Entry 3(if) read with Para 2 of Notification No 11/2017 – CT (R) since the same does not provide for complete exclusion of consideration towards land and provides only for 1/3rd deduction, instead.

The High Court after listening to both the parties have framed a question for consideration as to whether the impugned notification providing for 1/3rddeduction with respect to land or undivided share of land in cases of construction contracts involving element of land is ultra-vires the provisions of GST laws and/or violative Article 14 of Constitution of India?

After tracing the history of taxation of building construction contracts through various judgments of Supreme Court stated that the very base of the levy was not changed under GST law. While earlier VAT and service tax were imposed on tripartite agreements, such taxes were sought to be consolidated under GST laws with a specific exclusion of land element.

The Court stated that in the facts of the case the booking agreement showed specific consideration was agreed for sale of land and for construction of bungalow. **The Court stated that there is no averment in the affidavit filed by Revenue that such bifurcation is not acceptable.** In such a case, the Court stated that if there is a specific value for land and Revenue does not have any objection for such bi-furcation, can the notification provide for fixed deduction as against the actual value of land available in the agreement?

The Court stated it should be answered in negative because, when the valuation provisions provide for valuation with actual price paid or payable for the service and where such actual price is available, then tax has to be imposed on such actual value. Deeming fiction can be applied only where actual value is not ascertainable and accordingly held that mandatory application of deeming fiction of 1/3rd of total agreement value towards land even though the actual value of land is ascertainable is clearly contrary to the provisions and ultra-vires the statutory provisions.

[4] [2022] 138 taxmann.com 117 (Gujarat)

The Court further held that one of the most glaring feature of the impugned deeming fiction is its arbitrariness in as much as the same is uniformly applied irrespective of the size of plot of land and construction therein and there is no distinction which is made even between a flat and bungalow and while a flat would have number of floors and the transfer would only be undivided share in land, the same deduction which is available on supply of flats is made available on supply of bungalows without any regard to the vast different factual aspects.

The Court also rejected the Revenue's argument that there is a possibility to include the value of construction contract into the value of land and to avoid the GST on the construction contract by stating that there are various ways in the valuation mechanism through which Revenue can reject valuation in such cases and that cannot be the sole reason for adopting the fixed deduction.

The Court also stated that when there was a methodology prevalent under the service tax law ([as a consequence to the judgment of Delhi High Court in Suresh Kumar Bansal as discussed supra] to provide for deduction of land, ignoring the same and providing a standard deduction in GST laws is not right in law. The Court also ruled out that the present controversy is not pertaining to Para 5(b) of Schedule II because the issue is with the valuation and not with chargeability.

The Court concluded by stating that while maintaining the mandatory deduction of 1/3rdvalue of land is not sustainable in cases where the value of land is clearly ascertainable or where the value of construction service can be derived with aid of valuation rules, such deduction can be permitted at the option of taxable person particularly in cases where the value of land or undivided share of land is not ascertainable.

Accordingly, the Court held that the Para 2 has to be read down to the effect that the deeming fiction of 1/3rdwill not be mandatory in nature and it will only be available at the option of taxable person in cases where the actual value of land or undivided share in land is not ascertainable.

In the matter of Avigna Properties (P) Limited [5] – Madras High Court:

The Madras High Court was seized with a question of applicability of Para 2 of Notification No 11/2017 – CT (R), when the developer is in a position to provide the actual consideration of land involved in a supply of construction service? In the facts of the case, the developer is engaged in provision of construction services. The developer has paid the stamp duty on undivided share of land involved in the sale of flat. Accordingly, he has taken the value of land as the value used for payment of stamp duty and arrived at the value of supply, instead of adopting the standard deduction as provided in Para 2.

The authorities have passed an order stating that there is no prescription under the law to adopt any value towards land except for the mechanism prescribed under Para 2. Further, the authorities have also stated that the notification does not permit distinguishing sale of land and supply of construction services and in cases of composite transactions, there is no other way to deduct the value of land except as specified in Para 2.

[5] [2023] 151 taxmann.com 422 (Madras)

The High Court rejected the contention of the authorities. The Court stated that the deeming mechanism of 1/3rd deduction of land as provided in Para 2 is applicable only when the developer is unable to supply the bifurcation of construction and sale of land. The deeming fiction shall not be applicable when the assessee is in a position to supply the actual amount of consideration received towards construction services and land cost. Since in the instant case, the developer is in a position to provide the value towards land (value adopted for payment of stamp duty), the valuation of construction services should be done based on deduction of actual value of land instead of deeming fiction.

Conclusion:

From the reading of the above judgments, it can be understood that the aspect of deduction of land has various issues. Let us frame the issues and then proceed to examine the same.

Issue #1 – Whether it is possible to split the consideration towards the services and land and thereby pay tax only the value of services? [Reference to Munjaal Manishbhai Bhat (supra) and Avigna Properties (P) Limited (supra)].

In our view, after introduction of GST laws in the country, there is no mechanism to split the consideration towards land and services. The entire package is deemed to be supply of services in terms of Section 2(119) of CT Act read with Para 6(a) of Schedule II.

In light of the above deeming fiction, the taxpayer cannot actually split the consideration. The said issue was not debated at length in Munjaal Manishbhai Bhat (supra) and Avigna Properties (P) Limited.

We opine that the Court in Munjaal Manish Bhat (supra) has missed out a crucial aspect in arriving at the conclusion therein. The Revenue in their arguments has stated that the contract is integrated one and cannot be split dehors the fact that the consideration is separately agreed, for the reason that the petitioner (buyer) does not have any right to get the bungalow constructed by anyone except from the developer. Hence, the Revenue stated that such a split as argued by the Petitioner is not possible. However, when the Court was analysing, it has stated that the Revenue in its affidavit has no-where stated that bifurcation is not acceptable. Despite the Revenue has made its arguments in such a direction, the Court appears not to consider such arguments since they do not form part of the affidavit. The Revenue's submissions that the components of transaction cannot be separated and are integral part of the transaction are evident from Para 46 of the judgment. If this would have been considered, whether the High Court would have come to the same conclusion as it has reached is doubtful.

When it comes to Avigna Properties (P) Limited, the permissibility of split of consideration is not even discussed. It was assumed that it is legally possible to split and in such circumstances the value of land can be claimed as deduction.

To such an extent, one should take the above judgments with a pinch of salt. For more on this, please read our previous article here.

Issue #2 – Whether the prescription of 1/3rd deduction of total amount towards land in Para 2 of Notification No 11/2017 – CT (R) runs contrary to the settled position of law as enunciated in Suresh Kumar Bansal (supra)?

The conclusion of Delhi High Court in Suresh Kumar Bansal (supra) is that the prescription of abatement of 75% (towards supply of materials and land) in form of a notification rather than prescribing in statute or rules is not in accordance with the law laid down by Supreme Court in Larsen and Toubro (supra) and in absence of any specific mechanism in rules, it was held that levy fails.

Seen in the context of GST laws, the prescription of standard/deemed deduction of land is also provided in Para 2 of Notification No 11/2017 – CT (R). In such a scenario, whether the judgment of Suresh Kumar Bansal (supra) stands applicable even to GST laws and as a consequence, can it be said, that the levy fails even under GST laws?

In our view, the standard deduction provided for transfer of land under GST laws is through a notification and not circular. In fact, the entire rates, exemption and other important aspects under the GST laws are guided through notifications. Hence, we believe that just because the standard deduction is provided in a notification, that itself would not cause the levy to fail.

From the above, it would be evident that the deduction of land from the taxable value has many twists and turns.The Government should provide an option for the assessee to first deduct the original value of land and if not then get into the deeming business. However, under the GST laws no such option/alternative was provided. An universal deduction may not be the solution to the problem.There are high chances the top court may say that straight away providing deduction based on deeming fiction is not correct.Hence, developers who wish to take a chance for reduction of original value of land may try their luck. Other developers may simply take a deduction of 1/3rd of land without any qualms about it. Like any other matter in GST laws, the conclusion for the above issue will be settled by Court in the times to come.

DIRECT TAX

INTERPLAY BETWEEN ARTICLE 12 AND ARTICLE 14 OF DTAA

Contributed by CA Sri Harsha & CA Narendra

Background:

Income earned by a person in the CoR[1] is taxable in such a country unless such an income is earned in another country i.e., CoS [2]. When any person earns income from CoS, such a country gets the first right to tax the income earned by the person. However, because of simultaneous taxation of same income by two countries, taxpayer would suffer from double taxation. In order to eliminate the double taxation of same income in two different countries, a country enters to DTAA[3] with other countries.

Under the DTAA, double taxation may be avoided either by sharing the taxation right between two countries and/or by providing relief under Article 23 (or similar article) of the DTAA.

Under the DTAA, business income earned by a person is taxable under Article 7 of the DTAA, which states that income from a business is taxable in the CoR unless such person conducts business through a permanent establishment in CoS.

However, a person may earn passive income viz. dividend, interest, royalty, fees for technical services etc. without establishing/triggering permanent establishment in the CoS.

In order to tax such income earned in the CoS by a person without establishing/triggering a permanent establishment, countries agreed to share the taxing rights on such passive income.

[1] Country of Residence.

[2] Country of Source.

[3] Double Taxation Avoidance Agreement.

In this article, the interplay between Article 12 and Article 14 has been discussed. As more focus has been placed on interaction between two articles, specific conditions mentioned in Article 12 and Article 14 need to be analysed separately for taxing any services in the CoS.

Fees for Technical Services ('FTS')– Article 12:

Article 12 of the DTAA deals with the fees for technical services which states that income by way of fees for technical services is taxable in the CoR. However, such income may also be taxable in the CoS at specific rate[4] and CoR may allow credit of taxes paid in CoS while computing the tax liability in CoR.

For the purpose of Article 12, the term 'fees for technical services' have been defined to mean payments of any kind to any person in consideration for services of a ***managerial, technical or consultancy nature***[5].

Though the term FTS is clearly defined under Article 12,as individual terms 'managerial', 'technical' and 'consultancy' have not been defined, it creates a huge litigation before the judicial fora regarding whether a particular payment made by a person is considered as FTS or not.

In order to interpret the above terms, recourse may be taken to commentaries on model tax conventions, judicial precedents, technical explanation provided by a DTAA or protocols amending the DTAA etc.

Further, in general context, the term 'technical' involves specialized knowledge, skill or expertise in a particular area or any subject.

[4] 10/15 percent.

[5] Some DTAAs contains make available clause and some DTAAs does not contain the word managerial in its definition.

Similarly, the term 'consultancy' means the provision of advice, opinion, or recommendation etc. Further, the judicial fora on various occasions pointed out that the word 'technical' cannot be read in isolation as it is preceded by word'managerial' and succeeded by word 'consultancy'. Accordingly, the word 'technical' needs to be construed by considering the terms'managerial' and 'consultancy'.

If any person delivers any services through his skills, experience or expertise either through aid of any machines, equipment or any kind of technology, then rendering of such services can be reckoned as 'technical services'.

Further, Article 12 of DTAA states that if the person providing FTS has permanent establishment as stated in Article 7 or fixed base as stated in Article 14 in CoS, such services would be taxable under respective Articles. However, if a fixed base is not available, services provided by a person does not automatically fall under FTS.

Independent Personal Services ('IPS') – Article 14:

Article 14 of the DTAA deals with the income earned by way of 'independent personal services'. However, this Article has been removed from the OECD MTC[6] and clubbed with the Article 7 of the DTAA. The rationale for such removal is that there is no difference between the income earned from business and income from profession. However, UN MTC and DTAA enters into by various countries contains specific article for independent personal services.

Article 14 of DTAA[7] states that income derived from a resident of a country in respect of ***professional services or other activities of an independent character*** shall be taxable only in the CoR except in the following situation:

- If he has fixed place regularly available to in the CoS for the purpose of performing his activities; or

- If his stay in the CoS amounting to 183 days or more in any 12-month period commencing or ending in the financial year.

So, unlike Article 12, income from independent personal services is taxable in CoS only if any of the above two conditions ('additional conditions') have been satisfied by the person.

Further, the para 2 of the Article 14 states that the term 'professional services 'includes ***especially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.***

It means services provided by a professional is covered under Article 14. It is an established principle that a profession always includes vocation. In order to consider a service provided by a person as professional services, such person should have acquired knowledge or expertise by way of systematic study or training. For example, services provided by a legal practitioner requires a recognised qualification and requisite training as per the norms of the regulatory authority.

The above services are different from commercial/trading activities undertaken by an enterprise. Further, services provided by a person under employment relations shall not be considered an independent service. Therefore, the following aspects may be considered in determining whether a particular service provided by a person is covered under Article 14 or not:

- Whether such services are rendered by a professional?

- Whether the services are independent and personal in nature?

[6] Model Tax Convention
[7] Reference to UN MTC

- Whether such activities are commercial or business in nature?
- Whether such activities are performed in the course of employment?

Further, the above-mentioned para 2 of Article 14 deals with the professional services. However, Article 14 is also applicable, in addition to professional services, to other activities of an independent character.

In this regard, it is required to understand the meaning of the sentence 'other activities of an independent character'.

Though there is no specific explanation to the above sentence, as it is used in conjunction with the professional services, it seems that it includes independent services provided a person which requires/involves expertise or specialised skills not ordinarily provided by other person without specific knowledge, skill or expertise.

In the context of India – USA DTAA, the Hon'ble Kolkata Tribunal in the case of Graphite India Ltd[8]. has held that the following conditions are required to be satisfied for a service rendered by the US resident being brought within the ambit of 'independent person services' exigible to tax in India under Article 15 of the Indo US DTAA:

- The service should be in the nature of a 'professional service' or other activity of an independent character, which includes independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants. In addition, this service should be rendered by an individual or firm of individuals (other than a company).
- The service should not be in the nature of a commercial or industrial activity, or a professional service rendered in the course of employment.
- In addition to satisfying both the above conditions, at least one of the following conditions should also be satisfied:

  a. The person rendering such service has a fixed based regularly available to him in India for the purpose of performing his activities. The connotations of 'fixed base', for this purpose, are somewhat akin to a professional's chamber which, in broad terms, implies a place from where the person can conduct his independent professional activities.

  b. The person rendering such service stays in India, in the relevant previous year, for period of 90 days or more (as per India – USA DTAA).

FTS (Article 12) vs. IPS (Article 14):

As discussed above, Article 12 deals with FTS i.e., amount paid for managerial, technical or consultancy services and Article 14 deals with IPS i.e., professional and other activities of similar nature.

On reading Article 12 and Article 14, it appears that both Article 12 and Article 14 overlap with each other for certain types of services. When a particular service has been provided by a person, the question that arises is whether such service is covered under Article 12 or Article 14?

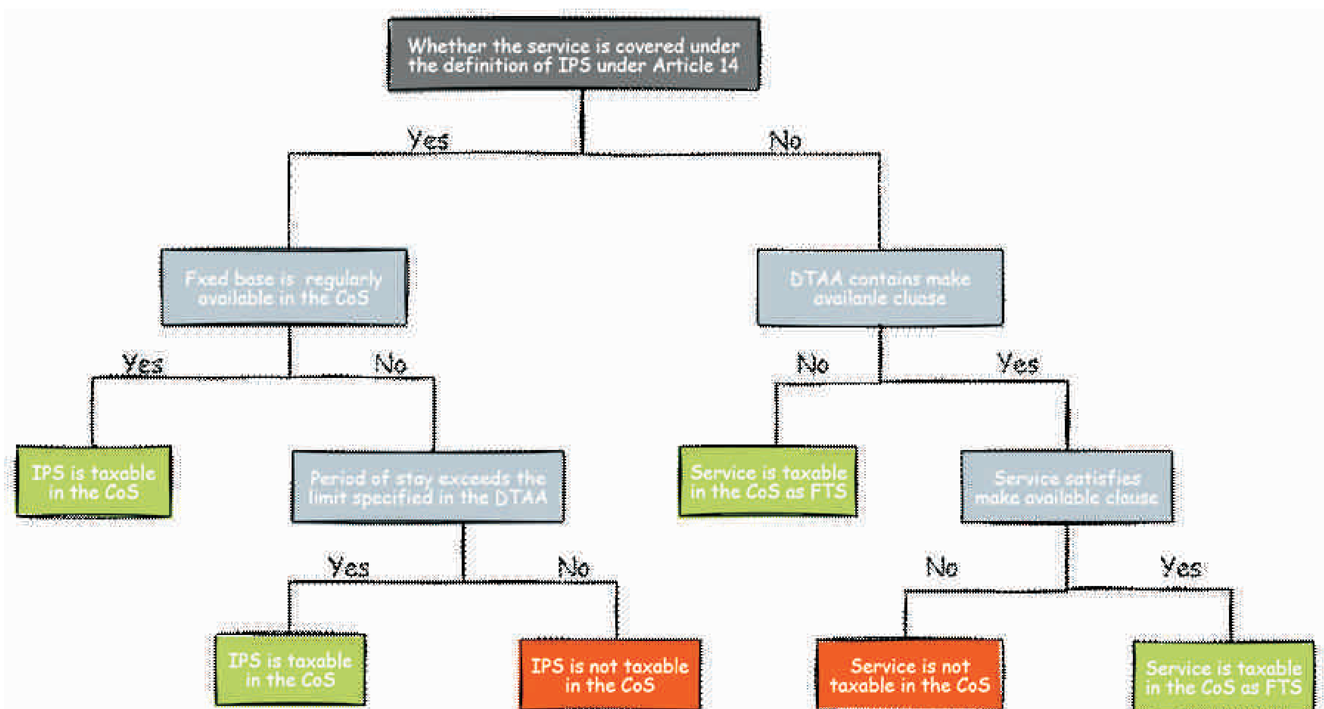
In this regard, it is required to understand that the provisions of Article 12 of DTAA are more general in nature which covers any type of consultancy services whereas article deals with only income with respect to professional services. It is settled law that when there is a conflict between two provisions, the more specific provisions would prevail over the general provisions of law.

[8] [2003] 86 ITD 384 (KOL.)

The Hon'ble Mumbai Tribunal in the case of Maharashtra State Electricity Board [9] has held that once the services in question constitute 'professional services', the natural corollary to this finding is that the provisions of Article 15 (the general Article 14) are to be applied in this case which specifically deal with 'professional services'.

Article 15 being specific provisions for professional services will override the relatively general provisions of Article 13 (the general Article 12)will apply to broader category of 'managerial, technical of consultancy services'.

Once it is determined that a particular service is covered by the provisions of Article 14, it is required to satisfy additional condition specified in Article 14 i.e., whether such a person has fixed base regularly available in the CoS or period of stay exceeds specified limit (which varies from country to country).



Given the above, when a particular service is covered by the provisions of Article 14, though such services are covered by the provisions of Article 12, such services are taxable only under Article 14 and not under Article 12.

[9] [2004] 90 ITD 793 (MUM.)

Case Studies:

Having discussed the interplay between Article 12 and Article 14, let us proceed to analyse certain practical case studies in order to determine whether such services fall under Article 12 or Article 14.

Case Study #1:

'Mr. A', an individual being a resident of Country A entered into an agreement to provide software development services to'Company B' situated in Country B. The aforementioned services have been provided from Country A and Mr. A has not travelled to Country B. Whether the amounts paid to 'Mr A' are taxable in Country B?

As discussed above, it is required to understand whether the service provided by 'Mr.A'falls under the definition of IPS under Article 14.

In this regard, the Hon'ble Ahmedabad Tribunal in the case of Susanto Purnamo[10] has held that software development service rendered by an individual, which essentially requires predominantly intellectual skill, dependent on individual characteristics of the person pursuing software development, and based on specialized and advanced education and expertise, is also a professional service.

Accordingly, the Tribunal has held that software development services provided by an individual fall under the definition of IPS and taxable as per the provisions of Article 14.

However, if the above-mentioned services are provided by a company, the provisions of Article 14 may need to be revisited based on facts of each case considering the DTAA with respective country. Further, once it is determined that the services are covered by the provisions of Article 14, it is required to analyse other additional conditions for taxing the income in the CoS. Since in the instant case, Mr A has not travelled to Country B, there cannot be any tax in CoS under Article 14.

Case Study #2:

'Mr. X', being an individual, resident of Country X completed graduation in law and practicing as a legal consultant/advocate in Country X. Considering the legal reputation of Mr. X, a company incorporated in 'Country Y' has approached Mr. X to represent their case in Country Y. Mx. X has travelled to Country Y on fly-in fly-out basis to represent the case of the company in Country Y. Whether the amounts paid to 'Mr. X' are taxable in Country Y?

In the present case, 'Mr. X' provides legal representation services which would be covered under the definition of IPS. In this regard, the Hon'ble Mumbai Tribunal in the case of Maharashtra State Electricity Board (supra) has held that any services in the nature of legal consultancy services inherently involve either purely intellectual skills of the person(s) rendering those services or of any manual skill, as in painting or sculpture or surgery, skill controlled by the intellectual skill of the person(s).

Whatever may be the popular conception or misconception regarding the role of lawyers and the alleged narrowing of gap between a profession on the one hand and a trade or business on the other, it is trite that traditionally, the lawyers do not carry on trade or business nor do they render services to the 'customers', thus the services rendered by them are distinctly in the nature of professional services. Similar view has been expressed by the Mumbai Tribunal in the case of Chadbourne & Parke LLP[11] .The above analogy is equally applicable to doctors as well. Hence, the amounts paid to 'Mr. X' are not taxable in Country Y.

[10] [2016] 73 taxmann.com 108 (Ahmedabad - Trib.)

[11] [2005] 2 SOT 434 (MUM.)

Case Study #3:

'Mr. P', being an individual, resident of Country P has entered into an agreement with the 'Company Q' in Country Q for providing engineering services viz. maintenance of plant, training of employees etc. Whether amounts paid to 'Mr. P' are taxable in Country Q?

The question which arises is, whether the above-mentioned services would qualify independent personal services under Article 14?

In this regard, the Hon'ble Mumbai Tribunal in the case of ABC Bearing Ltd[12]. has held that the services provided by individual in respect of engineering services viz. maintenance of machines, reducing breakdown time, to enhance productivity of machines and quality of products and also to train engineers on maintenance and other aspects of machines would fall under the definition of IPS under Article 14. Accordingly, the amounts paid to Mr. P would not be subjected to tax since he has not satisfied any of the additional conditions.

Case Study #4:

'Mr. M', being an individual, resident of 'Country M' (a freelancer) provides web design and hosting services to various persons across the world on freelancing basis. Customers reach Mr. M through social media platforms from various countries to avail web design services. Whether the payments made by customer (including Indian companies) are taxable in their respective countries?

In this case, the above services provided by a freelancer would fall under the definition of IPS under Article 14. Services provided by 'Mr. M' viz. web designing services fall under the definition of IPS as held by the Ahmedabad Tribunal in the case of Susanto Purnamo (supra) and the person providing freelancer satisfies the conditions mentioned by the Hon'ble Kolkata Tribunal in the case of Graphite India Ltd (supra). Accordingly, the above-mentioned services would be taxable only if additional conditions specified in Article 14 are satisfied.

Case Study #5:

'Mr. R', being an individual, resident of 'Country R' provides fashion design/costume design services to various artists in 'Country S'. Whether such amounts are taxable in Country S?

In order to provide the above service, Mr.R requires a specialized skill or expertise and those service may fall under the definition of professional services mentioned in Article 14. Even if the services provided by 'Mr. R' are not specifically covered under any of the categories mentioned in the definition of professional services (independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants), such services may be covered under ***'other activities of an independent character'.*** Hence, the amounts paid to Mr. R are subjected to tax only if the additional conditions are satisfied.

[12] [2017] 78 taxmann.com 62 (Mumbai - Trib.)

This article is contributed by CA Sri Harsha & CA Narendra, Chartered Accountants. The author can be reached at harsha@sbsandco.com

SUMMARY OF JUDGEMENT

SUMMARY OF GST DECISIONS

Contributed by Team SBS

1. **Punjab and Haryana High Court in the case of Samyak Metals Pvt. Ltd [1]. – Amount recovered by the department without passing any adjudication order or following the procedure under Section 73/74 of CT Act is invalid:**

A writ petition has been filed before High Court by the petitioner seeking for writ of mandamus to refund the amount which was illegally recovered by the department from them through DRC-03 without passing any show cause notice or any order under Section 74 of CT and ST Act.

In the present case, a search was conducted at petitioner's place of business by GST Investigation Wing, wherein it had examined the purchase ledger of a particular vendor for which no documents were available. Post completion of search, the petitioner has forced to deposit the credit claimed by them on such purchases through DRC-03. The petitioner contended that even after depositing the said amount there no acceptance from the department through DRC-04 after the requisite period.

The respondent contended that the petitioner has admitted that they accepted only bills without goods for which they have reversed the duty under Section 74(5) of CT Act along with the applicable interest and penalty.

After hearing both parties' contention, the Honourable High Court has drawn the reference to Vallabh Textiles[2] , wherein it held that deposit of tax made by the assesses during the search is not voluntary and amount cannot be detained, if no summons had been issued under Section 74(1) of CT Act and said notice should be issued within limitation period. Since in the present case, the facts are of same that deposit is made by the petitioner in the search and no show cause notice or order has been issued, following the Vallabh Textiles (supra), the Courtdirected the respondent to issue the refund with interest.

Our Comments:

There were many instances where the department/authorities has forced to deposit the tax amounts at the time of investigation or search. In order to curb such instances, the CBIC has issued an instruction in Instruction No. 01/2022-23[GST-INV] dated 25.05.2022. Despite the above efforts, the tax authorities without following the procedure known to law, make the taxpayer reverse or pay the amounts. The taxpayers reverse/pay the amounts since there are no options left to them. Once such amounts are paid, the tax authorities keep mum about them. There is neither an acknowledgment or show cause notice demanding and appropriating such amounts. In many cases, the taxpayers are clueless as to whether their proceedings have come to an end or not. There should be strict guidelines from CBIC and Courts that adopting to the above modus operandi defeats the rule of law. Till such time, the genuine taxpayers continue to suffer.

[1] 2023 (6) TMI 183 - PUNJAB AND HARYANA HIGH COURT

[2] 2022 SCC OnLine Del 4508.

2. Karnataka High Court in the case of M/s. Principle Mahendra Private Limited[3] – The opportunity of being heard should be granted even when the reply filed is belated. Order passed without grant of personal hearing is to be set aside:

In the present case, the petitioner has challenged the order, which was passed without giving him a personal hearing opportunity despite of the fact, he pleaded for the same. The petitioner also contended that though reply is submitted belatedly, the obligation under Section 75(4) of CT Act to afford the opportunity of being heard cannot be denied.

The respondent contended that the petitioner has filed the reply beyond the prescribed period and rightly the same has not been considered. The respondent further contended that, under Section 75(4) there should be a request for opportunity of being heard and the request filed by the petitioner is in the reply submitted (which was belatedly submitted) and since the reply submitted is rejected on the ground that they failed to comply with the mandate provisions, the question of opportunity of being heard does not arises.

After hearing both parties, the Honourable High Court held that as the petitioner has requested for opportunity to personal hearing in the reply filed, order passed without granting such opportunity is to be set aside as it clear violates the mandate of Section 75(4). The Court rejected the interpretation of the Respondent claiming that the belated reply containing request under Section 75(4) need not be considered stating that the same is hyper-technical. Further, the Court also ordered costs on petitioner for delay in filing the reply.

Our Comments:

Audi Alteram Partemis an important principle in any judicial or quasi-judicial proceedings. Whether or not Section 75(4) exists on the statue book, the authority is required to give the opportunity of personal hearing before concluding an issue. Then the order can be said to be in compliance with principles of natural justice and adhered to rule of law. However, in many cases, the authorities try to complete the above grant of opportunity of personal hearing as an empty formality. In cases like above, there is complete denial of opportunity, despite asked for, which is rightly set aside by the Court. Taxpayers need to be cautious about the timelines within which the replies or appeals to be made or preferred. They cannot delay indefinitely.

3. Allahabad High Court in the case of Elesh Agarwal[4] –Mere mention of wrong form number in the notice does not fatal proceedings:

A writ petition challenging the show cause notice issued by the respondent in Form DRC-01 instead of Form DRC-01A has been filed by petitioner. Wherein the said notice, a demand towards penalties under Section 142 of CT Act.

[3] 2023-VIL-339-KAR
[4] 2023-VIL-348-ALH

The petitioner contended that the notice is pre-mature. Under Section 74(5) of CT Act, the respondent should allow them the opportunity to pay up the alleged payments on self-assessed basis. However, in this case, the said opportunity has been denied and directly issued the show cause notice without following the procedure prescribed under the law. Further, he also contended that the notice was not uploaded in the portal and no notice was served through electronic means. He has relied upon the judgment of Agrometal Vendibles Private Limited[5] , wherein the High Court has set aside a show cause notice which was issued without issuing an intimation before issuance of show cause notice (DRC – 01A).

The respondent submitted that even though there is a discrepancy in the description of form issued, the impugned notice does not suffer any defect. This is for the reason that the petitioner wishes to challenge the notice but does not intend to pay the same as set out in Section 74(5).Therefore, the respondent submitted that adjudication proceedings have become necessary and issued the said notice. Further it was also contended that, there is no real prejudice which has been caused to the petitioner for reason of the discrepancy alleged in issuance of show cause notice on Form GST DRC-01 in place of Form GST DRC-01A. In addition, they also submitted that no adjudication order has been passed till date to claim it as disputed.

On hearing both parties, the Honourable High Court held that, since petitioner clearly did not admit the allegations being levied against them and does not have any intention to take the benefit of Section 74(5), hence non-granting of the same will be a formal allegation as there is no real prejudice for the respondent not granting such opportunity. Hence, the present petition has been disposed of by way of giving additional time to the petitioner to submit the reply to the impugned show cause notice.

The judgment of Agrometal Vendibles Private Limited (supra) has been distinguished from the facts in the current case. The High Court stated that in Agrometal Vendibles Private Limited, the notice itself appeared as good as final order (failing to pay the demand was stated to be recovered) and hence the Gujarat High Court was right in setting aside the show cause notice by stating that the petitioner was not given an intimation in DRC-01A and not followed the procedure prescribed in the law. However, in the instant case, the language of notice does not appear as it appeared in Agrometal Vendibles Private Limited (supra) and hence does not required to be quashed for mere wrong mentioning of the form. However, the Court directed the authorities to grant a month time for the petitioner to reply to the show cause notice. Also, the Court directed the Respondent to make sure that within 48 hours the notices have to be uploaded in GST portal and the communications to be done in accordance with the law.

Our Comments:

The High Court has rightly rejected the plea of petitioner, the ground being hyper technical in nature. As long as the petitioner does not want to take the benefit of Section 74(5), it would be adventurous to approach High Court alleging that the said opportunity has not been given and thereby asking the interference of Court. If the petitioner was serious in availing the said benefit, he should have paid in accordance with Section 74(5) and then approached the High Court. Having failed to do so, the intent

[5] 2022-VIL-260-GUJ

appears otherwise. Further, the authorities should also give an intimation before show cause notice and then followed by a show cause notice. Though quoting wrong number or using wrong number is not fatal to the entire proceedings (as long as the jurisdiction is there), the authorities are duty bound to follow the procedure prescribed under the law.

4. Delhi High Court in the case of Instakart Services Pvt. Ltd.[6] – Notice has been issued on mere ground of typo error in GSTR-3B and due to which there arises a difference in GSTR-2A with GSTR-3B, and thus requires to be set aside:

In the present case, the petitioner has challenged the show cause notice in which demand has been raised due to difference in credit available in GSTR-2A with the availed credit in GSTR-3B. The petitioner has been intimated by the respondent that there is a mismatch in credit between the GSTR-2A and GSTR-3B. Wherein he submitted that the difference has been arisen due to the clerical error and accordingly knowing the fact, they reversed the credit in the immediate next return and due to which, there exist a difference between the GSTR-2A and 3B.Since, there is no mechanism to adjust the excess declared liability, they have taken this step of reversing the same in the immediate return.

In response, the respondent has referred to the circular that has been issued with respect to rectifying the said errors in GSTR-1 and GSTR-3B. Since, the said circular has been issued in December 2017, the benefit of adjusting in terms of the said circular is not available to the petitioner as the issue has arisen before December 2017. Hence, they rejected the petitioner's contention in the intimation issued and accordingly issued show cause demanding irregular credit.

The Honourable High Court held that, since the said error is typographical error that has been noticed in the return and it is also apparent from the petitioner explanation. Hence, demanding of tax more than what is due and payable is not correct and accordingly ordered the respondent to consider the petitioners explanation and accordingly pass the suitable orders.

5. Madhya Pradesh High Court in the case of M/s. Kia Motors Private Limited[7] - Raising of e-way bill is mandatory for the case other than supply:

In the present case, the petitioner has transported the demo vehicle, which is not for sale to the state of Madhya Pradesh without raising any e-way bill. Petitioner contention is that they have transported the demo vehicle for which no consideration is receivable and accordingly no GST wouldbe applicable as the same would not fall under the term 'supply' as per Section 7 of CT Act. Further, Petitioner has also relied on circular 21/21/2017 dated 22.11.2017, wherein it states that inter-state movement of goods between the distinct persons for reasons other than supply should be treated as 'neither supply of goods nor supply of services'.Relied on the circular, the petitioner had transported the demo vehicle to the distinct person without any e-way bill, as the same does not form part of the supply.

[6](2023) 7 Centax 100 (Del.)
[7]2023-VIL-366-MP

However, the respondent contended that even though the said supply would not be fall under the Section 7 of CT Act but the provisions of e-way bill will squarely apply to the transactions for the case other than supply.

After hearing both parties contention, the Honourable High Court held that the Rule 138 of CT Rules was clear when you are causing of movement of a goods exceeding the value of Rs. 50,000/- for the reasons other than supply, the supplier should raise a e-way bill. Further, it also held that there is no exemption available in the rule to exempt the generation of e-way bill for the scope that are out of supply and accordingly the writ petition is dismissed on the ground that there is no jurisdictional error in the order of the Appellate Authority.

SUMMARY OF JUDGEMENT

SUMMARY OF IT DECISIONS

Contributed by Team SBS

1. **Karnataka High Court in the case of Rashtreeya Sikshana Samithi Trust[1] - Exemption cannot be denied in respect of donations received by a trust merely on the basis of assumption of AO that such receipts are being prohibited under other acts. Rejects revenue's reliance on SC ruling in New Noble Educational Society:**

   The assessee has claimed exemption on certain corpus donations received during the year on which the revenue has rejected the exemption by treating the donations as capitation fee received in violation of Karnataka Educational Institutions (Prohibition of Capitation Fee), Act, 1984. The argument of the revenue was that the assessee has received the capitation fee in guise of corpus donations. Further, revenue, placing reliance on SC ruling in New Noble Educational Society[2] has argued that since there is violation under KEI (Prohibition of Capitation Fee), Act, 1984, assessee is not entitled for exemption as the same shall also amount to violation of sections 11 and 12 of the IT Act.

   The assessee had argued that the amount received was not in the nature of capitation fee and had provided an affidavit declaring that no action under the KEI (Prohibition of Capitation Fee), Act was initiated against the assessee which clearly shows that the assessing officer, merely basis on the assumption and surmises, has held that there was violation under the KEI Act.

   The High Court has emphasized on revenue's reliance on New Noble Educational Society (supra) and held that in the said ruling, Hon'ble Supreme Court had held that registration under different statutes is also a relevant consideration while deciding the application for approval under section 10(23C) of IT Act.

   However, the subject matter of the case is not about the approval/rejection of the registration. The assessee had been granted exemption certificateand this court placing reliance on its co-ordinate bench judgement in Kammavari Sangham[3] held that as long as the exemption certificate isin force, the assessee is entitled for its benefit.Thus held, that the facts of New Noble Education Society (supra) are not applicable to the current case. The onus of proving that the receipts are capitation fee is on the assessing officer. Accordingly, rejected revenue's plea and allowed exemption to the assessee on the donations received.

   <u>Our Comments:</u>

   The revenue in this case has assumed that the nature of the capitation fee receipts has been concealed and argued that merely because no action has been initiated under respective statutes, it does not mean that there was no violation of any Acts and however, the IT authorities can consider violation of any statute while framing assessment at any time. However, the Court held that when the assessee is granted exemption certificate, he is entitled to exemption under section 10 or 11 and no exemption can be denied on mere assumption of AO.

[1] [TS-347-HC-2023(KAR)]
[2] [2022] 143 taxmann.com 276 (SC)
[3] [2023] 146 taxmann.com 367 (Karnataka)

2. Claiming of loss by filing a revised return of income - Pune Tribunal in Bilcare Limited[4] and by Delhi Tribunal in RRPR holding Private Limited[5].

In a recent ruling of Bilcare Limited[6], the Pune Tribunal has held that the loss arising from sale of shares can be claimed in the revised return which was omitted at the time of filing the original return provided the original return was filed within the due date as provided in section 139(1).

The facts of the case were that the assessee had filed the original return of income within the due date. During the year, the assessee had sold its shares in the subsidiary company which is being liquidated at 1 Singapore Dollar subsequent to obtaining approval from respective authority. However, the assessee had omitted to report long term capital loss incurred in its original return of income and claimed the loss of R922 crores by filing a revised return of income. It is to be noted that the assessee had failed to record the transaction in its books of accounts during the year. The assessing officer had rejected the loss contending that as per section 139(3) of IT Act, the loss can be claimed only through filing a return of income within due date specified in section 139(1) but not through the revised return. The argument of the assessing officer and the ruling by the tribunal is discussed below.

The revenue, by relying on the SCruling in Wipro Ltd.[7], had argued that a new loss cannot be claimed by filing a revised return. In Wipro Ltd(supra), it was held that revised return under Section 139(5) can only substitute the return filed under section 139(1) but cannot transform it into a return under section 139(3), in order to avail the benefit of carrying forward or set-off of any loss under section 80 of the IT Act.

However, the Tribunal in the instant case had identified that SC in Wipro Ltd(Supra) had primarily dealt with the issue, whether the assessee can claim the exemption under section 10B in its original return and withdraw the same by taking completely contrary stand against its original return and carried forward a new loss in revised return. The Tribunal had held that the interplay of section 139(5) and section 80 were not dealt before the Hon'ble SC in the above matter and accordingly held that the observations made by the SC has no application to the facts of the present case.

Accordingly, the Tribunal has held that when the original return is filed within the due date, whether it is a loss return or a profit return, as per section 139(5), revised return can be filed to claim higher loss or a new loss respectively, provided such claim is made on account of genuine omission or wrong statement made at the time of filing the original return. This view was upheld by Delhi High Court in Nalva Investments Ltd[8]. and by Karnataka High Court in Srinivasa Builders[9] respectively. Further, any claim in the income tax is allowed based on provisions of Income Tax Act, 1961 but not on the accounting principles of the assessee. Hence, the fact that the sale transaction is not recorded in books by which it was contended to be a bogus transaction cannot be held tenable. Therefore, given the above interpretation, the Tribunal allowed the assessee in claiming the loss on sale of shares by filing revised return.

[4][TS-344-ITAT-2023(PUN)]
[5][TS-341-ITAT-2023(DEL)]
[6][TS-344-ITAT-2023(PUN)]
[7][2022] 140 taxmann.com 223 (SC)
[8]ITA No.822/2005
[9]369 ITR 69 (Kar)

On contrary, Delhi Tribunal in a much recent case of RRPR holding Private Limited[10] has held that no loss can be claimed by the assessee by filing the revised return even when the original return has been filed within the specified time. The rationale of the ruling is as follows.

The assessee in the present case had filed its original return within the due date specified. Later, the case was selected under scrutiny and during the proceedings, the assessee had filed revised return which was within the due date to do so, claiming long term capital loss on sale of shares.

The Tribunal had analysed the provisions of sections 139(1), 139(3), 139(5) read with section 80 of the IT Act. It was held that section 80 restricts the claim of loss upto the extent of which was determined only under section 139(3). Section 139(3) provides for claiming the loss only when it is furnished before the due date as per section 139(1). Hence, when the revised return is filed after the due date of section 139(1) to claim a new loss, the said loss cannot be deemed to be a substitute for the loss return under section 139(3) and cannot be allowed for carry forward or set-off. Accordingly, the Delhi Tribunal had held that the loss claimed in the revised return cannot be allowed.

<u>Our Comments:</u>

Claiming of loss in revised return is always a debatable issue. One school of thought is that when an assessee filesa revised return, it substitutes original return and loss claimed in the revised return can be carry forward. This view was upheld by Allahabad High Court in Dhampur Sugar Mills Ltd.[11] and in Gopaldas Parshottamdas[12] .The other school of thought is that the same cannot be carried forward through a revised return.

Based on the various judicial precedents, claiming of loss can be summarised as follows. The above provided interpretations are tabulated as below:

Scenario	Original return was filed within due date	Original return not filed within due date
Loss as per original return and additional loss as per revised return	Additional loss shall be allowed	No lossis allowed (Including loss as per original and revised returns).
Profit as per original return and loss as per revised return	Allowed	Not Allowed
Loss claimed in revised return on account of deliberate omission/wrong statement in the original return	Not Allowed	Not Allowed
A claim which is completely contrary to the original return is made in the revised return[13]	Not Allowed	Not Allowed

[10] [TS-341-ITAT-2023(DEL)]
[11] 1973 90 ITR 236 All
[12] [1941] 9 I.T.R. 130 (All.)
[13] Wipro Ltd. (Supra)

3. Mumbai Tribunal in Vijaykumar Kanaiyalal Matta[14] - Section 69 of the Income Tax Act,1961 is not applicable to the on-money paid by NR unless the said income is proved to be Indian income and assessee is covered under Article 24 of India-Oman DTAA:

The facts of the present case were that the assessee is resident of Oman, had purchased a flat in India during the impugned assessment year. Further, a search was conducted on the builder of the said flats and some loose sheets were found with rough calculations. It was found that the assessee had paid on-money to the builder for an amount of Rs.47 lakhs which was found unaccounted which had led to re-opening of assessment and held as unexplained investments under section 69.

However, the Tribunal had set aside the order of Assessing Officer based on the following identified grounds. Firstly, the assessee is a resident of Oman and had been earning income in that country. The assessee does not have any income earned in India during any previous year as the revenue were failed to identify any Indian income pertaining to the assessee. Since the assessee had no Indian income, it cannot be said that the on-money paid to the builder is an unexplained investment under section 69 because the said amount could even be paid from the foreign sources of income and contrary to the same was not proved by the revenue.

Secondly, the assessee being a resident of Oman, covered under the Article 24 of India-Oman DTAA wherein it was provided that any income of the resident of a country shall not be taxable in the other country in the absence of any Permanent establishment in the other country. Hence, even though the foreign income is the source for the on-money paid by the assessee, the revenue cannot make the same taxable by virtue of Article 24. Hence, no discussion for treating the same as unexplained investment under section 69 would need to be raised. Accordingly, the Tribunal held that the addition under section 69 is unsustainable in law.

Our Comments:

Provisions of section 69 have been inserted into IT Act, in order to tax undisclosed income earned in India. If a non-resident earns income outside India and any investment from such income is found during the search, such income shall not be taxable under section 69. However, once it is found that such income is found to be earned in India, revenue is empowered to invoke provisions of section 69. In the present case, as revenue failed to establish the fact that the income is earned in India, Tribunal has held that provisions of section 69 shall not be invoked.

4. Bombay High Court in the case of Citicorp Investment Bank (Singapore) Ltd. [15] – LOB clause under Article 24 of India-Singapore DTAA cannot be invoked on mere assumption of the Assessing Officer and a certificate provided by Singapore Authorities shall be deemed to be sufficient to grant exemption under DTAA:

The facts of the case were that the assessee company, an FII registered under SEBI in India, has sold debentures during the year and earned Capital Gains on such sale. As per the Article 13(4) of India-Singapore treaty, any income arising from sale of property in India shall be taxable in Singapore and hence exempt in India. However, such exemption is subject to condition under Article 24 where the

[14] [TS-311-ITAT-2023(Mum)]
[15] [TS-346-HC-2023(BOM)]

exemption is restricted only up to the extent of the income which is taxable in Singapore on receipt basis. In simple words, if the entire capital gain is taxable in Singapore irrespective of the receipt, the capital gain is exempt in India without any conditions. Whereas, if the capital gain is taxable on receipt basis, then the exemption is provided to the extent of receipt in Singapore.

In the instant case, the income from capital gains is taxable in Singapore under accrual basis which was certified by the Singapore Tax authorities. However, the assessing officer has erroneously assumed that the capital gains in Singapore is taxable on receipt basis despite the submission of Singapore tax laws by the assessee. The High Court by relying on its ruling on Lakshmi Textiles Exporters Ltd[16] has held that the certificate furnished by Singapore Authorities shall be sufficient evidence to conclude the taxation rules of Singapore and assessing officer's assumption cannot form base for determining its taxability. Hence, it is identified that the Assessing officer has passed the order onad hoc basis without verifying the facts of the case and accordingly, quashed the order passed by Assessing Officer.

[16] 245 ITR 522

By

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