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Article

Tribunal's power to grant stay: The case of *Pepsi Foods*

By **Samyak Lohade**

Introduction

In the current bureaucratic setup of taxation systems in India, the right to appeal is an important right. The right of appeal against the Orders by the Income Tax authorities under the Income Tax Act, 1961 ('**Act**') has been expressly conferred on the taxpayers. In disposing of these appeals, the appellate authorities have inherent power to grant stay against the tax demands raised by Income Tax officers.

The power to grant stay by the Income Tax Appellate Tribunal ('**Tribunal**') has been subject to numerous litigations. In many cases, before the introduction of specific provisions in Section 254 of the Act concerning grant of stay by the Tribunal, the Courts have held that the Tribunal has inherent power to grant a stay against the recovery of income tax demand. Recently, the Supreme Court in *DCIT* v. *Pepsi Foods Ltd.*[1] examined the power of the Tribunal to grant stay, as well as certain amendments which provided for automatic vacation of stay granted by the Tribunal. This article analyses the legislative history in the matter of grant of stay by the Tribunal with the help of notable judicial precedents.

Legislative history and judicial precedents

The Act, as introduced in 1961, did not explicitly conferred any power with the Tribunal to grant stay against the recovery of income tax demand. The genesis of power to grant stay by the Tribunal flows from the judgement of the Apex Court in *ITO* v. *M.K. Mohammed Kunhi*[2], wherein, the Court noted that the income tax authorities do have express powers under Section 220(6) of the Act to grant stay against the income tax demand when the matter is *sub-judice* before the Commissioner of Income Tax (Appeals). However, the said power cannot be exercised if the challenge to assessment is pending before the Tribunal. Considering the wide amplitude of powers granted to Tribunal under Section 254(1) of the Act, to pass such orders as it thinks fit, the Court held that the Tribunal must be held to have the power to grant stay as incidental or ancillary to its appellate jurisdiction. The exercise of such power is subject to condition that a strong *prima facie* case is made out, to grant stay.

This landmark decision paved the way for legislative amendments, which were introduced more than three decades later.

For the first time, the Finance (No. 2) Act, 1998, inserted sub-section (7) to Section 253 of the Act, providing for levy of fees on the application for stay of demand. Though this amendment did not expressly confer any power to grant stay onto the Tribunal, yet it somewhere recognised the inherent power of the Tribunal in granting stay.

The principal amendments relating to grant of stay by the Tribunal, were introduced *vide* Finance Act, 2001 w.e.f. 1 June 2001, which introduced two provisos to Section 254(2A) of the

[1] [2021] 126 taxmann.com 69 (SC)

[2] [1969] 2 SCR 65 (SC)

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Act. These provisos added an obligation upon the Tribunal to dispose of an appeal within 180 days of the grant of stay, failing which, the stay order shall stand vacated at the end of the period. The Memorandum to the Finance Bill, 2001 states that in many cases, such stays granted by the Tribunal on recovery of demand till the disposal of appeal, makes the demand irrecoverable for several months or even years. Thus, the amendment was brought about to shore up revenue collection which was stuck due to these stay orders.

Thereafter, the Finance Act, 2007 substituted the provisos inserted by the Finance Act, 2001 and inserted three provisos to Section 254(2A). Under the '*First proviso*', the Tribunal could grant stay for 180 days coupled with liability to dispose of the appeal in such time period. However, if the appeal could not be disposed of within 180 days for reasons not attributable to the assessee, then the '*Second proviso*' provided that the Tribunal may extend the period of stay for further period, as it thinks fit, but the aggregate period of stay (original 180 days + further period of stay) shall not, in any case, exceed 365 days. The Tribunal was again made duty-bound to dispose of appeal during the existence of stay period. Again, if the appeal could not be disposed of within this extended period, the '*Third proviso*' provided that the order of stay shall stand vacated after the expiry of such period. This proviso was silent as to whether the non-disposal of appeal is due to reasons attributable to the assessee or not.

Thus, by putting an embargo on the power of Tribunal in granting stay for limited number of days, the legislature put in jeopardy those assessee's who were not at fault in non-disposal of appeal by the Tribunal within the existence of stay period. Further, a question also arose that owing to the 2nd proviso where the stay could not be extended beyond 365 days, could the interpretation of the 3rd proviso curtail the Tribunal's inherent power to grant stay beyond 365 days. This question assumed more significance when the delay in disposing of the appeal was not attributable to the assessee.

The above noted question came up for consideration before the Bombay High Court, in *Narang Overseas Pvt. Ltd.* v. *ITAT*[3]. The Court observed that the mischief sought to be curtailed by the Legislature was the long delay in disposing of proceedings where interim relief had been obtained by the assessee. The Court thus held that it would not be possible to hold that even though there is a vested right of appeal, there is no power to continue the grant of interim relief granted to the assessee for no fault of his, and thereby divesting the incidental power of the Tribunal to continue the interim relief. The Court held that such a reading would result in such an exercise being rendered unreasonable and violative of Article 14 of the Constitution.

Thus, the Court effectively bifurcated the situation in two parts:

1. Where the delay in disposal of appeal was not due to any fault of the assessee, the stay granted would not be vacated even after the expiry of 365 days;
2. Where the delay in disposal of appeal could be attributed to the actions of the assessee, the stay would automatically vacate on the expiry of 365 days.

To overcome the above judgement, the Finance Act, 2008 replaced the then existing 3rd Proviso, to now provide that the stay would be vacated at the expiry of 365 days even if the delay in disposing of the appeal was not attributable to the assessee. This amendment then led to a plethora of litigation.

[3] [2007] 295 ITR 22 (Bom.)

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When the above amendment, came up for consideration before the High Court of Delhi, in *CIT* v. *Maruti Suzuki (India) Ltd.*[4], the Court, without examining the constitutionality of the provisions, held that the Tribunal has no power to extend stay beyond 365 days. But, the assessee can approach the High Court by way of writ petition under Article 226 of the Constitution of India wherein the High Court has power to grant stay and issue directions to the Tribunal, as may be required. In a subsequent decision, the High Court of Gujarat in *DCIT* v. *Vodafone Essar Gujarat Ltd.*[5] disagreed with the above view and held that the Tribunal can extend stay granted earlier beyond period of 365 days from date of grant of initial stay, on being subjectively satisfied that delay in disposing of appeal within a period of 365 days was not attributable to assessee, and that assessee was not at fault. It recommended that the registrar of the Tribunal maintain separate registers for stay granted matters and give them priority in disposal.

For the first time, the constitutional validity of these provisions was challenged before the High Court of Delhi in *Pepsi Foods Ltd.* v. *ACIT*[6]. The Court upheld the challenge and struck down the amendments made the Finance Act, 2008 as being violative of Article 14 of the Constitution of India. Aggrieved by this order, the Revenue filed an appeal in the Supreme Court.

Supreme Court on the constitutional validity of the amendment

Firstly, as to whether provisions of tax statues can be challenged under Article 14 of the Constitution of India, the Supreme Court held that challenges to tax statutes under Article 14 can be on grounds relatable to discrimination as well as grounds relatable to manifest arbitrariness, either on procedural or substantive grounds. The Court referred to a recent Constitution Bench Decision in the case of *Shayara Bano* v. *Union of India*[7] wherein the Court set out the test of manifest arbitrariness. The Court had held:

"Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary."

On both the parameters, the SC found the amendments brought in by Finance Act, 2008 to be both arbitrary and discriminatory and, therefore, liable to be struck down as offending Article 14.

The SC further held that *vide* the amendment, un-equals were treated equally in that no differentiation was made by the third proviso between the assessees who were responsible for delaying the proceedings and assessees who were not so responsible. It observed that object sought to be achieved by the third proviso to Section 254(2A) of the Act is speedy disposal of appeals before the Tribunal in cases in which a stay has been granted in favour of the assessee. But such object cannot itself be discriminatory or arbitrary[8].

Further, the SC held that the provision is capricious, irrational and disproportionate so far as the assessee is concerned since it unfairly penalizes the assessee even where the appeal could not be taken up for fault of the Tribunal or even if the revenue was itself responsible for the delay in hearing the appeal. This would give rise to a situation wherein the revenue itself adopts delaying tactics and thereafter would be unjustly rewarded by automatic vacation of stay.

[4] [2014] 362 ITR 215 (Del)
[5] [2015] 376 ITR 23 (Guj)
[6] [2015] 376 ITR 87 (Del), the impugned judgement

[7] [2017] 9 SCC 1 (SC)
[8] *Nagpur Improvement Trust* v. *Vithal Rao* [1973] 3 SCR 39

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The Revenue contended that when Article 14 of the Constitution of India is applied to tax legislation, greater freedom in the joints must be allowed by the Court in adjudging the constitutional validity of the same, relying on certain decisions[9] of the SC itself. However, relying upon paragraphs within those very judgements, the SC held that a taxing statute may contravene Article 14 of the Constitution of India if it seeks to impose upon the same class of property, persons, etc., something which leads to obvious inequality.

The SC thus upheld the impugned order of the Delhi High Court and struck down the word 'even' and the words 'is not' after the words 'delay in disposing of the appeal' in the third proviso to Section 254(2A) as arbitrary and discriminatory, violative of Article 14 of the Constitution.

Further challenges

While the decision of the SC is a panacea for many assessee's, the challenges do not end with this decision. The Finance Act, 2020 has again made certain amendments to Section 254 of the Act and introduced more conditions and limitation to the power of the Tribunal in grant of stay of recovery of demand. The amendments introduced a new condition that the Tribunal could only grant stay of recovery subject to the condition that the assessee deposits twenty percent of the amount demanded by the Revenue. Further, it has amended the second proviso to incorporate the aforementioned condition, while retaining the period for which the stay may be granted.

These amendments reveal the intent of the legislature to curb the Tribunal's unconditional power to grant stay and with this decision of the SC, stand at variance with the judicial declaration of the legal position.

Further, the Department has lately been relying upon the decision of the Supreme Court in *Asian Resurfacing of Road Agency Pvt. Ltd.* v. *CBI*[10] to hold that any stay order granted by the High Court or Tribunal will automatically stand vacated if it is not extended by a speaking order of that Court. Relying upon this decision, notices have been sent to multiple assessees for recovery of demand and resumption of proceedings which were stayed by the High Courts.

The High Court of Bombay in *Oracle Financial Services Ltd.* v. *DCIT*[11] has however held that the decision of the SC in the *Asian Resurfacing* case cannot be applied in the context of tax matters, since the decision clearly mandates that stay granted in civil/criminal proceedings would be vacated, and not stay granted in quasi-judicial matters. Even with this decision of the Bombay HC, the impact of the decisions of the SC in *Asian Resurfacing* case read with the decision in *Pepsi Foods* is likely to lead to further challenges and another judicial contest appears imminent.

Conclusion

As the Legislature keeps interfering with the power of Tribunal to grant stay, it appears that the Tribunal can no longer exercise its independence in granting complete stay even where the assessee is able to satisfy the three ingredients for seeking a stay, being a *prima facie* case, balance of convenience and financial / genuine hardship. Even in cases where the issue in appeal is covered in favour of the assessee, the Tribunal would have no option, but to direct the assessee to pay 20%, thereby causing unnecessary financial hardship on the

[9] *State of M.P.* v. *Bhopal Sugar Industries Ltd.* [1964] 6 SCR 846, *N. Venugopala Ravi Varma Rajah* v. *Union of India* [1969] 1 SCC 681

[10] Criminal Appeal No. 1375-76/2013 (SC)

[11] W.P. No. 542/2019

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assessees. The only recourse in those cases would be to approach the High Court under Article 226 of the Constitution of India.

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Notifications & Circulars

Form 12BA under Rule 26A(2) revised – Employer to furnish various additional details including stock options allotted

Under Rule 26A(2) of Rules, an employer is required to furnish Form 12BA being a 'statement giving correct and complete particulars of perquisites or profits in lieu of salary and the value thereof', to its employee provided the amount of salary paid or payable to, is more than INR 1.5 lac.

The CBDT has by Notification No. 15/2021/F.No. 370142/04/2019-TPL, dated 11 March 2021 [Income Tax (3rd Amendment) Rules, 2021] notified amended Form 12BA under Rule 26A(2)(b). The amended Form now additionally requires the employer to furnish details of (i) stock options allotted or transferred by employer being an eligible start-up referred to in section 80-IAC of the Act; (ii) Contribution by employer to fund and scheme taxable under section 17(2)(vii) of the Act; and (iii) annual accretion by way of interest, dividend etc. to the balance at the credit of fund and scheme referred to in section 17(2)(vii) of the Act and taxable under section 17(2)(viia) of the Act. Further, the amended form also requires the employer to submit as to whether employee has opted for concessional tax regime u/s 115BAC in part B of Form 16. Correspondingly, Form 24Q has also been amended. The new form has come into force w.e.f. 1 April 2021.

Payments to non-residents – New rule introduced for online application for lower withholding

The existing procedure of making application for lower withholding tax on payments to a non-resident under Section 195 of the Income Tax Act, was a paper-based submission process with no specific form prescribed. Under Section 195(7), the CBDT was empowered to prescribe the form and manner of filing such application, however, nothing was prescribed. The CBDT has now *vide* Notification No. 18 of 2021, dated 16 March 2021 notified Rule 29BA and Form No. 15E for making an application of lower deduction of tax under Section 195(2) of the Act.

Under this rule, the Form No. 15E shall be filed electronically under digital signature or through electronic verification code. This form requires furnishing of elaborate details of the payer, non-resident payee, nature of payment, previous year for which certificate is requested, estimated tax payable on such payment, details of advance tax paid and any existing tax liabilities under the Act of the payee in India, and taxability under the Act as well as under the Double Taxation Avoidance Agreement, along with copies of transaction documents.

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Thereafter, the Assessing Officer shall determine the chargeability of the sum under the Act read with the relevant provisions of the double taxation avoidance agreement. The Assessing Officer shall grant a certificate determining the appropriate portion of sum on which tax is deductible. Such certificate would be valid only for the payment named therein and for such years as specified unless cancelled by the Assessing Officer.

CIT(A)s for jurisdiction under Black Money Act notified

Section 15 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 ('**BMA**') provides for an appeal before the Commissioner (Appeals) against the assessment finalised under the BMA. *Vide* Notification dated 1 October 2018, certain CIT(A)s were notified as the Commissioner (Appeals) for the purposes of the BMA. With the notification of the Faceless Appeals Scheme, 2020, many of these Commissioners were transferred to the Appeals unit of the National Faceless Appeal Centre. Thus, the assessee's were left with no forum to appeal to against the assessment order passed under the BMA. Realising this lacuna, the CBDT has now *vide* Letter F.No. 279/Misc.jM-44 /2018-ITJ, dated 23 March 2021 notified Commissioner of Income Tax (Appeals) to exercise jurisdiction over the cases under the BMA in specified Principal Chief Commissioner of Income Tax regions/charges.

Classification of 'search case' under Direct Tax Vivad se Vishwas Act 2020 clarified

The CBDT had issued Circular No. 21 of 2020 under Sections 10 and 11 of the Direct Tax Vivad se Vishwas Act, 2020 ('**VsV Act**'), to provide answers to certain FAQs. In this Circular in Q. No. 70, the CBDT had clarified the eligibility for 'search case' under VsV Act. It was clarified that in case of a taxpayer, if an assessment order has been passed under Section 143(3) / 144 of the Income Tax Act based on the search executed in some other taxpayer's case, then it is to be considered as a 'search case' under VsV Act. In order to remove any uncertainty with regard to understanding of the term 'search case' in Q. No. 70, this question and answer thereto has been modified. It is now stated that a 'search case' would mean an assessment or reassessment made under Section 143(3)/ 144/ 147/ 153A/ 153C/ 158BC of the Act in the case of a person referred to in Section 153A/ 153C/ 158BC/ 158BD on the basis of search initiated under Section 132, or requisition made under Section 132A of the Act. Circular No. 4/2021, dated 23 March 2021 has been issued for the purpose.

Extension of certain reporting requirements in Form 3CD until 31 March 2022

Under clause 30C of Form 3CD details of impermissible avoidance arrangement as referred to in Section 96 of the Income Tax Act, 1961 are to be reported by the assessee. Further, clause 44 of Form 3CD requires reporting of break-up of total expenditure of entities registered or not registered under the GST. However, the reporting under these clauses was kept in abeyance till 31 March 2021. In view of the prevailing situation due to COVID-19 pandemic across the country, the reporting under clauses 30C and 44 of the Tax Audit Report has been kept in abeyance till 31 March 2022. Circular No. 5 of 2021, dated 25 March 2021 has been issued for the purpose.

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Re-registrations of trusts under Section 12AB – Rules and Forms notified

Section 12AB was introduced in the Income Tax Act, 1961 by the Finance Act, 2020 requiring all trusts which were previously registered under Sections 12A/12AA and 10(23C) of the Income Tax Act, to get themselves re-registered under Section 12AB within the time frame prescribed. However, the Rules and Forms for obtaining such registration were not prescribed. The CBDT has now by Notification No. 19 of 2021, dated 26 March 2021 notified the Rules and the Forms prescribing the manner in which the registrations must be done.

Applications for condonation of delay in filing of Form 10B and 10BB for years prior to A.Y. 2018-19 to be disposed within 3 months

Under Section 10(23C) of the Income Tax Act, if the total income of certain funds, universities, educational institutions, hospitals and other organisations, referred to in Clause (iv), (v), (vi) and (via), without giving effect to the exemption under Section 10(23C) exceeds the maximum amount not chargeable to tax, then such funds etc. are required to get their accounts audited and furnish such audit report before one month from the due date of filing of return of income. As per Rule 16CC, such audit report is to be furnished electronically in Form No. 10BB. Circular No. 19 of 2020, dated 3 November 2020 provided that in all the cases of belated applications in filing of Form No. 10BB for years prior to AY 2018-19, the Commissioners of Income tax are authorised to admit belated applications for condonation of delay under Sections 119(2)(b). Such applications were to be disposed-off by 31 March 2021. Now, Circular No. 6 of 2021 provides that all the pending applications as well as new applications, shall be disposed preferably within 3 months from the end of the month in which application is received.

Further, Para 4(ii) of Circular 10 of 2019, dated 22 May 2019, as further modified by Circular No. 28 of 2019 dated 27 November 2019, provided that Commissioners of Income tax are authorised to admit belated applications in filing Form No. 10B relating to audit of accounts of trust for years prior to AY 2018-19, for condonation of delay under Section 119(2)(b). Such applications were to be disposed-off by 31 March 2021. Now, Circular No. 7 of 2021 provides that all the pending applications as well as new applications, shall be disposed preferably within 3 months from the end of the month in which such application is received.

'Potential cases' for issuance of notice under Section 148

By Instruction dated 4 March 2021 (F. No. 225/40/2021/ITA-II), the CBDT had specified certain categories of cases as 'potential cases' for taking action under Section 148 of the Income Tax Act by 31 March 2021 (which has now been extended to 30 April 2021) for A.Y. 2013-14 and A.Y. 2017-18. Any other case not falling within these specified categories of cases, was not to be considered for issuing any reopening notices under Section 148. These instructions were not made applicable to Central Charge and International Taxation Charge.

Vide Instruction dated 12 March 2021, the CBDT clarified the following points in relation to identification of 'potential cases':

a. 'Potential cases' includes cases flagged by Directorate of Income Tax (Systems) subsequent to 4 March 2021 and Non-filer Management System cases flagged earlier will get subsumed in the new list.

b. It was clarified that 'any other Income Tax Authority' includes the Assessing Officer.

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Further, the information received from any Income Tax authority shall not include information received from Directorate of Income Tax (Investigation), Central Charges, and Directorate of Income Tax (Intelligence and Criminal Investigation) after 1 April 2019. CCIT will suggest potential cases to AO, requiring action under Section 148, after examining list of potential cases along with details and evidence.

Vide Instruction dated 15 March 2021, the CBDT issued certain instructions for issue of notice under Section 148 by the International Taxation Charge. The following instructions were issued:

a. The verification of remittances made on or before 31 March 2017 which have been flagged by the Directorate of Income Tax (Systems), shall be conducted only where the aggregate amount of flagged remittances made by a remitter during the corresponding financial year is INR 5 cr. or more. If the verification exercises in such cases and cases where the verification of remittances had completed before issuance of this instruction, indicates escapement of income in the hands of non-resident remittee, then such cases shall be considered as 'potential cases' for issuance of notice under Section 148 by 31 March 2021 [now extended to 30 April 2021].

b. Further, the following instances which would require action under Section 148 shall also be considered as 'potential cases':

   i. Audit objection (Revenue / Internal);

   ii. Information received from any other Government agency / law enforcement agency;

   iii. 'Potential cases' including reports of Directorate of Income Tax (Investigation), reports of Directorate of Intelligence & Criminal Investigation, cases of Non-filter Management System & Other cases, as flagged by Directorate of Income Tax (Systems) subsequent to 4 March 2021 and Non-filer Management System cases flagged earlier will get subsumed in the new list;

   iv. Information arising out of field survey action;

   v. Information arising out of FT&TR references;

   vi. Information is received from any Income Tax authority including the Assessing officer himself/herself, requiring action under Section 148 of the Act. It shall not include information received from Directorate of Income Tax (Investigation), Central Charges, and Directorate of Income Tax (Intelligence and Criminal Investigation) after 1 April 2019. CCIT will suggest potential cases to AO, requiring action under Section 148, after examining list of potential cases along with details and evidence.

c. In all the above categories of cases, notice under Section 148 shall only be issued after recording of reasons for reopening and obtaining sanction u/s. 151 of the Act.

As regards reopening of non-PAN cases, *vide* Instruction dated 26 March 2021, the CBDT has stated that considering the time required for allotment of PAN and other technical issues involving generation of notices, a manual notice under Section 148 without mandatory DIN as provided in exception of Circular 19/2019, may be issued. Further the jurisdictional AO shall collect the basic parameters for PAN allotment and take up the matter with Directorate of Income Tax (Systems) for PAN allotment.

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In partial modification of the above instruction dated 26 March 2021, the CBDT *vide* Instruction dated 27 March 2021 has stated that the information received from Central Charges after 1 April 2019 may be considered as 'potential cases', if it has not been uploaded into VRU/CRIU functionality and is so flagged to the Jurisdictional Authorities by the Central Charges.

Due dates extended for passing of specified Orders, issuance of notices and linking Aadhaar with PAN

The CBDT has notified that the period for passing of final assessment order pursuant to directions issued by DRP (due date being up to 31 March 2021) shall stand extended to 30 April 2021. The time-limits for issuance of notice under Section 148 (i.e. for re-opening of assessment under Section 147) or sanction under Section 151 of the Income Tax Act, have also been extended to 30 April 2021. Similarly, the time-limit for processing of equalisation levy statements has been extended to 30 April 2021. Further, as per Notification No. 20/2021 [F. No. 370142/35/2020-TPL], dated 31 March 2021, issued for the purpose, the CBDT has also extended the last date for intimating Aadhaar number for the purposes of linking Aadhaar with PAN to 30 June 2021.

Faceless assessment – Class of cases for Section 144B specified

The CBDT has specified the class of cases for which assessments pending as on 31 March 2021 and initiated on or after 1 April 2021, other than those in the Central Charges or International Taxation Charges, shall be completed under Section 144B of the Income Tax Act, 1961. The class of cases covered by the said order F. No. 187/3/2020-ITA-1. dated 31 March 2021 (effective from 1 April 2021) are:

a. Where notice under Section 143(2) is issued either under e-Assessment or Faceless Assessment scheme;

b. Where the return of income has been furnished under Section 139(1) or in response to notices under Section 142(1) or 148 and notice under Section 143(2) has been issued;

c. Where the return of income has not been furnished in response to notice under Section 142(1);

d. Where the return of income has not been furnished in response to notice under Section 148 and notice under Section 142(1) is issued.

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Ratio Decidendi

Payment made by resident software importers for shrink-wrapped software is not ‘royalty’

The Supreme Court has held that payments made by resident software importers to a non-resident, for shrink-wrapped software, is not to be taxed as ‘royalty’ under the Income Tax Act, 1961. On examination of the End-User Service Agreement (‘**EULA**’) / Distribution Agreement, the Court found that what was granted to the distributor was only a non-exclusive, non-transferable license to resell the computer software. Apart from a ‘right to use’ the computer programme by the end-user, there was no further right given to sub-license or transfer, nor was there any right to reverse-engineer, modify or reproduce in any manner otherwise than permitted by the license to the end-user. Hence, the license that was granted was not a ‘license’ that transfers an interest in all or any of the copyright rights but was a ‘license’ that imposed restrictions or conditions on the use of computer software. The Court was also of the view that since payment made was not for any right in the copyright of the owner but for the copyrighted article, the consideration paid by Indian end user/distributor is not ‘royalty’.

The Supreme Court for this purpose examined the provisions of the Copyright Act and held that the creator of the computer programme has the exclusive right to do or authorize the doing of several acts in receipt of such work. The right to reproduce a computer programme and exploit the reproduction commercially is at the heart of the said exclusive right. However, the making of copies or adaptation of a computer programme in order to utilize the said computer programme for the purpose for which it was supplied, or to make back-up copies as a temporary protection against loss, destruction or damage so as to be able to utilize the computer programme for the purpose for which it was supplied, does not constitute an act of infringement of copyright.

TDS liability

The Court noted that once a relevant Double Taxation Avoidance Agreement (‘DTAA’) applies, the provisions of the Act can apply to the extent they are more beneficial to the assessee and not otherwise. Further, Explanation 4 to Section 90 of the ITA stipulates that where a term is defined in the DTAA, the definition contained therein must be applied. It is only where there is no such definition that the definition in the Act can be applied. The SC relied on its earlier ruling in GE Technology Centre Private Limited where it was held that TDS deductions can only be made if the non-resident assessee is liable to pay tax under Section 195 of the Act. The SC distinguished its ruling in PILCOM case (which was in the context of deduction under Section 194E on payments made to non-resident sportsperson/association) and observed that Section 194E deals with TDS without reference to chargeability under the Act by the concerned non-resident assessee.

Applicability of definition of ‘royalty’ amended retrospectively

The Apex Court acknowledged the fact that persons mentioned in Section 195 (i.e., deductors of tax at source) cannot be expected to do the impossible, that is, apply the expanded definition of ‘royalty’ inserted by said explanation, for the relevant assessment year, at the time when such explanation was not actually and factually in the statute. [*Engineering Analysis Centre of Excellence (P.) Ltd.* v. *CIT* - [2021] 125 taxmann.com 42 (SC)]

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Vivad se Vishwas Scheme not debarred by prosecution initiated on issue unrelated to tax arrears in particular AY – Bombay HC strikes down FAQ 73 of Circular No. 21/2020

The Bombay High Court has held that the exclusion under Section 9(a)(ii) of the Direct Tax Vivad se Vishwas Act, 2020 ('**VsV Act**') is regarding pendency of a prosecution in respect of tax arrears relatable to an assessment year as on the date of filing of declaration and not pendency of a prosecution in respect of an assessment year on any issue. The Court was of the view that the debarment must be in respect of the tax arrears as defined under Section 2(1)(o) of the VsV Act and that to hold that an assessee would not be eligible to file a declaration because there was a pending prosecution for the assessment year on an issue unrelated to tax arrears, would defeat the very purport and object of the Scheme. In the facts of this case, the Court observed that prosecution was initiated under Section 276C(2) of the Income Tax Act which cannot be construed as tax arrear under Section 2(1)(o) of the VsV Act. Question No. 73 of Circular No. 21/2020, dated 4 December 2020 was hence held to be not in consonance with Section 9(a)(ii) of the VsV Act and was quashed. The declaration of assessee was directed to be decided as per the provisions of the VsV Act de hors the answer given to Q. No. 73. For the assessment year 2015-16, the Assessee filed its return of income. The sum of self-assessment tax payable was paid after filing of return of income. While the declaration under VsV Act was pending, the assessee came to know that the Income tax Department had filed criminal complaint under Section 276C(2) read with Section 278B of the Income Tax Act against the assessee and its directors for delayed payment of self-assessment tax.

The Court noted that under Section 9(a)(ii) of the VsV Act, the provisions of the VsV Act would not apply in respect of tax arrears relating to an assessment year in respect of which prosecution was instituted on or before the date of filing of declaration and therefore, the prosecution must be in respect of tax arrear relating to an assessment year. The High Court also drew conclusion by comparing the provisions of clause (a) vis-à-vis clauses (b) to (e) of Section 9 of the VsV Act. It held that under clause (a), the exclusion was in respect of tax arrears whereas under clause (b) to (e), the exclusion was in respect of certain categories of person who are facing prosecution under serious charges or those who are in detention, as mentioned in those clauses. [*Macrotech Developers Limited* v. *PCIT* - [2021] 126 taxmann.com 1 (Bombay)]

Refund of taxes paid in foreign jurisdictions not available in absence of any tax liability in India – Tax paid however available as business expenditure

The assessee, an Indian public sector bank, earned business profits from its branches situated in foreign countries and applicable taxes on these profits, were paid in those countries. While filing the return of income in India, the total income of the assessee was loss and, hence, it did not have any Indian tax liability. However, it claimed the credit of taxes paid in foreign countries. The AO rejected the claim of credit of foreign tax on the ground that there was no tax liability in India in respect of the business profits earned abroad. On appeal, the CIT(A) confirmed the order of the AO.

The Tribunal held that as regarding countries with which India has entered into DTAAs, in the absence of any tax liability in India, the credit of foreign taxes paid is not allowable in India. The terms 'liable to tax' and 'subject to tax' have different meaning. The former is a condition

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precedent to be covered by the scope of the DTAA, and the latter is a condition precedent for being eligible for getting the foreign tax credits under Article 24(2) of the DTAA. The term 'subject to tax' has a narrower meaning and means when an income is actually subjected to tax, i.e., tax is levied on the said income.

Further, referring to the provisions of Article 24(2), the Tribunal held that the foreign tax credit under the said article was available only to the extent of Indian tax payable on such income. It noted that a foreign tax credit is a notional credit, for taxes paid in the foreign jurisdiction, in respect of the taxes so paid and the foreign tax credit, in any event, cannot exceed the home jurisdiction tax liability for the resident tax-payer in respect of the said income. It noted that the scheme of tax credits does not envisage any situation in which the excess foreign tax credit can result in a situation in which a taxpayer can get refunds, from the exchequer of residence jurisdictions, in respect of taxes paid to the exchequers of the source jurisdictions. Further, it was held that in absence of any provision, the unutilised foreign tax credit cannot be carried forward to subsequent assessment years. The Tribunal distinguished the judgement in *Wipro Ltd.* [62 taxmann.com 26) (Kar.)] as the aspect of refund of foreign tax credit in the absence of any tax liability in India, was not considered.

Even for countries with which no treaty existed, the Tribunal applied similar reasoning to deny refund in respect of foreign tax credit claimed. It observed that Section 91 of the Income Tax Act was in respect of 'doubly-taxed income' and that in case there is no tax liability in India due to loss at an overall level, the condition was not satisfied. While the Tribunal denied the taxpayer's primary claim of refund of foreign taxes, it allowed secondary claim of business expense deduction. [*Bank of India* v. *ACIT* – Order dated 4 March 2021 in ITA No.869/Mum/2018, ITAT Mumbai]

Cancellation of registration under Section 12A effective from date of conclusion of hearings for cancellation of registration – Option of assessee to avail the benefit of Section 11

The ITAT has held that registration under Section 12A of the Income Tax Act is in the nature of benefit to the trusts and if an assessee is unwilling to avail the 'benefit' for some reason, then it cannot be forced to avail such benefit. It also held that the cancellation of registration under Section 12A must be effective from the date on which hearing on first show-cause notice (issued consequent to letter by assessee wishing to cancel registration) was concluded and show-cause notice issued by Commissioner was formally acquiesced by the assessee. The Tribunal also noted that it was the duty of the Commissioner (Exemptions) to pass an order when the assessee had clarified its intention for cancellation of registration and its admission to potential violation of the provisions of the Act. The Commissioner (Exemptions) has no choice in withdrawing or not withdrawing registration. The trust had claimed that since the cancellation of registration was applied for in 2015, it should not be treated as registered charitable trust with effect from assessment year 2015-16. However, the Revenue Authorities had submitted that cancellation of registration will have prospective effect and accordingly the trust will be treated as a registered trust under Section 11 of the Act for all the previous assessment years. [*Navajbai Ratan Tata Trust* v. *Principal Commissioner* – [2021] 125 taxmann.com 374 (Mumbai - Trib.)]

Sums paid by company to shareholder and adjusted later against security deposit and rentals are not deemed dividends under Section 2(22)(e)

The assessee, an individual, was a director in a Company where she held more than 10% of shares in the said company. The assessee was

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also an owner of a land. The company agreed to take the building on rent, to be constructed on the aforesaid plot of land. For the purpose of construction, the Company agreed to pay certain amounts depending upon the availability of the funds. These amounts would be adjusted against the security deposit and balance against rent payable for the building. The Company made direct payments to the contractors and suppliers for construction of the building. Post construction, the assessee executed a lease deed with the said company.

In the assessment proceedings, the Assessing Officer treated the receipt of security deposit and lease rental as deemed dividend under Section 2(22)(e) of the Income Tax Act. On appeal, CIT (Appeals) deleted the addition holding that recovery of amounts to trade advances were from rentals in the normal course of business and are not liable to be taxed as envisaged. However, on further appeal, the Tribunal upheld the action of the AO.

On appeal, the High Court observed that as per Section 2(22)(e) of the Act, only where a loan is advanced by a company to a shareholder and other conditions are satisfied, the amount of loan would be liable to be treated as deemed dividend. It noted that the purpose of insertion of sub-clause (e) of Section 2(22) was to bring within the tax the net accumulated profits which are distributed by closely held companies to its shareholders in the form of loans to avoid payment of dividend distribution tax under Section 115-O. Observing that the word 'loan' means anything lent, specially money on interest, whereas deposit means a sum of money paid to secure an article at service etc, the Court held that 'deposit' is not covered by Section 2(22)(e). It observed that the Company did not give any loan to the assessee and the sums paid by the Company were to be adjusted against the security deposit and rentals. Holding that these sums were paid during the usual course of business, it held that the transaction in question was a commercial transaction and was outside the purview of Section 2(22)(e). [*Jamuna Vernaker* v. *DCIT* - TS-159-HC-2021 (KAR)]

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