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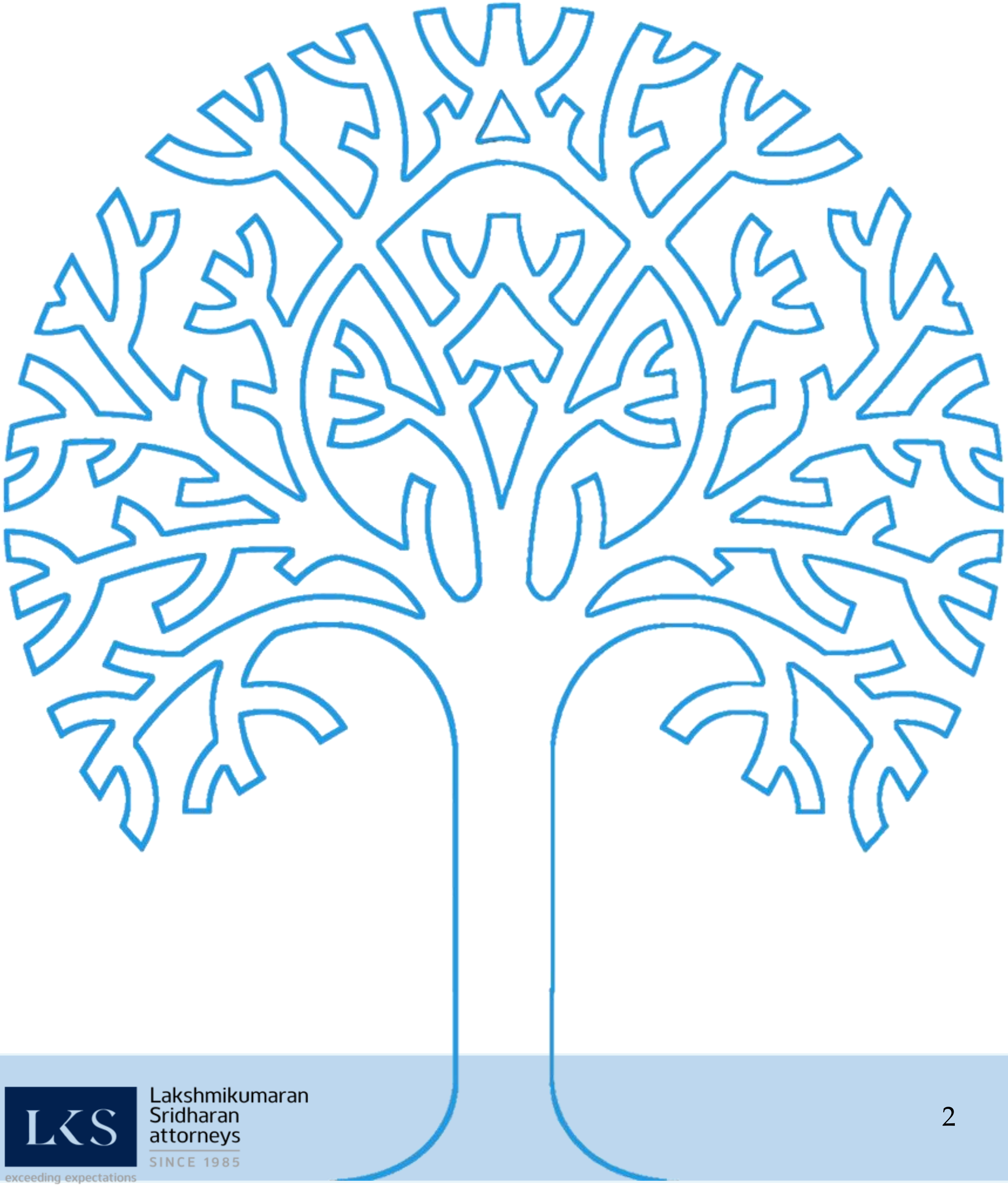

Article

From a taxman lens: Life Insurance Policy *vis-à-vis* Annuity – The modern-day conundrum

By **Samyak Navedia**

The drastic difference in income-tax treatment of both the instruments – Life Insurance Policies and Annuities, requires closer examination of their meaning to distinguish one from another. The article in this issue of Direct Tax Amicus, for this purpose, explores the meaning propounded by various judicial interpretations and legal dictionaries, and also explores the question as to whether annuity is merely return of the capital invested. Demonstrating that there is a thin line of difference between features offered by modern iterations of life insurance policies and annuities, the author points out that it is crucial for insurance companies to take proactive steps to separate the elements of the life insurance policies from that of annuities. He in this regard points out that from income-tax perspective, payment of benefits under a life insurance policy without the requirement of life cover could result in taxation of the entire policy proceeds.

From a taxman lens: Life Insurance Policy vis-à-vis Annuity – The modern-day conundrum

By Samyak Navedia

Introduction

Insurance industry has been in existence since the 12th century, but the last century has witnessed widescale adoption among the general masses. With the growth of the insurance industry, life insurance policies as well as annuities in the modern-day have come to be developed as highly complex products, so much so that both products have come to integrate various overlapping features. Further, the drastic difference in income-tax treatment of both the instruments requires closer examination of their meaning to distinguish one from another. However, there is no guidance as to the meaning of either '*life insurance policy*' or '*annuity*' in the Income Tax Act, 1961 ('**IT Act**'). In absence of definition in the IT Act, the meaning propounded by judicial interpretations and legal dictionaries assumes importance.

Life Insurance Policy

The maxim '*Nihil certius morte, nihil incertius hora mortis*' means that nothing is more certain than death, nothing more uncertain than the hour of death. This element of uncertainty results in life insurance policies to be considered as something more than an ordinary contract. They are treated as securities for money[1] which is bound to be paid at an uncertain future date, but on a future event which is bound to occur (apart from the operation of excepted perils).

Bunyon's Treatise Upon the Law of Life Assurance defines life insurance '*to be that in which one party agrees to pay a given sum upon the happening of a particular event contingent upon the duration of human life, in consideration of the immediate payment of a smaller sum or certain equivalent periodical payments by another*.' This definition has been adopted by various High Courts subsequently.

Therefore, an LIP has been explained by Courts to mean a contract where one party agrees to pay a given sum upon the happening of a particular event contingent upon the duration of human life, in consideration of the immediate payment of a

[1] Romilly M.R. in Stokoe v. Cowan (1861) 4 L.T. 695, 696.

smaller sum or certain equivalent periodical payments by another.

Payments received under a contract of insuring life has been exempted from taxation under the Act by virtue of clause (10D) of Section 10 of the IT Act. These payments are inclusive of not only the principal sums but also any bonus that the policy holder might receive under such life insurance policy[2].

Annuity

Section 280B(4) of the IT Act (omitted *vide* Finance Act, 1988), defined 'annuity' as '*any annual instalment of principal and interest…*'. However, under the current iteration of IT Act, only annuities pursuant to employment contract are a subject-matter of tax in Section 17. Other forms of annuities, such as annuities provided to a wife by a deed of separation, or alimony payable annually under a judicial decree, annuities purchased under a private contract with a life insurance company, are not specifically charged to tax. With regard to these annuities, Privy Council in *Maharajkumar Gopal Saran Narain Singh* v. *CIT*, [1935] 3 ITR 237 (PC) held that the annuity is 'income' falling under the residuary head of charge, i.e., 'Income, from other sources' even when the annuitant derives no profit or gain.

Halsbury's Laws of England[3] explains annuity as a yearly payment of a certain sum of money granted to another in fee for life or for a term of years either payable under a personal obligation of the grantor or out of property (not consisting exclusively of land). The right created by an instrument (whether deed, will, codicil or statute) to receive a definite annual sum of money is an interest which may be, strictly speaking, either a rent charge or an annuity.[4] To constitute an annuity, the annuitant must have handed over money or other asset altogether, converting it into a certain or even an uncertain number of yearly payments. Annuity requires adventure of capital.[5]

Therefore, in the ordinary sense of the expression, annuity can be regarded to be purchase of income by conversion of capital, such that the capital ceases to exist. The existence of a real existing capital sum, but representing some kind of capital obligation, has been held to be a requirement to be considered

[2] In the recent years, the exemption under Section 10(10D) of the Act have been subject to certain conditions. We are however not concerned with the applicability of these conditions. We have proceeded on the footing that the additional conditions specified in the Section would be complied with.

[3] Halsbury's Laws of England, third edition, volume 32, at page 534, paragraph 899.

[4] *Ahmed G.H Ariff* v. *CWT* (1970) 76 ITR 471 (SC).

[5] *Perrin* v. *Dickson* 14 TC 608, 615 (CA); *Foley* v. *Fletcher* 3 H & N 769: 117 RR 967.

as an annuity. This classic definition of an annuity given more than 150 years ago, has never been departed from.

The next logical question arises whether annuity is merely return of the capital invested?

Capital repayment - Whether it is also Annuity?

The Court of Appeal in *Sothern-Smith* v. *Clancy* [1940] 24 TC 1 (CA) held that one distinction between an annuity simplicitor and capital payment is that the latter is in discharge of a pre-existing debt. However, no simple test can be laid down for distinction. It placed reliance on older judgments to state that regard must be had to the true nature of the transaction from which the annual payment arises and ascertain whether or not it is the purchase of an annual income in return for the surrender of capital. Annual payment in the nature of capital payment is not taxable. But where capital payment is coupled with interest, then the sum may be dissected, and tax charged only on the portion representing interest. However, annual payment pursuant to whole-life annuity cannot be regarded as return of capital plus interest because the annual payment is calculated on the grantee's expectation of life. Here, the annuitant retains no interest in the capital once it has been paid, i.e., the capital ceases to have any existence. Further, at the end of the annuity period, the annuitant may receive sums considerably exceeding the normal interest earning capacity on that investment. Simultaneously, the annuity grantor takes the risk of the life being prolonged beyond a period which will yield a profit to him on the transaction. This adventure of capital towards purchase of income is liable to tax in whole.

Where the capital has gone and has ceased to exist, but has been converted into recurring income, that is an annuity. It therefore follows that where, in a given transaction, capital is not at stake, i.e., capital has not been hazarded, and the annual payments are merely a mode of realising the capital in instalments, there is no annuity in the real sense of the term.

The Supreme Court in *CIT* v. *Kunwar Trivikram Narain Singh* (1965) 57 ITR 29 (SC) held that the question of taxability is determined by the real character of the payment, and not by the nomenclature assigned to it by the parties. When a capital asset is exchanged for a perpetual annuity, such receipts are taxable. On the contrary, if the exchange is for a capital sum payable in installments, receipt of such installments would not be taxable. The Madhya Pradesh High Court in *Parmanandbhai Patel* v. *CWT* (1989) 177 ITR 339 (MP) further explained the fine distinction between capital repayments and annuities. One test is to ascertain whether the principal is gone forever and is satisfied by periodical payments. In other words, the question is whether or not it is the purchase of the annual income in return for the surrender of the capital. If it is purchase of income, the annual payment is taxable; if it is capital payment, it is not. Where the property is sold for what is an annuity in the strict sense of the word, the principal disappears and the annuity which takes its place is chargeable to tax.

Court of Appeal ruling in *IRC* v. *36/49 Holdings Ltd* (1942) 25 TC 173 (CA) was approved by the Supreme Court in *National Cement Mines Industries Ltd* v. *CIT* (1961) 42 ITR 69 (SC) held that annuity is where capital sum is parted with in consideration of a grant to him of a number of periodical payments of revenue character. That is, the capital has gone and has ceased exist. In its place, only a promise to pay has arisen. The only continuing relation between the annuity and the vanished capital is that the amount of the vanished capital is arbitrarily taken to measure the minimum period for which the annuity is to run. The sums received by the annuitant should not have any relation to the capital sum paid. At the end of the payment period of a whole-life annuity, sums received by the annuitant may considerably exceed the normal interest earned on the capital invested. Conversely, grantor will have to pay much less, if the annuitant does not live the expected number of years. Owing to such uncertainty, a contract of annuity cannot be said to be in the nature of an investment producing a capital return equivalent to the capital invested. The financial result may be comparable to that of a debt. However, it is not permissible to look beyond the real nature of the transaction and to enquire into its financial nature, i.e., calculations to segregate the principal from the interest. The entire instalment is profit and is taxable.

Juxtaposing Life Insurance Contracts vis-à-vis Annuities

Interestingly, from the perspective of an insurer, Section 2(11) of the Insurance Act, 1938 defines '*Life insurance business*' to mean the business of effecting contracts of insurance upon human life (contingency depended human life, death or a term dependent on human life) as well as the granting of annuities upon human life. This is because both life insurance policies as well as annuities require actuarial calculations on the basis of life of a person.

Annuity simpliciter is characterised by receipt of periodic payments of revenue character with an element of regularity. To this end, the annuitant contributes lump sum amount of capital nature. On the other hand, in a life insurance contract simpliciter, periodic premium payments are made by policyholder over a pre-determined period in exchange of a promise to receive lump sum upon happening of a contingent event. In other words, annuity simpliciter involves conversion of capital sum into guaranteed revenue income while life insurance policy simpliciter involves conversion of revenue payments into capital lump sum. In simple terms, annuity may be regarded as the inverse of a life insurance policy.

Life insurance policy and annuity cannot be distinguished simply by the nature of payments being lump sum or periodical. The Court of Appeal in *IR* v. *DH Williams's Executors* [1943] 11 ITR Suppl 84 (CA), affirmed 26 TC 23 (HL) and conclusively held that there is no distinction between a lump sum and a periodical sum received under a life insurance policy. The question is only as to the nature of the sum. Therefore, the sums by whatever name called, received either as lump sum or as periodical payment, should not lose their true character. Gujarat High Court in *CIT* v. *M.K.S. Ranjitsinhji* [1998] 232 ITR 140 (Gujarat) has held similarly in the case of annuities as well.

Notably, the distinction has not remained so clear with the modern-day products. *For instance*, certain traditional endowment products presently being offered by life insurance companies have received approval from Insurance Regulatory and Development Authority of India as a life insurance policy. The benefits payable under such contracts would *prima facie* appear to be purely in the form of life insurance as lump sum payment upon completion of term of insurance.

However, close scrutiny would reveal that such plans additionally provide for payment of guaranteed benefits (periodic payment) to the insured / nominee irrespective of death of the insured, i.e., extending for a considerable time beyond completion of the term of insurance. This raises the question about non-existence of contingent event in such life insurance policies. To qualify as a life insurance policy, it is crucial for the benefits under the policy are payable upon fulfilment of event(s) contingent on the life of the insured. Therefore, guaranteed benefits receivable subsequent to insurable period lack this insurance element embedded in it in the form of a life cover.

It would appear that such plans are being offered more as a saving product, than as an insurance product. It is possible for the Revenue Authorities to contend that such plans are a combination of both insurance and annuity policies, leading them to seek bifurcation of the policy into two independent contracts. This can result in the annuities being fully taxable, despite the plans having an insurance element.

Conclusion

The IT Act relies on the insurance laws and regulations for the meaning of life insurance policies and annuities. From income-tax perspective, payment of benefits under a life insurance policy without the requirement of life cover could result in taxation of the entire policy proceeds. As demonstrated above, owing to the thin line of difference between features offered by modern iterations of life insurance policies and annuities, it is crucial for insurance companies to take proactive steps to separate the elements of the life insurance policies from that of annuities. It is advisable to pre-empt the customers about possibility of the litigation. In any case, if tax exemption is to be retained, the plans should be modified as life insurance products instead of a saving product.

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Notifications & Circulars

- Due date for filing Form No. 26QE, which was required to be filed during the period 1 July 2022 to 28 February 2023, ex-post facto extended
- No TDS on certain payments made by any ‘payer’ to a person being a Unit of International Financial Services Centre (‘IFSC’)
- Tax Treaty between India and Spain – Amendment notified
- Time-limit for verification of return of income after uploading clarified

Due date for filing Form No. 26QE, which was required to be filed during the period 1 July 2022 to 28 February 2023, ex-post facto extended

Section 194S of the Income Tax Act requires the payer of any sum to a resident by way of consideration for the transfer of a virtual digital asset, to deduct an amount equal to 1% of such sum. Further, sub-section (2) of Section 194S provides that the provisions of Sections 203A (tax deduction account number) and 206AB (special provision for deduction of tax at source for non-filers of income-tax return) shall not apply to a 'specified person'.

As per sub-rule (40) of Rule 31A, the 'specified person' is required to report deductions u/s 194S in a challan-cum-statement electronically in Form No. 26QE within thirty days from the end of the month in which such deduction is made. However, during the period from 1 July 2022 to 31 January 2023, the said Form was not available. Further, during the period from 1 February 2023 to 28 February 2023, sufficient time was not available to specified persons to file the Form.

Therefore, CBDT has, *vide* Circular No. 4 dated 7 March 2024, ex-post facto extended the due date of filing Form No. 26QE by specified persons who deducted tax u/s 194S but failed to file the Form, to 30 May 2023. Fee levied under Section 234E and/or interest charged under Section 201(1A)(ii) of the Act in such cases for the period up to 30 May 2023, has also been waived.

No TDS on certain payments made by any 'payer' to a person being a Unit of International Financial Services Centre ('IFSC')

The CBDT has, *vide* Notification No. 28 dated 7 March 2024, notified a list of payments receivable by a Unit of IFSC on which no deduction of tax is to be made by a payer at the time of payment or credit, as the case may be. The list covers various TDS provisions including Sections 194, 194A, 194D, 194J, 194H and 195 of the Act.

The above relaxation is available to the Unit of IFSC only during the said previous years relevant to the ten consecutive assessment years as declared by the it in Form No. 1 for which deduction u/s 80LA is being opted. The Unit of IFSC is required to furnish a statement-cum-declaration in the said Form No. 1 to the payer. The payer is liable to deduct tax on referred payments for any other year.

Tax Treaty between India and Spain – Amendment notified

Vide Notification No. 33 dated 19 March 2024, paragraph 2 of Article 13 of the Tax Treaty between India and Spain has been modified with effect from Assessment Year 2024-25. It now provides that the rate of tax on royalties and fees for technical services in the source state shall not exceed 10% of the gross amount of the said payment, if the recipient of the payment is the beneficial owner.

Time-limit for verification of return of income after uploading clarified

The CBDT (Directorate of Systems, Bengaluru) has, *vide* Notification No. 2 dated 31 March 2024, clarified that:

- where e-verification / ITR-V submission is done within 30 days of uploading the return of income, the date of uploading the return of income shall be considered as the date of furnishing the return of income.
- where e-verification / ITR-V submission is not done within 30 days of uploading the return of income, the date of e-verification/ITR-V submission shall be treated as the date of furnishing the return of income and all consequences of late filing of return under the Act shall follow, as applicable.
- where duly verified ITR-V is sent to Central Processing Centre, the date on which the same is received at CPC shall be considered for the purpose of determination of the 30 days period from the date of uploading of return of income.
- where the return of income is not verified after uploading within the specified time limit, such return shall be treated as invalid.

Ratio Decidendi

- Assessing Officer has no power to propose transfer pricing adjustments not proposed by Transfer Pricing Officer – Delhi High Court
- No TDS liability on deposits made to Calcutta Dock Labour Board for disbursement of wages to employees on account of statutory mandate – Calcutta High Court
- Subscription fee received for granting access to online database is not ‘royalty’ under Section 9(1)(vi) of Income Tax Act and under Article 12(3) of India-USA DTAA – ITAT Mumbai
- No penalty under Section 271B where deposits made by assessee were not on his own account – ITAT New Delhi
- Incriminating material for one assessment year cannot trigger provisions of Section 153C for proceedings for other assessment years – Delhi High Court

Assessing Officer has no power to propose transfer pricing adjustments not proposed by Transfer Pricing Officer

The assessee is an Indian wholly owned subsidiary of a company incorporated in Germany and engaged in the business of providing software and information technology enabled services. The assessee's mobile security division got demerged into Giesecke & Devrient MS India on a going concern basis. Reference was made by the Assessing Officer ('**AO**') to the Transfer Pricing Officer ('**TPO**') for the determination of Arm's Length Price ('**ALP**') of the international transactions undertaken by the assessee.

The TPO proposed a transfer pricing adjustment of INR 25,58,68,79,196/- u/s 92CA(3) of the Act. Subsequently, the TPO rectified the order and proposed an adjustment of INR 16,84,51,531/-, while also suggesting that the AO examines the taxability of the value of 'demerged business' of the assessee to the tune of INR 25,41,84,27,665/-. Thereafter, the AO passed the draft assessment order u/s 144C of the Act and proposed a total adjustment of INR 25,58,68,79,196/-, which included the transfer pricing adjustment of INR 16,84,51,531/- and also INR 25,41,84,27,665/-. The assessee challenged the draft assessment order in a writ petition on the ground that the AO travelled beyond the adjustments proposed by the TPO and the mandate of the applicable provisions.

The Delhi High Court, placing reliance on the provisions of Section 92CA of the Act, Apex Court's decision in *S.G. Asia Holdings (India) (P) Ltd.*, [(2019) 13 SCC 353] and its own decision in *Louis Dreyfus Company India Pvt. Ltd.* [W.P.(C) 15381/2022], and held that where international transactions may have a bearing on the total income, the AO ought to refer the matter to the TPO in order to determine the ALP of the international transactions and that the AO, while computing the total income of the assessee, shall proceed in conformity with the ALP determined by the TPO. Since in the present case, the order of the TPO order only proposed the transfer pricing adjustment to the tune of INR 16,84,51,531, the order of the AO adding an amount of INR 25,41,84,27,665/- as a transfer pricing adjustment to the total income of the assessee breaches the legislative mandate of Section 92CA. Accordingly, the Hon'ble Court set aside the draft assessment order and remanded the matter back to the AO with a direction to proceed in accordance with law.

[*Giesecke and Devrient India Pvt. Ltd.* v. *DCIT* – Order dated 1 April 2024 in W.P.(C) 5429/2021, Delhi High Court]

No TDS liability on deposits made to Calcutta Dock Labour Board for disbursement of wages to employees on account of statutory mandate

The Assessee was a registered employer under the Dock Workers (Regulation of Employment) Act, 1948 ('**Act 1948**') read with Calcutta Dock Workers (Regulation of Employment) Scheme, 1970 ('**Regulation Scheme 1970**'). On account of the Act 1948 and Regulation Scheme 1970, the assessee was required to deposit sums with Calcutta Dock Labour Board ('**Board**') for the purposes of disbursement of wages to its employees.

During the years under consideration, the AO held that the assessee was depositing sums with the Board as the Board was providing labour to the assessee and therefore, the assessee was bound to deduct tax at source under Section 194C of the Income Tax Act. The assessee challenged such finding of the AO and the matter travelled to the High Court.

The Hon'ble Calcutta High Court analysed the provisions of the Act 1948 read with the Regulation Scheme 1970 and observed that the contract of employment was between the assessee and the registered dock workers. Further, that the assessee was merely discharging its obligation under the Act 1948 read with Regulation Scheme 1970 by making deposits with the Board. Therefore, the High Court held that there was no contract between the assessee and the Board for Section 194C to apply.

[*Kamal Mookerjee & Co. (Shipping) P. Ltd.* v. *CIT* – Order dated 3 April 2024 in IT Appeal Nos. 72 & 73 of 2012, Calcutta High Court]

Subscription fee received for granting access to online database is not 'royalty' under Section 9(1)(vi) of Income Tax Act and under Article 12(3) of India-USA DTAA

The Assessee was a corporation based in the USA, established to promote and support development and knowledge in the field of chemistry. It had an online chemistry database, towards granting the access to which it received subscription fees from Indian customers. During the assessment proceedings, the TPO/AO was of the view that the payment made by the Indian customers to the assessee was consideration for transfer or any rights in respect of copyright, literary artistic or scientific work and thus, the same was royalty liable to tax in India.

In an appeal before ITAT, Mumbai, the ITAT, relying on its own decision in the case of the assessee itself for other year, held that the income of the assessee from Indian customers is towards the subscription to database and that the same did not constitute royalty. The ITAT observed that under the agreements entered into by the assessee with the Indian customers, all that the customers got was the right to search, view and display the articles (whether online or by taking a print). That, reproducing or exploiting the same in any manner other than for personal use was strictly prohibited. It was also observed that the customers did not get any rights to the journal or articles therein and that no use or right to use in any copyright or any other intellectual property of any kind was provided by the assessee to its customers. Furthermore, the information resides on servers outside India, to which the customers have no right or access, nor do they possess control or dominion over the servers in any way. Therefore, the ITAT held that the question of such payments qualifying as consideration for use or right to use any equipment, whether industrial, commercial or scientific does not arise and thus, the same does not qualify as royalty.

[*American Chemical Society* v. *DCIT (International Taxation)* – Order dated 27 March 2024 in IT Appeal No. 4615 of 2023, ITAT Mumbai]

No penalty under Section 271B where deposits made by assessee were not on his own account

The assessee earned commission income from selling products of Mother Dairy, totaling INR 3,24,558/-. However, the AO noted that the assessee had made cash deposits in the bank amounting to INR 2,74,40,000/- and that despite the same, the assessee had failed to get his accounts audited. Accordingly, the AO levied penalty on the assessee under Section 271B of the Income Tax Act.

In the appeal before the ITAT, Delhi, the assessee submitted that he was under a *bona fide* belief that since the sales belonged to Mother Dairy and that his own income did not cross the monetary threshold prescribed for getting the accounts audited, the assessee did not get his accounts audited. The Hon'ble ITAT held that the deposits in the bank were in fact sales on behalf of Mother Dairy and not that of assessee. The ITAT also held that the assessee was under a reasonable / *bona fide* belief that he was not required to get his accounts audited as the concerned transactions belonged to Mother Dairy. Accordingly, the ITAT deleted the penalty levied u/s 271B.

[*Ved Singh* v. *Income-Tax Officer* – Order dated 19 January 2024 in IT Appeal No. 998 of 2023, ITAT New Delhi]

Incriminating material for one assessment year cannot trigger provisions of Section 153C for proceedings for other assessment years

A search and seizure operation were conducted on another company, wherein material/documents related to the assessee were found. Pursuant thereto, a notice under Section 153C of the Income Tax Act was issued to the Assessee for AY 2015-16. A satisfaction note was recorded by the jurisdictional AO, wherein the AO referred to the incriminating material found in the course of the search proceedings pertaining to AYs 2010-11, 2011-12 and 2012-13. The assessee challenged the notice issued u/s 153C for AY 2015-16 on the ground that there is no incriminating material found during the search in relation to the year under consideration.

The Hon'ble Delhi High Court examined the difference between Sections 153A and 153C of the Act, to note that an action under Section 153C can be initiated only if the AO to whom the books of accounts or documents or assets, seized or requisitioned are handed over to, records a satisfaction that the books of accounts or documents or assets, seized or requisitioned '*have a bearing on the determination of the total income*' of the Assessee for the block of six or ten years, as the case may be. The Hon'ble Court placed reliance on the decision in *Kabul Chawla* [2015 SCC Online Del 11555] and the decision in *Abhisar Buildwell Private Limited* [(2024) 2 SCC 433] to hold that the decisions rendered in the context of Section 153A would also be relevant in the context of Section 153C. That, therefore, unless the AO is satisfied that the material gathered for a particular AY could potentially impact the determination of total income for others AYs which can form part of the 'relevant assessment year' under Section 153C, the AO would be unjustified in mechanically reopening or assessing all over again all the ten AYs that could possibly form part of the block of ten years. Since in the facts under consideration, the AO did not record his satisfaction in relation to the year under consideration, the Hon'ble Court quashed the notice issued u/s 153C of the Act for AY 2015-16.

[*Saksham Commodities Limited* v. *ITO* – Order dated 9 April 2024 in W.P.(C) 1459/2024, Delhi High Court]

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