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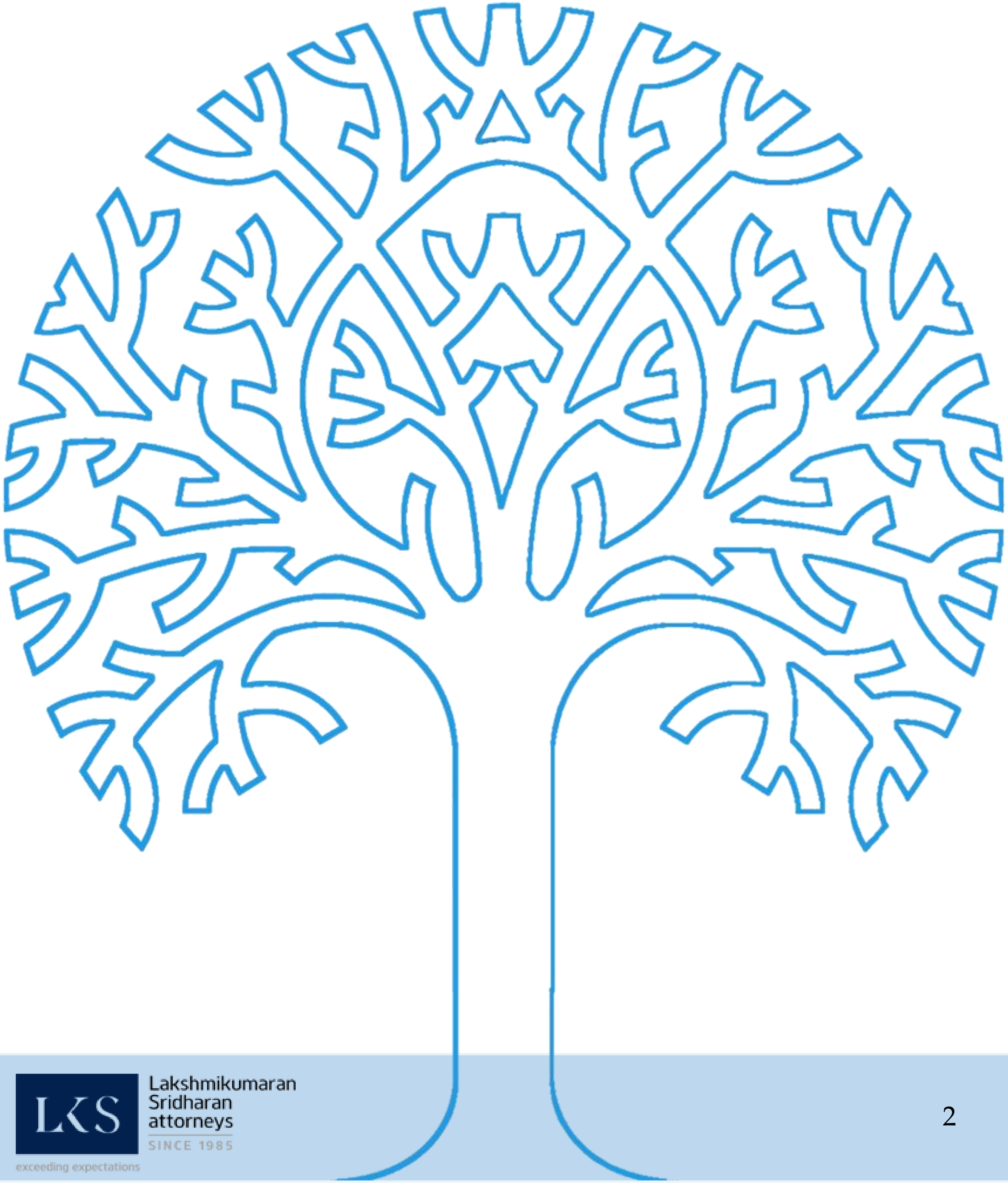

Article

Applicability of Doctrine of Merger between intimation under Section 143(1) and assessment order under Section 143(3)

By **Abhinov Vaidyanathan and Bhavana Kulluru**

The article in this issue of Direct Tax Amicus discusses the issue of whether an intimation under Section 143(1) of the Income Tax Act, 1961 will automatically merge with an assessment order under Section 143(3). Considering various decisions of the ITAT, the authors note that it can be inferred that a strait jacket formula cannot be adopted for applying the Doctrine of Merger for an initiation under Section 143(1) and the assessment order under Section 143(3). According to them, while the taxpayers should continue to agitate all issues while filing appeal against regular assessment including issues arising in an intimation, they must also consider challenging the intimation independently in appeal wherever the issues dealt with in the intimation and the assessment order are different in order to avoid any challenge on non-applicability of Doctrine of Merger.

Applicability of Doctrine of Merger between intimation under Section 143(1) and assessment order under Section 143(3)

By Abhinov Vaidyanathan and Bhavana Kulluru

Introduction

The 'Doctrine of Merger' has gained significance in its applicability to the taxation laws, drawing the attention of various Courts and Tribunals. It is a common law doctrine that is based on the simple logic that there cannot be more than one operative order on a particular subject matter at any given point.

The Hon'ble Supreme Court in the *Kunhayammed* v. *State of Kerala*[1] has aptly summed up the doctrine as follows:

> *'Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of the law.'*

Therefore, the Doctrine of Merger simply means that when an order passed by a lower court, tribunal or authority is subjected to the remedy of appeal available under a statute before a superior court, and the superior court either affirms or modifies the order, the order of the lower court, tribunal or authority merges with the order of the superior court.

With this background on the Doctrine of Merger, the authors in this article will be dealing with the issue of whether an intimation under Section 143(1) of the Income Tax Act, 1961 ('**IT Act**') will automatically merge with an assessment order under Section 143(3) of the IT Act.

Brief background

Once an assessee files his/her Return of Income ('**RoI**') under Section 139 of the IT Act, the RoI is processed by the Centralized Processing Centre and an intimation under Section 143(1) of the IT Act is issued to the assessee. At this stage, there are two outcomes:

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[1] (2000) 113 Taxman 470 (SC)

i. The income returned by the assessee is accepted.

ii. The income returned by the assessee is not accepted and certain adjustments are made.

As per the proviso to Section 143(1)(a), no such adjustments can be made without providing an opportunity to the assessee to provide a response. Assuming if an adjustment is made and the intimation is issued, the same constitutes an appealable order and hence, is appealable before the Commissioner of Income Tax (Appeals)/National Faceless Assessment Centre ('**NFAC**') under Section 246A of the IT Act.

However, it is pertinent to note that a scrutiny for the same assessee could be picked for the same Assessment Year by issuing a Notice under Section 143(2) of the IT Act wherein the Assessing Officer has powers to scrutinize any issue. Under the scrutiny assessment, the Assessing Officer may pick up issues, seek replies from the assessee, consider the responses for the same and pass an assessment order under Section 143(3) of the IT Act.

Merger of intimation under Section 143(1) with assessment order under Section 143(3) of the IT Act

At this juncture, it is essential to analyse whether an intimation under Section 143(1) of the IT Act would automatically merge with the assessment order under Section 143(3) of the IT Act in all cases. This question is of utmost significance because both the intimation under Section 143(1) and the assessment order under Section 143(3) of the IT Act are independent appealable orders under Section 246A of the IT Act before the CIT(A)/NFAC. Therefore, the question is could there be instances where there is no merger of the intimation and the assessment order, and consequently, both are required to be challenged in appeal separately.

The concept of merger between an intimation and an assessment has been dealt with by various Courts and Tribunals. To begin with, the authors would be discussing decisions wherein the Courts have taken a view the Doctrine of Merger will apply in of the context of orders passed under Section 143(1) and Section 143(3).

The Hon'ble High Court of Madras in *Tamil Nadu Magnesite Ltd.* v. *CIT and others*[2] held that after passing of an order under

[2] W.P. No. 17819 of 2001

Section 143(3) of the Act, the intimation under Section 143(1)(a) of the Act gets merged with the order under Section 143(3) of the Act and the intimation under Section 143(1)(a) of the Act does not any more independently survive for rectification by the Assessing Authority under Section 154 of the Act. Therefore, the Hon'ble High Court held that after an order has been passed in terms of Section 143(3) of the Act, no rectification order under Section 154 could be passed to rectify the intimation under Section 143(1)(a) of the Act.

The Hon'ble High Court of Calcutta in *C.E.S.C. Ltd.* v. *DCIT*[3] dealt with a similar issue. The Court held that when what was accepted in the intimation has been reversed in the regular assessment and the assessee has preferred an appeal which is pending, the theory of merger is bound to apply in the present case for the reason that the intimation issued under Section 143(1)(*a*) is no longer operative. It was further observed that the only order which is effective, and operative is the one passed under Section 143(3) of the IT Act.

The Bangalore ITAT in *South India Club* v. *ITO*[4] dealt with a similar issue. The assessee claimed exemption under Section 11 while filing the RoI. The said exemption was denied *vide* the intimation under Section 143(1). The assessee filed an appeal before the CIT(A) against the said intimation. Subsequently, the case of the assessee was picked up for scrutiny and the Assessing Officer also denied the same exemption in the assessment order under Section 143(3) of the IT Act. The Hon'ble Tribunal held that in the present case the intimation under Section 143(1) of the IT Act merges with the assessment order under Section 143(3), the said intimation becomes inoperative. Therefore, the appeal filed against such an intimation would also become infructuous.

The other decisions on this point are:

1. *CIT* v. *Amritlal Bhogilal & Co*[5]
2. *Coats of India Ltd.* v. *DCIT*[6]

However, an interesting question that arises is when the subject matter of adjustment/additions under Section 143(1) and Section 143(3) are different, can the principle of Doctrine of Merger be applied and even if the adjustments made under Section 143(1) are not agitated separately, can they be agitated along with the additions made under Section 143(1) of the IT Act? The cases cited above do not deal with this scenario.

[3] (2004) 134 Taxman 647 (CAL.)
[4] (2024) 163 taxmann.com 479 (Delhi - Trib.)
[5] (1958) 34 ITR 130
[6] (1995) 214 ITR 498

At this juncture, it would be interesting to analyse certain recent decisions of the ITAT wherein it has been held that an intimation under Section 143(1) will not automatically merge with an assessment order under Section 143(3) of the IT Act.

The Bangalore ITAT in *Areca Trust* v. *CIT (Appeals), NFAC*[7], dealt with a similar issue. In the present facts, the assessee being a trust filed its RoI declaring the total income as Nil. The RoI was processed by the Assessing Officer and an intimation u/s 143(1) of the Act was issued considering an amount of Rs. 23,29,62,417 as the income chargeable to tax under Section 115BB of the IT Act. The assessee filed a rectification application against the said intimation under Section 154 of the IT Act. Subsequently, the case of the assessee was picked up for scrutiny and the assessment order u/s 143(3) was passed by assessing the total income at INR 23,29,62,417 as per the intimation issued u/s 143(1). The Assessing Officer merely adopted the assessed figures mentioned in the intimation and passed the assessment order. The assessee preferred an appeal against the Order under Section 143(3) before the CIT(A). The CIT(A) held that appeal filed by the assessee against the Order under Section 143(3) is not maintainable since the Assessing Officer did not adjudicate the matter on merits and merely concluded the assessment by incorporating adjustments from the intimation under Section 143(1). On appeal, the Tribunal made the following observations:

i. Though, Section 143(4) of the IT Act mentions that the tax paid by the assessee u/s 143(1) of the Act shall be deemed to have been paid towards the regular assessment u/s 143(1) or 144 of the Act, that by itself does not mean there is a merger of intimation u/s 143(1) with that of regular assessment u/s 143(3) or 144 of the Act, unless the issues have been discussed and adjudicated in regular assessment u/s 143(3)/144.

ii. Since, the assessment is completed under Section 143(3) by merely adopting the assessed figures mentioned in the Intimation, no cause of action arises against the said Order and the assessee ought to have appealed against the Intimation under Section 143(1) of the IT Act.

The Delhi ITAT in *Orient Craft Ltd.* v. *DCIT*[8] dealt with the issue of whether Doctrine of Merger will apply in a case where the intimation and the assessment order are on different issues.

[7] (2024) 117 ITR (Trib) 264 (ITAT[Bang])

[8] (2024) 158 taxmann.com 1124 (Delhi - Trib.)

The assessee in the present case filed its RoI and the same was processed by the CPC wherein an intimation was issued making additions w.r.t to the delay in depositing employee contributions of PF/ESI and house property income. The assessee preferred an appeal against the intimation which was later withdrawn by the assessee since the case of the assessee was selected for scrutiny assessment u/s 143(3) of the IT Act. The assessment order u/s 143(3) was passed by the Assessing Officer wherein additions were made on various grounds other than those mentioned in the Intimation passed u/s 143(1). The assessee preferred an appeal against the assessment order under Section 143(3) of the IT Act wherein it also challenged the additions made in the intimation under Section 143(1) of the IT Act. The ITAT relying on the decision of *Areca Trust* (*supra*) held that since the additions made under the intimation under Section 143(1) and the assessment order under Section 143(3) are on different issues, the intimation under Section 143(1) of the IT Act stood final after withdrawal of appeal by the assessee and there was no merger of two orders.

A similar view has also been taken by the Hon'ble Chennai ITAT in *Global Entropolis (Vizag) Private Limited* v. *AO, NFAC*[9].

One may infer from the above decisions that an intimation under Section 143(1) will not automatically merge with the assessment order under Section 143(3) in the following cases:

1. The issues dealt with in the intimation and the assessment order are different.
2. The assessment order without providing any discussion/reasoning has merely adopted the figures from the intimation under Section 143(1) of the IT Act.

However, it is essential to note that the abovementioned decisions of the Hon'ble ITAT do not make any reference to the decisions of the Hon'ble High Courts discussed above.

Conclusion

At the outset, one may be able to conclude that every intimation under Section 143(1) would automatically merge with the assessment order under Section 143(3) of the IT Act. However, the Tribunals *vide* their recent decisions have viewed the applicability of Doctrine of Merger from a different spectrum when it comes to Section 143(1) and Section 143(3). On a reading of the Tribunal decisions discussed above, it can be inferred that a strait jacket formula cannot be adopted for

[9] 2023 (8) TMI 81 – ITAT Chennai

applying the Doctrine of Merger for an initiation under Section 143(1) and the assessment order under Section 143(3).

In view of the divergent views discussed above, while the taxpayers should continue to agitate all issues while filing appeal against regular assessment including issues arising in an intimation, they must also consider challenging the intimation independently in appeal wherever the issues dealt with in the intimation and the assessment order are different in order to avoid any challenge on non-applicability of Doctrine of Merger.

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Notifications & Circulars

- Monetary limits enhanced for Departmental appeals before ITAT, High Courts and SLPs/appeals before Supreme Court
- Authorisation of officers and condonation of delay in filing returns claiming refund, carry forward of loss and set off thereof – Guidelines issued
- Direct Tax Vivad se Vishwas Scheme, 2024 comes into force
- Direct Tax Vivad se Vishwas Rules, 2024 notified
- Direct Tax Vivad se Vishwas Scheme – Procedure w.r.t online filing of Form 1

Monetary limits enhanced for Departmental appeals before ITAT, High Courts and SLPs/appeals before Supreme Court

In exercise of Section 268A of the IT Act, the CBDT *vide* para 4.1 of Circular No. 5/2024 had provided that Appeals / SLPs shall not be filed in cases where the tax effect does not exceed the monetary limits.

Vide the Circular No. 09/2024, dated 17 September 2024, the monetary limits with respect to filing Appeals / SLPs have been revised as follows-

Sl. No	Appeals / SLP in Income tax matters	Monetary limit (tax effect in INR)
1.	Before Income tax Appellate Tribunal	60 lakh
2.	Before High Court	2 crore
3.	Before Supreme Court	5 crore

The said monetary limits shall be applicable to all cases including TDS / TCS. However, it is to be noted that for certain scenarios, the decision to file appeal / SLPs shall be taken on merits and not based on monetary limits. The said scenarios have been elucidated *vide* Para 3.1 and 3.2 of Circular No. 5/2024.

The modifications with respect to the monetary limits has come into effect from 17 September 2024.

Authorisation of officers and condonation of delay in filing returns claiming refund, carry forward of loss and set off thereof – Guidelines issued

The CBDT has issued Circular No. 11/2024, dated 1 October 2024 to deal with the applications for condonation of delay in filing returns claiming refund and returns claiming carry forward of loss and set off and procedures to be followed while deciding such matters. Accordingly, it is stated that,

- If the amount of the aforesaid claims does not exceed INR 1 crore for any one AY, then Principal Commissioners of Income-tax, Commissioners of Income-tax shall be vested with powers of acceptance / rejections of such applications / claims.
- If the amount of the aforesaid claims exceeds INR 1 crore but not more than INR 3 crore, for any one AY, then Chief Commissioners of Income-tax shall be vested with powers of acceptance / rejections of such applications / claims.

- If the amount of the aforesaid claims exceeds INR 3 crore for any one AY, then Principal Chief Commissioners of Income-tax shall be vested with powers of acceptance / rejections of such applications / claims.
- In cases where condonation of delay applications u/s. 119(2)(b) pertains to delay in verification of RoI, then the Commissioner of Income-tax, CPC, Bengaluru shall be vested with powers of acceptance / rejection of petitions.
- No condonation of delay application shall be entertained beyond 5 years from the end of the AY in which such application / claim is made (the said time limit of five years shall be applicable for those applications filed on or after 1 October 2024).
- If a RoI has been furnished pursuant to an Order u/s 119(2)(b) (Section 139(9A) of the IT Act), the power of acceptance / rejection of application shall be subject to the conditions that, at the time of considering the case u/s. 119(2)(b), the assessee was prevented by reasonable cause from filing RoI. The authorities are empowered to direct the Jurisdictional AO to make inquiries to ensure that the application is dealt on merits.

Direct Tax Vivad se Vishwas Scheme, 2024 comes into force

Section 88 of the Finance (No.2) Act, 2024 provides for the constitution of a scheme called Direct Tax Vivad se Vishwas Scheme, 2024. Section 88(2) therein provides that the said scheme shall come into force on such date as the Central Government may by notification in the Official Gazette appoint.

In exercise of the same, *vide* the present Notification No. 103/2024, dated 19 September 2024, 1 October 2024 has been appointed as the date on which the said Scheme shall come into force.

Direct Tax Vivad se Vishwas Rules, 2024 notified

Section 99 of the Finance (No.2) Act, 2024 confers powers on the Central Government to make rules for carrying out the provisions of the Direct Tax Vivad se Vishwas Scheme, 2024. In exercise of the said powers, the Direct Tax Vivad se Vishwas Rules, 2024 (‘**VsV Rules**’) have been framed by CBDT Notification No. 104/2024, dated 20 September 2024. In the said rules, necessary forms have been notified and the same are elucidated as hereunder:

1. The declaration made by the declarant referred to in Section 91(1) of the Finance (No. 2) Act, 2024 shall be made in Form 1 *(Rule 4)*.
2. The designated authority shall determine the amount payable by the declarant and grant a certificate to the declarant containing particulars of the tax arrear and the amount payable after such determination. The same shall be made in Form 2 *(Rule 5)*.
3. Once the quantum of payment is determined by the designated authority, the declarant shall pay the amount within 15 days from receipt of Form 2. The details of the payment made shall be sent to the designated authority in Form 3 *(Rule 6)*. Alongwith the said form, proof of withdrawal of appeal, objection, application, writ petition, special leave petition or claim shall be made by the declarant.
4. Upon receipt of Form 3, the designated authority shall pass an Order stating that the declarant has paid the aforesaid amount vide Form 4 *(Rule 7)*.

Direct Tax Vivad se Vishwas Scheme – Procedure w.r.t online filing of Form 1

As elucidated *vide* Notification No. 104/2024, the declaration on opting for VsV shall be made by the declarant in Form 1. *Vide* Notification No. 4/2024, dated 30 September 2024 of the Directorate of Income Tax (Systems), Bengaluru, the Directorate has laid down procedures to enable online filing of Form 1.

Ratio Decidendi

- TOLA survives post IT Act amendment courtesy 'substitution' principle – Supreme Court upholds re-assessment notices – *Supreme Court*
- Maharashtra Airport Development Co. Ltd is a State under Article 289(1) of the Constitution – Interest on fixed deposits is not chargeable to tax – *ITAT Mumbai*
- Expenses not claimed in the ROI – Remedy lies with the administrative officers including CBDT and not before Appellate Authority – *ITAT New Delhi*
- Company undergoing voluntary liquidation cannot claim exemptions from the applicability of any provisions of IT Act including Section 115JB – *ITAT Kolkata*
- Section 115JB not applicable to banks constituted as 'corresponding new bank' in terms of the Banking Companies (Acquistion and Transfer of Undertakings) Act, 1970 – *ITAT Mumbai*
- Profits attributable to a Permanent Establishment ('PE') in India would be liable to tax, irrespective of losses incurred at the entity level – *Delhi High Court*

TOLA survives post IT Act amendment courtesy 'substitution' principle – Supreme Court upholds re-assessment notices

A batch of appeals came for adjudication before the Supreme Court involving the interplay of three parliamentary statutes namely, Income Tax Act, 1961, Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 ('**TOLA**') and the Finance Act, 2021.

Section 3(1) of TOLA extended the time limit of 'any' action under the 'specified act' which fell for compliance in March 2020 and March 2021, further extended to June 2021. The Finance Act, 2021 substituted the scheme of re-assessment proceedings with effect from 1 April 2021. Prior to the Finance Act, 2021, the Assessing officer ('**AO**') could issue a Notice under Section 148 within four years from end of relevant AY (in all cases) and till six years from the end of relevant AY (in cases where income escaping assessment amounted INR 1 lakh or more). Post Finance Act, 2021, the AO can initiate re-assessment proceedings only based on prior information and with the prior approval of specified authority u/s. 151. Further, the time period for issuance of Notices was reduced from four to three years from end of relevant AY (in all cases) and within three years but not later than ten years from the end of the relevant AY (in cases where income escaping assessment amounts to INR 50 lakh or more). Further, first proviso to Section 149(1)(b) provided that no Notice u/s. 148 can be issued after the amendment if the time limit to issue Notice u/s. 148 under the earlier provision had expired.

In the case of *Ashish Agrawal*[10], the Supreme Court had held that the notices issued under Section 148 of the old regime shall be deemed to be notices issued under Section 148A(b) of the new regime. Subsequently, the Central Board of Direct Taxes ('**CBDT'**) issued an Instruction[2] wherein it was clarified that *Ashish Agrawal's* decision will apply to all cases where extended reassessment notices have been issued irrespective of the fact whether such notices have been challenged or not.

As the Supreme Court, in *Ashish Agarwal* judgement, did not deal with the issue of whether the reassessment notices were issued within the time limit prescribed under TOLA and left it open for adjudication, the matter relating to reassessment once again reached the SC.

[10] (2023) 1 SCC 617

In this batch of appeals the issue that fell for consideration before the SC were the re-assessment Notices issued, after completion of procedure prescribed in Section 148A, between July and September 2022 for the AYs 2013-14, 2014-15, 2015-16, 2016-17 and 2017-18. These Notices were challenged before various High Courts and the Hon'ble High Courts[11] had declared the Notices to be invalid on the ground that,

(i) reopening notices are barred by limitation because the time period of 6 years and 3 years u/s. 149(1)(b) of the old law and amended regime for AYs 2013-14, 2014-15, 2015-16, 2016-17 and 2017-18 has already expired as on date of issuance of reopening notice between July 2022 and September 2022;

(ii) issued without obtaining appropriate sanction of the specified authority as mandated under Section 151 of the IT Act.

Aggrieved, the Revenue preferred the present appeals before the SC. Before the SC, the Revenue raised the following:

- For the notices issued after 1 April 2021, whether provisions contained in TOLA relating to relaxation of the time for completion of any actions or proceedings etc., would also apply; and
- Whether the reassessment notices issued under Section 148 of the new regime between July and September 2022 are valid.

The SC held that Section 3(1) of TOLA will override Section 149 of the Income Tax Act, to the extent of relaxation of time limit specified therein. It held that TOLA would continue to apply to the Act after 1 April 2021, if any action or proceeding specified under the substituted provisions of the Act falls for completion between 20 March 2020 and 31 March 2021. The SC held that the logical effect of creating this deeming fiction in *Ashish Agarwal* is that the time surviving under the IT Act for the AO to complete procedure u/s. 148A and finally to issue a Notice u/s. 148 should be read with extended timelines in TOLA. Further, the SC held that the implied stay from date of pre-inquiry notice till date of supply of material or information by AO and a two-week response period granted thereafter to assessees, pursuant to

[11] *Union of India* v. *Rajeev Bansal* (Writ Tax No. 1086 of 2022 (Allahabad HC)); *Keenara Industries Pvt. Ltd.* v. *ITO, Surat* (R/Special CA No. 17321 of 2022 (Gujarat HC)); *J M Financial and Investment Consultancy Services Pvt. Ltd.* v. *ACIT*, WP No. 1050 of 2022 (Bombay HC); *Siemens Financial Services Pvt. Ltd.* v. *DCIT* [2023] 457 ITR 647 (Bombay HC); *Geeta Agarwal* v. *ITO* (DB Civil Writ Petition No. 14794 of 2022) (Rajasthan HC); *Ambika Iron and Steel Pvt. Ltd.* v. *PCIT* (WP(C) No. 20919 of 2021) (Orissa HC); *Twylight Infrastructure Pvt. Ltd.* v. *ITO* (WP(C) No. 16524/2022) (Delhi HC); *Ganesh Dass Khanna* v. *ITO* [2024] 460 ITR 546 (Delhi HC)

directions by the SC in *Ashish Agarwal* should be excluded while considering the extended timelines.

The Court therefore held that the clock started ticking for the Revenue only after it received the response of the assesses to the show causes notices. Once that clock started ticking, the AO was required to complete these procedures within the surviving time limit. On this basis, the reassessment notices issued during July 2022 to September 2022 were held to be valid.

Sanction and TOLA

The SC observed that in terms of the law laid down by the Court in *Ashish Agarwal*, the AO was required to issue re-assessment notice after following the procedure required under Section 148A of the IT Act. This included obtaining approval from specified authority in terms of the Section 151. Since the approval under the new law specifies grant of sanction from higher level of authorities compared to the old law, the new law being more beneficial to the assessees was to be followed by the AO while issuing re-assessment notices under old law post 1 April 2021. Before the SC the assessee argued that

- For AY 2015-16 the four-year period under the old law expired on 31 March 2020 however notices were issued after 31 March 2020 by obtaining sanction from lower authorities as opposed to authorities prescribed for sanctioning notices issued after four years.
- For AY 2016-17 and AY 2017-18, the three-year period under the new law expired on 31 March 2020 and 31 March 2021. However, notices were issued after 1 April 2021 by obtaining sanction from lower authorities as opposed to authorities prescribed for sanctioning notices issued after three years.

The SC held that TOLA relaxes the time limit for compliance of any action which also includes sanction by a specified authority under Section 151 of the new/old law. Further, it was held that if four years under the old law is expiring between March 2020 and March 2021 then the specified authority under Section 151(2) of the old law has power to grant approval until 31 March 2021. If three years under the new law is expiring between March 2020 and March 2021 then the specified authority under the new law has power to grant approval under Section 151(i) until 30 June 2021, by virtue of extensions granted under TOLA.

Thus, the Supreme Court has effectively rejected all the objections raised by the assesses under Sections 149 and 151 of the Act. However, it has been held that the remaining issues are left open to be contested in separate/subsequent proceedings.

[*Union of India* v. *Rajeev Bansal* – TS-725-SC-2024]

Maharashtra Airport Development Co. Ltd is a State under Article 289(1) of the Constitution – Interest on fixed deposits is not chargeable to tax

Facts

Maharashtra Airport Development Co. Ltd. ('**MADC – assessee'**), a company incorporated under the Companies Act, 1956, is engaged in developing the Multi-modal International Hub Airport at Nagpur and has been designated as a Special Planning Authority under Section 40(1)(b) of the Maharashtra Regional and Town Planning Act, 1966 ('**MRTP Act**') engaged for the purpose of maintaining and developing various airports across the State of Maharashtra

MADC filed its RoI on 20 October 2007, reporting nil income. The case was selected for scrutiny and an Order came to be passed by the AO wherein the entire expenditure was disallowed, and total receipts were taxed under the head 'Income from other sources'.

On further appeal to the Commissioner of Income Tax Appeals, ('**CIT(A)**'), the Appeal was partly allowed directing the AO to ascertain expenses which are directly related to earning of this income and allow it under Section 57 of the IT Act. Subsequently, a giving effect Order was passed by the AO. On remand, the AO passed a giving effect Order without allowing a specified expense. Aggrieved, MADC again preferred an Appeal to the CIT(A), wherein only 10% of the expenditure was allowed. Aggrieved, MADC filed an appeal before the Income Tax Appellate Tribunal ('**ITAT**'). ITAT upon hearing the case remanded the matter back to the file of the AO to reassess the allowable quantum of interest expenses against interest income. However, while following ITAT's directions, the AO denied MADC's claim for deduction in respect of interest on borrowings. MADC, aggrieved, the present appeal was preferred before this Hon'ble ITAT.

An additional ground was taken before the Hon'ble ITAT that interest income earned by the assessee on fixed deposits should not be added to its total income for the reason being that the activities carried out by the assessee are akin to the functions of the State. The assessee/Appellant argued that it was constituted as a company under the Companies Act, 1956 by the Government of Maharashtra, as a special purpose company to develop aviation infrastructure in the State of Maharashtra and therefore any activity engaged by the assessee is akin to an activity conducted by the State.

Observations by the Bench

The Tribunal referred to Article 289 of the Constitution of India which provides for exemption of State income or property from the ambit of taxation. The Tribunal placed reliance on assessee's own case for the previous AYs 10-11, 12-13 and 15-16, wherein the assessee was held to be an agent of the State of Maharashtra, amenable to immunity as per Article 289(1) of the Constitution of India.

Reference was also placed on a coordinate bench ruling in the case of *Karnataka Urban Infrastructure Development and Finance Corporation*, wherein the assessee was held to be a State within the meaning of Article 289(1) of the Constitution of India, being an instrumentality of State and therefore interest earned on the FDRs was held to be exempt as per Article 289 of the Constitution of India.

Placing reliance on the aforesaid decision, the Tribunal held the assessee to be a State within the meaning of Article 289 of the Constitution of India and thus the interest income earned by the assessee on fixed deposits was held as not chargeable to tax. Additions made towards interest income on fixed deposits were thus deleted.

[*Maharashtra Airport Development Co. Ltd. v. Assistant Commissioner of Income Tax* – TS-727-ITAT 2024(Mum)]

Expenses not claimed in the ROI – Remedy lies with the administrative officers including CBDT and not before Appellate Authority

The assessee is a public limited company, engaged in the business of manufacturing Acrylic Fibre. For the relevant AY 2019–20, the assessee filed RoI on 17 October 2019. The RoI filed by the assessee was accepted *vide* intimation under Section 143(1) of the IT Act dated 18 December 2009. Subsequently, upon realizing that certain expenditures were not claimed as deduction in the ROI that was processed under Section 143(1) of the IT Act, the assessee filed an appeal before the CIT (A). The CIT(A) rejected the claim on the grounds that claim of expenditure u/s 37 of the IT Act after processing the ROI is an afterthought and the assessee should have filed a revised return within the due date for making such claims. The CIT(A) relied on the decision of the Hon'ble Supreme Court in *Goetze India Ltd*[12] and dismissed the appeal of the assessee. Aggrieved by the CIT (A) order, the assessee preferred this appeal before ITAT.

[12] (2006) 284 ITR 323 (SC)

Before the Hon'ble ITAT, the assessee relied on the decision of Hon'ble Apex Court in case of *CIT* v. *Excel Industries Ltd.*[13] and contended that when there is no dispute on the allowability of prior period expenses, the CIT(A) could have admitted the claim of the assessee. The assessee further contended that the CIT(A) erred in not allowing the deductions merely because the assessee has not claimed the same in ROI when such claim is allowable in view of Article 265 of the Constitution. Article 265 of the Constitution lays down that no tax shall be levied or collected except by authority of law. The assessee further contended that an income which is not taxable under the IT Act cannot be made taxable merely because the same is offered for taxation under misconception of law or mistake. Before the Hon'ble ITAT, the Department argued that there was no grievance to the assessee since the ROI filed by the assessee was accepted and the issue raised in the appeal does not arise consequent to intimation passed under Section 143(1) of the IT Act. The Department relied on the decision of the Hon'ble Bombay High Court in case of *Ultratech Cement Ltd.*[14] to substantiate its contention.

The ITAT perused the submissions made by both the parties. The Hon'ble ITAT observed that the judicial decisions relied upon by the assessee relate to the fresh claim made by the assessee in the regular assessment proceedings and not at the stage of preliminary assessment under Section 143(1) of the IT Act. The ITAT observed that the mandate of preliminary assessment under Section 143(1) of the IT Act is only to process the ROI, vouch for arithmetical errors, detect incorrect claim of expenses, losses and deductions, cross verify details in audit report, cross verify income reported in Form 26AS or Form 16A etc. and the Revenue is not allowed to travel beyond this mandate. The Hon'ble ITAT noted that the assessee received an intimation under Section 143(1) and the case was not selected for regular assessment. It was further noted that since the time limit for filing revised return had lapsed when the assessee identified the discrepancy, it was easy for an assessee to make the claim before the CIT(A). The ITAT listed down the avenues available for an assessee to make a fresh claim if such claim was not made in the original ROI as follows:

i. Filing a revised ROI.

ii. Making the claim during regular assessment, if the ROI is selected for scrutiny

iii. Filing a revision application under Section 264 of the IT Act before the Jurisdictional commissioner (within 1

[13] 38 Taxman 100 (SC)

[14] 408 ITR 500 (Bombay)

year from the date on which the order sought to be revised has was passed.)

iv. Filing an application under Section 119(2)(b) of the IT Act before the CBDT.

The ITAT noted that in the present facts, the assessee was precluded from filing a revised return under Section 139(5) of the IT Act, as the statutory time limit had expired and the assessee was also ineligible to invoke revisionary relief under Section 264 of the IT Act, since no regular assessment had taken place. The Tribunal further stated that the assessee may have a genuine claim, however failure to include the same in the original RoI renders the issue debatable. It was noted that the claim may still be considered upon making proper verification and assessment, however, the final decision rests with the discretion of the relevant authorities, including CBDT. The ITAT held that the remedy for a fresh claim lies not with the appellate authority but with the administrative officers or the Board. It was further observed that if the Board rejects the application, the only available remedy is through a Writ Petition. In light of the aforementioned observations, the ITAT dismissed the appeal.

[*Pasupati Acrylon Limited* v. *ACIT* – TS-696-ITAT-2024 (Del)]

Company undergoing voluntary liquidation cannot claim exemptions from the applicability of any provisions of IT Act including Section 115JB

The issue in the given case was whether a company under voluntary liquidation can claim exemption from applicability of Section 115JB of the IT Act. The AY in question was AY 2018-19. The assessee company is wholly owned by the Central Government, with its entire share capital being held by the President of India and 7 nominees. Considering the poor financial performance, the Government of India at an Extra Ordinary General Meeting of the shareholders decided to go for voluntary winding up in accordance with the provisions of Section 484 of Companies Act 1956 (‘**CA, 1956**’) (Section 304 of the Companies Act, 2013) (‘**CA, 2013**’). The process of winding up commenced and was still in force during the relevant AY. After the commencement of liquidation, the assessee Company was not engaged in any business activity other than realizing its assets and discharging its liabilities.

For the relevant AY, the assessee filed RoI declaring a total income of Rs. NIL after entirely setting off the brought forward losses. The Assessing Officer (‘**AO**’) assessed the total income as Nil *vide* an assessment order dated 22 February 2021. Thereafter, the Principal Commissioner of Income Tax ('**PCIT**') initiated the proceedings under Section 263 of the IT Act. The proceedings had been initiated on the grounds that the assessee had not computed income under the provisions of Section 115JB of the IT Act. A Show cause Notice under Section 263 of the IT Act was issued requiring the assessee Company to explain as to why provisions of Section 115JB are not applicable to it. The assessee Company responded that the company was undergoing liquidation and hence was not required to prepare accounts from which any book profit can be computed. The PCIT held that the provisions of Section 115JB will squarely apply to the assessee company even when undergoing voluntary liquidation and further held that the AO did not conduct any enquiry on the issue and assessed the case only on the returned income. Thus, the PCIT *vide* its Order directed the AO to do a fresh assessment. Aggrieved by this, the assessee company filed this appeal before the ITAT. The assessee company challenged the said Order on the grounds that the PCIT had erred in setting aside the order of AO as being prejudicial to the interest of revenue and that the PCIT failed to appreciate the fact that the assessee company was undergoing liquidation and in the absence of a requirement to prepare a profit and loss account and no scope in the Form ITR – 6 for computing book profit under Section 115JB(2), it could not have computed any book profit.

The assessee company substantiated before the ITAT that it had paid taxes subsequently after the losses were exhausted and that there was no intent to evade tax. It was also submitted that the position that Section 115JB will not apply to the assessee company, was also accepted by the Department for AY prior and subsequent to the relevant AY. It was further contended that the assessee company was following the mandate under Section 348 of the CA, 2013 (Section 551 of the CA, 1956) and accordingly had prepared only quarterly receipts and payments account in the prescribed Form No.153 as per Companies (Court) Rules, 1959 which were placed at the EGM after audits and filed with the ROC and eventually forwarded to the Ministry of Finance for placing before both the houses of the Parliament as per Section 394 of the CA, 2013 (Section 619A of the CA, 1956). The assessee company thus submitted that since it was preparing only quarterly statements and there was no scope to prepare profit and loss account and balance sheet in accordance with Schedule 3 of the CA, 2013 (Schedule 6 of the CA, 1956) and consequently no scope to compute book profits under Section 115JB as well. The Department contended that the provisions of Section 115JB of the IT Act do not provide any exceptions in respect of companies undergoing liquidation and the accounting system of assessee company would permit computation of book profits. It was further contended that mere maintenance of quarterly statements as per the CA 1956/2013 does not provide an exemption from preparation of profit and loss account.

After hearing the submissions, the Hon'ble ITAT observed that it is evident that during the course of assessment proceedings, the Ld.AO did not carry out any inquiry regarding applicability of Section 115JB of the Act. The Hon'ble ITAT emphasized the mandate and principles governing the revisionary powers under Section 263 by referring to the Circular No. 19/2015 dated 27.11.2015 and the decision of the Bombay Bench of ITAT in *Khatiza S. Oomerbhoy* v. *ITO*[15]. The Hon'ble ITAT applied the tests contained in the said decision and held that in the present case the Ld. PCIT satisfied the twin conditions to invoke revisionary powers under Section 263, namely (i) the order of the Ld.AO sought to be revised is erroneous and (ii) it is prejudicial to the interest of revenue. With regard to the applicability of Section 115JB, the Hon'ble ITAT observed that the liquidation proceedings were initiated under the CA, 1956 and the same was still in process and that wherever the Legislature intended to make amendments in the IT Act for the same to be in line with the CA, 2013, the same was carried out in many places. The Hon'ble ITAT drew specific attention to Section 115JB(2(a) of the IT Act, wherein the phrase 'profit and loss account' was changed to the phrase 'statement of profit and loss' by the Finance Act 2017 and that the notes to Finance Bill, 2017 specifically stated that the said amendment was made to align with the provisions of CA, 2013 where companies prepare financial statements in accordance with Indian Accounting Standards. Therefore, the Hon'ble ITAT observed that if the legislative intent was to exclude a specific category assessee from the applicability of provisions of Section 115JB, then such an exclusion would have been explicitly stated in the statute as is contained in Section 115JB (2) of the IT Act. The Hon'ble ITAT also considered the argument made by the assessee with respect to the practical difficulty in filing Form ITR – 6. The Hon'ble ITAT held that the ITR form is creation under the IT Act and the same would not have an overriding effect over the provision of the IT Act. Furthermore, the Hon'ble ITAT noted that from the system followed by the assessee company for accounting, it was quite possible to determine profit or loss. The Hon'ble ITAT further observed that Section 348 of the CA, 2013 (Section 551 of the CA, 1956) does not grant any supremacy over any of the provisions

[15] [2006] 100 ITD 173 (Mumbai)

of the IT Act including Section 115JB. In light of the above, the Hon'ble ITAT rejected the appeal filed by the assessee company, concluding that the provisions of Section 115JB would apply in the given facts.

[*Industrial Investment Bank of India Ltd.* v. *PCIT* – [2024] 166 taxmann.com 409 (Kolkata Tribunal)]

Section 115JB not applicable to banks constituted as 'corresponding new bank' in terms of the Banking Companies (Acquistion and Transfer of Undertakings) Act, 1970

The issue before the Special Bench of the Hon'ble ITAT is with respect to applicability of Section 115JB(2)(b) of the IT Act in case of banks which is constituted as 'corresponding new bank' in terms of the Banking Companies (Acquisition and Transfer of undertakings) Act, 1970 ('**Acquisition Act**') from AY 2013 – 14 onwards.

For AY 2015 – 16, the case of the assessee was taken up for scrutiny and assessee was asked to show cause as to why the 'provisions and contingency' debited to profit and loss account should not be added back for computation of book profit. In response, the assessee submitted that the provisions of Section 115JB of IT Act would not be applicable to the assessee. The Ld. AO rejected this plea on the ground that after the amendment *vide* the Finance Act, 2012 ('**FA 2012**'), not only companies registered under the Companies Act but also companies governed by other Regulating Acts including the Banking Regulation Act, 1949 ('**BR Act**') would be subject to Section 115JB. The CIT(A) upheld the view of the AO. The assessee challenged the Order passed by the CIT (A) before the ITAT.

The assessee relied on orders passed by the Hon'ble Mumbai in its own case for the AYs 2013 – 14 and 2014 – 15, wherein the Hon'ble ITAT ruled that the provisions of Section 115JB of the IT Act would not apply to assessee relying on the decision of Bombay High Court in assessee's own case[16]. The ruling of the Hon'ble High Court considered the position of law as it stood prior to the amendment by the FA 2012. Contrary to the aforesaid cases, the Coordinate Bench issued another decision in case of *Bank of India*[17]. In the said decision, the Hon'ble ITAT observed that Section 11 of the Acquisition Act provides that for the purposes of IT Act, every 'corresponding new bank' shall be deemed to be an Indian Company and a company in which public are substantially interested and therefore it was not open

[16] ITA No.1196 of 2013

[17] ITA No. 167 and 2048/Mum / 2019

to take a view that it would not be treated as a 'company' for the purposes of provisions of Section 115JB of the IT Act.

Before the Special Bench of the Hon'ble ITAT, the assessee submitted that it came into existence on 19 July 1969 as 'corresponding new bank' under Section 3(1) of Acquisition Act. As per this Act, only the undertaking of the existing bank was transferred from Union Bank of India Ltd to the assessee and the assessee was a creation by the Acquisition Act. It was submitted that Union Bank of India Ltd was still in existence as per the records of Registrar of Companies (ROC). It was further stated that the assessee is neither a company incorporated under the Companies Act, 1956 nor under any previous company law. Therefore, it was contended that these are two different entities distinct from each other, one incorporated under the Company Law and the other under Acquisition Act. The assessee relied on *Rustom Cavasjee Cooper* v. *Union Bank of India*[18] to substantiate that only undertakings of the existing bank had to be transferred under Acquistion Act and vested in the corresponding new bank and the assessee is not a company and therefore, the provisions of Section 115JB of the IT Act would not apply. The assessee contended that the legal framework applicable to a bank, banking company and corresponding new bank are different under the BR Act. The assessee contended that the provisions of Section 115JB of the IT Act prior to the amendment by FA 2012 was only applicable to the companies which were required to prepare a profit and loss account in accordance with Companies Act and that the assessee was required to prepare its profit and loss account accordance with Section 51 read with Section 29 of the BR Act and thus, prior to amendment by FA, 2012, the provisions of Section 115JB of the IT Act will not be applicable. The assessee contended that even after the amendment, the provisions of Section 115JB of the IT Act will not apply to the assessee because it neither qualifies as a company or banking company. The assessee further contended that provisions of Section 11 of the Acquisition Act which treats the assessee as a company for the purposes of IT Act cannot be extended to the Companies Act. To substantiate this, the assessee relied on *Dy CIT* v. *Damodar Valley Corporation*[19] and *CIT* v. *Rajasthan Financial Corporation*[20]. The assessee contended that the provisions of IT Act itself recognizes the distinction between banking company and a corresponding new bank by making separate provisions for the same in Section 36(1)(viii) and 72AA of the IT Act.

[18] [1970] 1 SCC 248

[19] ITA No. 438/Kol/2017

[20] [2023] 199 ITD 570

As against this, the Revenue submitted that on a conjoint reading of Section 11 of the Acquisition Act, Section 5(c) of the BR Act and the definition of a company in Section 3 of the Companies Act, the assessee is nothing but a banking company and thus, it will squarely fall within the ambit of Section 115JB of the IT Act.

The Special bench of the Hon'ble ITAT held that the assessee was neither formed or registered under the Companies Act and once the same is not satisfied, the first condition referred to in Section 115JB(2)(b) of the IT Act will not be construed as fulfilled. The Hon'ble ITAT further went on to hold that the fiction created by Section 11 of the Acquisition Act does not imply that the assessee would also become a company for the purposes of the Companies Act for which Section 115JB(2)(b) of the IT Act is applicable. It was observed by the Hon'ble ITAT that the expression 'company' used in Section 115JB(2)(b) of the IT Act is to be inferred as referring to a company under the Companies Act and not to an entity which is deemed by a fiction to be a company for the purposes of IT Act. The ITAT also relied on Notification No. S.O. 170 dated 16 February 1970 to establish that the Government of India considers the corresponding new bank as separate and distinct from banking companies. In light of the aforementioned observations, the Hon'ble ITAT concluded the matter in favour of the assessee and held that the provisions of Section 115JB would not apply.

[*Union Bank of India* v. *DCIT* – TS-654-ITAT-2024 (Mum)]

Profits attributable to a Permanent Establishment ('PE') in India would be liable to tax, irrespective of losses incurred at the entity level

Hyatt International Southwest Asia Ltd., headquartered in the UAE, provides management services to various hotels across various regions, including India. The company has a PE in India that manages specific hotel properties within India.

The legal issue under consideration was whether profits attributable to an Indian PE are taxable in India, even if the entity incurs financial losses at the global level.

A Full Bench of the Delhi High Court, citing Article 7 ('**Business Profits**') of the India-UAE Double Taxation Avoidance Agreement ('**DTAA**'), ruled that the PE is to be treated as an independent taxable entity and any profits generated by the Indian PE are subjected to tax in India, irrespective of the losses suffered by the entity at global level.

In the instant case, the assessee relied upon the decision of the Delhi High Court in the judgment of *Commissioner of Income Tax*

v. *Nokia Solutions and Networks OY*[21], and claimed that since the Taxpayer incurred a global loss, no profit or income could be attributed to its alleged PE in India. In *Nokia Solutions* (*Supra*), the Delhi High Court had affirmed the order of the Income Tax Appellate Tribunal and upheld that the profit attribution to a PE was not warranted if the global entity has incurred losses.

A second Division Bench of the Delhi High Court disagreed with the view expressed in *Nokia Solutions* and took a view that the profits of a PE should be assessed and chargeable to tax in India irrespective of losses incurred at overall entity level. In light of the divergent views expressed on the issue by two Division Benches of Delhi High Court, a reference was made to a Full Bench of the Delhi High Court to adjudicate on the issue whether profit / income could be attributed to a PE of an enterprise in India if the enterprise incurs losses.

The assessee contended that under Article 7 of the India-UAE DTAA, profits of a UAE-based enterprise are taxable only in the UAE (and not in India). The assessee further contended that a foreign enterprise can only be taxed in India if the following three conditions are cumulatively met *viz.*, the enterprise is making profit, it has a PE in India, and a part of that profit is attributable to the PE.

The Revenue's argument was that Article 7 of the DTAA treats a PE as a separate and distinct enterprise, thus requiring profit attribution based solely on independent activities of the PE, irrespective of the global profits or losses of the enterprise.

A Full Bench of the Delhi High Court ruled in favour of the Revenue and held that a PE was to be treated as a separate and independent entity *qua* the global entity for attribution of profits regardless of profits or losses incurred by the entity at global level. Key factors and observations noted by the Full Bench of the Delhi High Court are as set out below:

- Article 7 of the DTAA stipulates that the profits of an enterprise should only be taxed in the state of its residence. However, if the enterprise operates in the other state through a PE, the profits attributable to that PE can also be taxed in that other state. Article 7(2) treats the PE as a distinct and separate entity for the purposes of determining its profits.

[21] (2023) 147 taxmann.com 165 (Delhi)

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- Profits of a PE are treated as independently taxable in the state where it is located, even though the PE is part of a global enterprise.
- The Court rejected the argument that taxation should be based on the overall profitability or income of the enterprise as a whole. It ruled that only the profits arising from the activities of the PE within the state where it operates should be taxed (independent of the global financials).

Upon examination of the India-UAE DTAA, the Court further held that Article 7 did not expressly preclude attributing profits to a PE in cases where the global entity suffered losses. Therefore, the court ruled that the profits attributable to the PE should be determined independently of the enterprise's international financial performance.

The Court ruled in favour of the revenue authorities, holding that the profits attributable to Hyatt International's Indian PE could be taxed, even though the global entity incurred losses. The court reaffirmed that a PE should be treated as an independent entity for tax purposes, and any profits generated locally could be taxed, irrespective of the enterprise's global financial performance.

The Court distinguished this case from the *Nokia Solutions and Networks OY* case, explaining that the said ruling was based on specific factual circumstances that did not apply to the present case. In *Nokia*, the Court had ruled that no profit attribution was warranted since the global entity had incurred losses and *no income was attributable to the PE*. However, in the present case, the court noted that the PE had generated profits in India, which could be taxed, even if the global entity had reported losses.

[*Hyatt International Southwest Asia Ltd.* v. *Additional Director of Income Tax* – (2024) 166 taxmann.com 466 (Delhi)]

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