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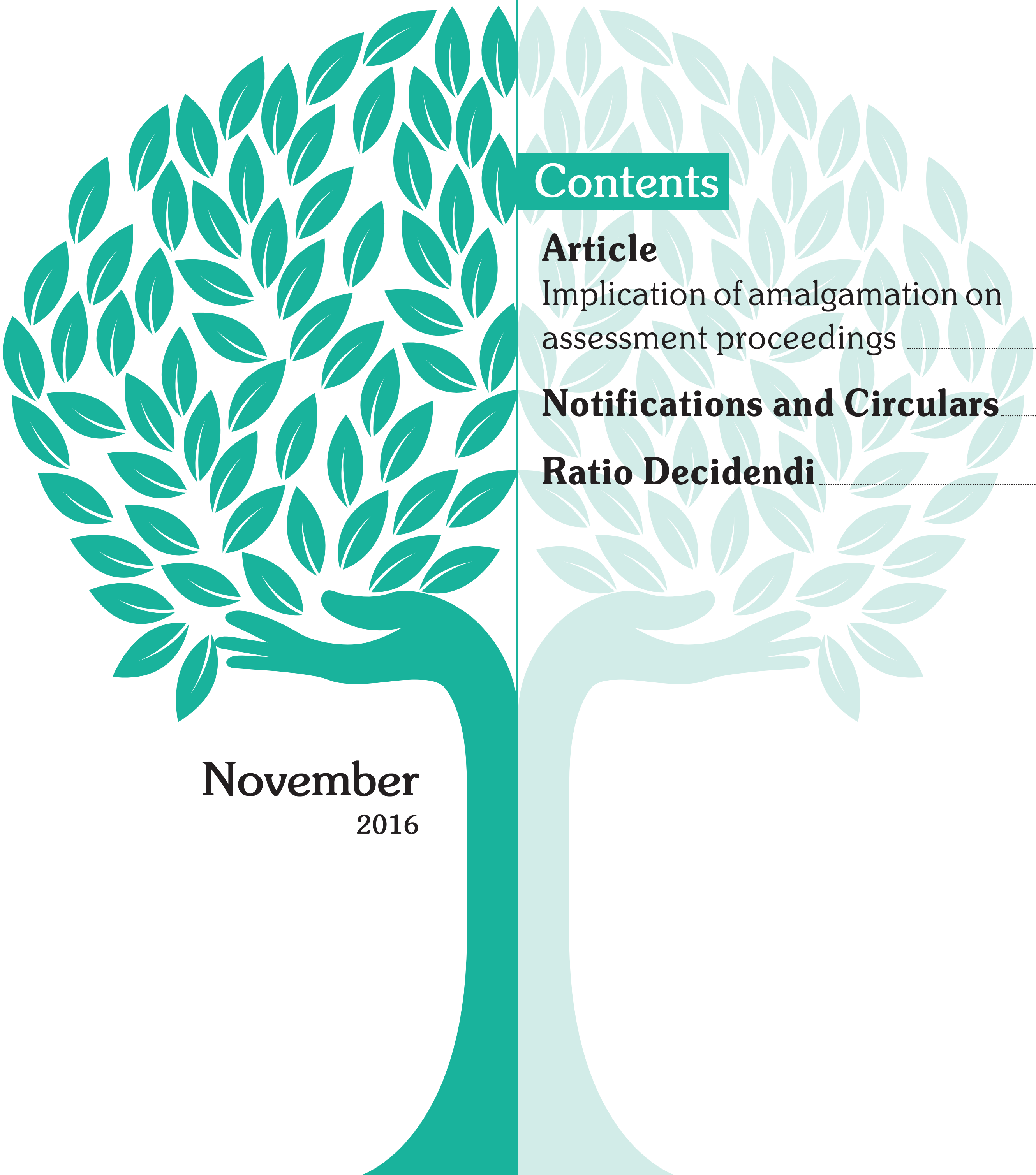

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Implication of amalgamation on assessment proceedings

By **Sumeet Khurana**

A company is a juristic personality which not only comes into existence by operation of law but its cessation also takes place by operation of law. Section 170 of the Income Tax Act, 1961 deals with cases of succession in general and can be applied to succession of companies by way of amalgamation. It provides that in a case where predecessor cannot be found (e.g. transferor company in case of amalgamation cannot be found) the assessment shall be made on the successor (transferee company) for (a) the year of succession till the date of succession and (b) for the year preceding the year of succession. Section 159 deals with assessment and tax recovery after the death of a person but there is no similar provision in the Act dealing specifically with companies if they cease to exist on account of winding up or merger.

Assessment proceedings of companies after amalgamation

Various judicial decisions[1] have held that once a company (say transferor) has amalgamated with another (say transferee) and this fact has been brought to the notice of the tax officer (Assessing Officer or 'AO'), tax assessment cannot be framed on the transferor company. These decisions have held that an assessment on transferor despite succession / amalgamation is a *nullity*.

However, where the taxpayer did not inform the AO about amalgamation and assessment was framed on the transferor, the High Court[2] and Tribunal[3] refused to accept the contention of the taxpayer that the assessment on non-existent transferor is invalid. In another case the Tribunal held that the assessment framed on the transferor is only an *irregularity* as the taxpayer had failed to inform the fact of amalgamation to the AO. In another case, the Tribunal[4] held that as the assessment on transferor as framed is invalid AO and it is for revenue authorities to initiate *appropriate proceedings* [5]against the right person (viz. transferee).

Even without going into the aspect of any failure on the part of the taxpayer to intimate the fact of amalgamation the High Court in the undernoted[6] case, after declaring the assessment on the transferor company to be invalid, held as under:

"We may, however mention that on the basis of the returns filed by [transferor company] for the [tax period] 2003-04, the department may proceed for making

[1] *CIT* v. *Dimension Apparels P. Ltd.* 370 ITR 288 (Del); *Spice Entertainment* ITA 475 of 2011 (Delhi); *Emirald Co. Ltd.* v. *ITO* 176 TTJ 276 (Kol); I.K. Agencies *(P) Ltd.* V. *CIT* 347 ITR 664 (Cal)

[2] *CIT* v. *Shaw Wallace Distilleries Ltd.* 386 ITR 14 (Cal)

[3] *Subhlakshmi Vanijya (P) Ltd*. v. *CIT* 172 TTJ 721 (Kol)

[4] *Pampasar Distillary Ltd.* v. *ACIT* 15 SOT 331 (Kol)

[5] Discussed later under the heading "If assessment is held to be invalid"

[6] *CIT* v. *Intel Technology India (P) Ltd*. 380 ITR 272 (Kar)

assessment in accordance with law and in terms of the provisions of the Income tax Act, 1961."

Tax liability arising on account of acts or omission of transferor company have been held to fall on the transferee company by undernoted[7] decision in following words:

"An order of amalgamation made by the High Court under the provisions of s. 394 of the Companies Act is not an order which is meant to relieve either of the legal entities which are parties to the scheme of amalgamation, from the liability for payment of tax. ….None of the provisions of the Companies Act providing for amalgamation, nor any other provision in the Act, confers immunity from payment of tax to either of the entities which are parties to the order of amalgamation. ..

9. It is not open to the amalgamated company which has taken over all assets and liabilities of the amalgamating company to claim that it is not in any way liable for the tax payable by the amalgamating company, even though the order under Section 104 came to be made after the order of amalgamation .."

Analysis of legal framework and judicial decisions

1) If assessment is held to be invalid

If the order of Tribunal or Court concludes that the assessment on the transferor is a nullity and also states that income needs to be assessed in the hands of transferee, then it will become imperative to analyse as to whether and how the assessment on transferee will be framed as the regular time limit for the same might stand expired by the time of such order (say 'appellate order').

Explanation 2 to Section 153 provides that where any income is excluded from the total income of one person (here transferor) *and held to be the income of another person* (here transferee), then, an assessment of such income on such other person (here transferee) shall, for the purposes of Section 150 and this section, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order, if such other person was given an opportunity of being heard before the said order was passed. Section 150 provides that notwithstanding anything contained in Section 149, the *notice* under Section 148 *may be issued at any time* for the purpose of making an assessment or reassessment or re-computation in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under the Income Tax Act by way of appeal, reference or revision or by a court in any proceeding under any other law. Section 153 (2) provides that assessment under Section 147 can be made within nine months from the end of financial year of service of notice under Section 148.

Thus, it appears that the assessment on transferee company can be framed in consequence of the finding or direction in the appellate order without any restriction of time limit. This conclusion is however subject to detailed deliberation on following aspects:

[7] *CIT* v. *T.V. Sundaram Iyengar & Sons* 238 ITR 328 (Mad)

a) The extended limitation depends on a finding about another person

In the undernoted case[8] it was held that the reassessment of another person (here transferee) can be framed without time limit restriction if it is intimately connected with the assessments of the person in whose case the finding or direction has been given in appellate order. To illustrate, the assessment of partner / member is connected with the assessment of his firm/HUF. If the scope of 'another person' is stretched to cover unconnected persons then the relevant clause will become unconstitutional[9]. Thus, it needs to be evaluated as to whether the assessment of transferee is intimately connected with the assessment of transferor in the above mentioned sense.

b) Meaning of expression 'income of another person'

The availability of extended time limitation depends on finding that 'income is of another person' (here transferee). The issue that requires deliberation is whether the income of the transferor company, earned during the period prior to effective date of amalgamation, can be held to be 'of transferee company'. The effect of Section 170 is to enable collection of tax from the transferee in case of succession. It does not seem to have the effect of deeming the income earned by predecessor (transferor) as income of the successor (transferee). Therefore, any finding to treat the income of transferor as income of transferee will probably be outside the legislative framework.

Based on above, it appears difficult to apply extended time limit to the assessment on transferee for the income earned by transferor even if a Tribunal or Court gives some finding or direction in this regard.

2) Scope of Section 170

Sub-section (2) of Section 170 provides that if the predecessor cannot be found then the *income shall be assessed on* the successor. It is difficult to conceive as to how the highlighted phrase can be read as 'income shall be assessed *in the name of* the successor'. The purpose of this sub-section is to have the machinery in place for realization of taxes in case predecessor cannot be found. Sub-section (3) complements it by providing for cases where predecessor can be found and has been assessed but tax cannot be realized from him. Mentioning the name of predecessor /transferor in the assessment order does not cause any prejudice to anyone in so far as the successor transferee has been given due opportunity of being heard and the assessment is otherwise in conformity with Section 170.

Further, the expression 'assessment' has been judicially expounded to mean not merely the computation of income, but to refer to the computation income as well as the application of the procedure for declaration and imposition of

8 *ITO* v. *Murlidhar Bhagwandas52 ITR 335* (SC) (5JB)

9 *S.C. Prashar* v. *Vasantsen Dwarkadas* 49 ITR 1 (SC)(5JB)

tax liability and the machinery for enforcement thereof. Thus, the author is of the view that the phrase 'assessed on the successor' means that the opportunity of being heard shall be given to successor and machinery for enforcement of tax shall be moved against successor. Viewed in this light, it becomes difficult to appreciate the undernoted[10] decisions since mention of the name of predecessor (transferor) in the assessment order seems to be of the least consequence when the identity of the taxpayer is not misconceived.

Conclusion

The judgements favoring of annulling the assessment framed in the name of transferor company may not be upheld by higher judicial forums. Further, it will be interesting to evaluate as to what extent the principle enunciated by Madras High Court[11] can be applied in diverse situations. In cases where Tribunal or High Court treats the assessment as nullity, it would be difficult for the revenue to collect tax from transferee, in an assessment on transferee framed after annulment of assessment of transferor, even if there is some finding or direction by the Tribunal or Court in the appellate order.

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Notifications and Circulars

Furnishing information regarding cash deposits in relation to demonetization scheme

Following the announcement of demonetization scheme on 08.11.2016, the Rule 114B and Rule 114E of Income-tax Rules, 1962 have been amended by way of Notification No. 104/2016 dated 15-11-2016 to the provide the following:

Amendment to Rule 114B: Rule 114B has been amended to provide that PAN shall be mandatorily quoted in a case where the deposits in a bank or post office exceed Rs. 50,000/- in a day or Rs. 2,50,000/- during the period 09th November 2016 to 30th December, 2016.

Amendment to Rule 114E: Rule 114E has been amended to provide that a statement of financial transaction as required under Section 285BA of Income-tax Act, 1961 shall be furnished by a bank or Post Office in case of a person whose deposits in one or more current account exceed Rs. 12,50,000/- or whose deposits in one or more accounts (other than current accounts) exceeds Rs. 2,50,000/- during the period of 09th November 2016 to 30th December 2016. Further, a proviso to Rule 114E (5) has been inserted to provide that the banks and the post office will be required to furnish the information in relation to the period of 09th November 2016 to 30th December 2016 by 31st January 2017.

[10] *CIT* v. *Dimension Apparels P. Ltd.* 370 ITR 288 (Del); *Spice Entertainment* ITA 475 of 2011 (Delhi); *Emirald Co. Ltd.* v. *ITO* 176 TTJ 276 (Kol); *I.K. Agencies (P) Ltd.* V. *CIT* 347 ITR 664 (Cal)

[11] *See T.V. Sundaram* (supra)

Reduction in rates of accelerated depreciation

The Finance Minister had said in his Budget speech that the accelerated depreciation provided in the Income-tax Act, 2016 will be reduced to 40% w.e.f 1-4-2017. By way of Notification No. 103/2016 dated 7-11-2016, the following amendments have been brought to Income-tax Rules, 1962. Proviso has been inserted to Rule 5(1) to provide that the allowance of depreciation u/s 32(1)(ii) of Income-tax Act, 1961 in case of a domestic company specified in Section 115BA of Income-tax Act, 1961 will be restricted to 40% of the written down value of each block of asset. The rates of depreciation in the Appendix I (table of rates at which depreciation is admissible), exceeding 40% have been amended to bring down such rates to 40%.

Amendment to India-Japan DTAA

The Central Government has signed a Protocol with Government of Japan to amend the India-Japan DTAA with effect from 29th October 2016. Notification No. 102/2016 dated 28-10-2016 has been issued in this regard. The key amendments to the India-Japan DTAA are as follows:

Article 11 of India-Japan DTAA to include Nippon Export and Investment Insurance (in case of Japan) and General Insurance Corporation of India and New India Assurance Company Limited (in case of India) within the ambit of the term 'Central Bank' in order to extend the benefit of Para 3 of Article 11 to these entities.

Amendment to Article 26 and insertion of Article 26A for allowing effective exchange information in relation to its taxpayers and for rendering assistance in collection of revenue claims. Para 5 of amended Article 26 provides that a Contracting State shall not decline to supply information solely because the information is held by a bank or other financial institution. Para 2(b) of newly inserted Article 26A includes excise duty, service tax and Value Added Tax within the ambit of term 'Revenue Claims' as provided in Article 26A. Thus, Japan will render assistance to India in collection of claims of Excise Duty, Service tax and VAT apart from Income-tax.

Chapter VI-A deductions on enhanced profits

Chapter VI-A of Income-tax Act, 1961 provides certain profit-linked deductions in respect of certain incomes. While computing income of the assessee, the assessing officer can make disallowance under Section 40(a)(ia), 40A(3), 43B of Income-tax Act, 1961. The effect of disallowance is that the profits of the assessee are increased to the extent of disallowance made by the assessing officer. The fact as to whether profit linked deductions under Chapter VI-A will be available on the increased profits as computed after making disallowance has been subject matter of dispute. CBDT has clarified vide Circular No. 37/2016 dated 2-11-2016 that the profit linked deductions under Chapter VI-A will also be available on profits enhanced after making disallowances.

Applicability of TDS provisions under Section 194-I on lump sum lease premium paid for acquisition of long term leasehold rights in land

Section 194-I of Income-tax Act, 1961 provides for tax deduction at source on payment of income in the nature of rent. The issue as to whether the provisions of Section 194-I are applicable on lump-sum lease premium or one-time upfront lease charges paid for acquiring long term leasehold rights in land had been a subject matter of litigation. CBDT has issued Circular No. 35/2016 dated 13-10-2016 wherein the Board while citing the judgment of Hon'ble High Court of Delhi in the case *The Indian Newspaper Society* (ITA No. 918 & 920/2015) and Hon'ble Madras High Court in the case of *Foxconn India Developer Limited* (Tax Case Appeal No. 801/2013) and *Tril Infopark Limited* (Tax Case Appeal No. 882/2015) has clarified that the upfront lease charges paid for acquiring long term leasehold rights in the land is a capital payment and would not constitute rental income in the hands of lessor. Accordingly, CBDT has clarified that such payments are not liable for TDS under Section 194-I of Income-tax Act, 1961.

Ratio decidendi

Legal fees paid to overseas firm towards assisting in setting up of branch abroad is not royalty or Fees for Technical services

The assessee, a banking Company paid legal fees to UK attorney firm in USD towards conducting a market survey for possible acquisition of a Bank in US and also for the presentation given by the professional of UK firm and discussion on various legal/ regulatory requirement of US for setting up of a Bank Branch in US. As per the agreement between the Assessee and the UK legal firm, the Assessee deducted TDS @ 20% on gross amount. Subsequently, it filed appeal under Section 248 of the Act stating that the amount is not taxable as per the Treaty and also as per the domestic laws. The CIT (A) disallowed the claim of the Assessee. On appeal to the Tribunal, the Tribunal held that Article 15 of the India-UK DTAA which deals with Independent professional services, being more specific will apply over Article 13 of the India-UK DTAA which deals with Royalty/ Fess for Technical Services. Placing reliance on the Apex Court decision in the case of *CIT* v. *Rajendra Prasad Moody* [1978] 115 ITR 519 (SC) the Tribunal held that the payment cannot be held to be in the nature of 'Royalty' or 'Fees for Technical Services' as per Section 9 (1) (vi)/ 9(1) (vii). Further, placing reliance on the decision in the case of *ADIT (International Taxation)* v. *Clifford Chance* [2013] 33 taxmann.com 200, the Tribunal observed that in the absence of any business connection in India/ permanent establishment in India and since no employees were present in India for more than 90 days, it can be said that the payments cannot be held to be taxable in India as per India-UK DTAA as well as the domestic laws. [*Kotak Mahindra*

Bank Ltd v. *ITO (International Taxation)* TDS-3 (2016) 74 taxmann.com 246 (Mum-Tri)]

Transfer pricing provisions are not applicable on the transactions between the Indian head office and foreign branch office as it is not a separate enterprise

The assessee was an Indian company having branch office in Canada and a wholly owned subsidiary in US. The question before the Tribunal was whether the transactions between the assessee and its branch office in Canada can be considered to be international transaction and whether arm's length price is to be determined. The Tribunal, considering the definition of the term 'enterprise' under Section 92F (iii) in juxtaposition with Section 92B (1) which defines the term 'international transaction', scope of total income under Section 5 observed that making a transfer pricing adjustment in respect of the international transaction between the Indian head office and the foreign branch office will result in charging tax on income which is more than legitimately due to the exchequer. However, the Tribunal held that non-applicability of transfer pricing provisions in a contra situation is not acceptable i.e. legislature introduced Chapter X with the caption 'Special provision relating to avoidance of tax' so as to ensure that the international transactions are reported at arm's length price and Section 92F (iii) was introduced to ensure that not only the transactions between foreign enterprise and Indian associated enterprise are covered, but also the transactions between the foreign enterprise and its branch office in India are also determined at ALP so that India is not deprived of the rightful amount of tax due to it. [*Aithent Technologies P. Ltd* v. *DCIT* (2016) 74 taxmann.com 214 (Del-Tri)]

Provisions of Section 50C applicable when property is transferred by sale cum GPA agreement.

The assessee sold his residential house by entering into a registered sale cum General Power of Attorney (GPA). The value fixed for payment of stamp duty was higher than the actual sale consideration. Placing an argument that the provisions of Section 50C are not applicable in cases where there is a sale cum GPA, the assessee paid tax only on the sale consideration and not on the increase value adopted by stamp duty authority as required under Section 50C. The assessee also claimed exemption under Section 54 for construction of a new residential house. The construction began even before the sale of the residential house in question. In this context, two questions of law were raised before the Tribunal, whether Section 50C is applicable in case where there is a sale cum GPA through which property is transferred and whether exemption under Section 54 be available even in cases where the construction of a residential house commences before the transfer of the residential house for which exemption is claimed? The ITAT held that the moment transfer within the meaning of Section 2(47)(v) takes place, the deeming provisions of Section 50C are applicable and the value determined by the stamp duty authority shall be taken if the same is more than the consideration for the sale of the property. As regards the exemption as per Section 54, it held that the section lays down condition only in respect of completion of construction and not in respect of when the activity of construction should begin. Therefore even when the construction of the property commences before the transfer, exemption is available if the same is completed within 3 years from the date of transfer. Also, it is sufficient to invest the net sale consideration for claiming exemption under Section 54 and the deemed meaning of full value of consideration under Section 50C need not be extended to exemption 54. [*DCIT* v. *Dr.Chalasani Mallikarjuna Rao,* TS-574-ITAT-2016 (Viz)]

Assembling of parts to make an electric bike amounts to manufacture - Deduction under Section 80-IC available

The assessee was engaged in the business of importing parts from China and assembling the same to make an electric bike. It claimed deduction under Section 80-IC on its profits. The question before the Tribunal was whether assembling of components to make an electric bike amounts to manufacture. It was held that the test to determine whether a particular activity amounts to manufacture or not is whether a new and different commodity emerges having a distinctive name, character and use and the moment there is a transformation into a new commodity whether as a result of one process or several processes, there is manufacture. In the facts of the case, the products imported from China have undergone a change and there is a new product which emerges and thus the assessee is eligible to claim deduction under Section 80-IC. [*ACIT* v. *Accura Bikes P Limited,* (2016) 74 taxmann.com 200 (Ahd-Trib)]

No adjustment to be made on reimbursement of cost made by the AE towards hardware purchased on behalf of the AE

The assessee, a wholly owned subsidiary of a Swedish company procured certain equipment for its AE, the cost of which was reimbursed by the AE to assessee. The AO sought to apply a markup considering the transaction to be a sale. After perusing the agreement between AE and the assessee, it was held that the Assessee merely procures and supplies the goods at the instruction of the AE and the transaction was undertaken only for the sake of administrative convenience. It was held that no mark up was required to be made since the assessee did not undertake any significant functions or employ significant assets and did not bear significant risks and no services are rendered by the assessee. (*DCIT* v. *Ericsson India (P) Limited,* (2016) 74 taxmann.com 173 - Delhi-Trib).

Initiation of assessment proceedings is invalid if Notice u/s 143(2) is not issued

During a course of survey under Section 133A on 24.09.2009, it was found that the assessee had suppressed the receipts for taking MRI Scan and CIT Scan and had paid commission and professional charges to doctors without deducting tax at source. The return of income for the assessment year 2009-10 was filed by the assessee on 30.09.2009. Notice under Section 148 was issued to the assessee on 11.01.2012 based on materials unearthed during the survey. The assessment for the year under Section 143(3) read with Section 147 was completed on 30.03.2013. For the subsequent assessment year, AY 2010-11, on the same set of allegations, assessment order u/s 143(3) was passed on 30.03.2013. These assessment orders were challenged by the Assessee on the ground that the estimation of income was based on mere presumptive of ratios and that income of another entity was incorrectly included as the assessee's income. The assessee also contended that notice under Section 143(2) was not issued to them and hence assessment/reassessment is not valid. The High Court held that a notice under Section 143(2) is the hypostasis on which any proceedings under Section 143(3) or a re-assessment under Section 147 (if the time for regular assessment is not over) will have to be rested on. In the absence of a notice under Section 143(2), no further proceedings can be continued under Section 143. It was also held that the principle of estoppel enshrined in Section 292BB would not apply to a case where no notice is issued since the issuance of a notice is a mandatory action. [*Travancore Diagnostics P Ltd* v. *ACIT*, TS-583-HC-2016 (Ker)]

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