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Article

Rollback of retro tax: A step in the right direction

By **Tanmay Bhatnagar**

In January 2012, the Supreme Court of India gave relief to foreign investors through its landmark decision in *Vodafone International Holdings BV* v. *Union of India*[1] ('**Vodafone case**'). However, in a matter of months, the ratio laid down by the Supreme Court was rendered infructuous by way of amendments to the Income-tax Act ('**IT Act**'), which were given retrospective effect from 1962. Considering the controversies surrounding these amendments, now the Taxation Law (Amendment) Act, 2021 ('**Amendment Act**') seeks to undo the retrospective effect of the amendments.

Background

In the *Vodafone* case, the Singapore based Hutch group sought to transfer its 67% shareholding in Hutchison Essar Ltd. ('**HEL**'), an Indian telecommunications company, to the Vodafone group of UK. The actual transfer was effected by way of sale of shares in CGP, a Cayman Islands SPV company, by HTIL, a holding entity of Hutch in Cayman Islands, to Vodafone, B.V., a Dutch company. CGP was an SPV for Hutch, which either directly or through its Mauritian subsidiaries held 67% of the shares in HEL.

The Indian Income-tax Department ('**Department**') considered the capital gains arising to HTIL from this transaction to be taxable in India since it involved a transfer of controlling interests and rights in an Indian company resulting in an accrual of income for HTIL from a capital asset situated in India. Consequently, Vodafone B.V. was held to be an assessee-in-default under Section 201 for its failure to deduct tax at source under Section 195 of the IT Act on the payment made, and a tax demand of approximately USD 2.2 billion was raised. This decision was upheld by the High Court of Bombay.

In appeal, the issue which arose before the Supreme Court in this case was whether the capital gains arising from an indirect transfer of shares of an Indian company (i.e. capital assets situated in India) could be taxed as per Section 9(1)(i) of the IT Act. The Supreme Court decided this issue in favour of the taxpayers by *inter-alia* holding that Section 9(1)(i) covers only income arising or accruing directly or indirectly or through the transfer of a capital asset situated in India and could not be extended to cover their indirect transfers. In the absence of a specific legislative provision to this effect, capital gains from such indirect transfer could not be taxed in India since the source of income was not in India.

Finance Act, 2012 – The start of uncertainty

The Government overcame the decision of the Supreme Court in the *Vodafone* case through two new provisions introduced *vide* the Finance Act, 2012 with retrospective effect from 1 April 1962.

Explanation 5 to Section 9(1)(i) was inserted as a clarificatory amendment in the IT Act. It laid down that the shares or interest in a company incorporated outside India would be deemed to be an asset or capital asset which has always

[1] [2012] 341 ITR 1 (SC)

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been situated in India, if such shares or interest derived substantial value from assets located in India.

This was coupled with Section 119 of the Finance Act, 2012, which retrospectively validated any notice or tax demand with respect to income accruing or arising through or from the indirect transfer of a capital assets situated in India. It provided that regardless of the decision of any judicial or quasi-judicial forum on the taxability of such transfers, any notice issued, or demand raised would be valid. Such a notice or demand could not be questioned on the ground that the tax was not chargeable on the indirect transfers at the time when the notice was issued.

Therefore, in one fell swoop, the Department was now able to go after indirect transfers of assets situated in India which had occurred prior to the introduction of the Finance Act, 2012 and realize any demand raised on taxpayers such as Vodafone B.V., even if the taxpayer had a judgment from the Supreme Court in their favour.

The intervening years – Controversies abound

In the post retrospective amendments era, some taxpayers were able to seek refuge of the double taxation avoidance agreements (‘**DTAAs**’) entered into by India with their country of residence. An instance of this was seen in the decision of the High Court of Andhra Pradesh in the case of *Sanofi Pasteur Holding SA* v. *Department of Revenue, Ministry of Finance*[2]. However, such protection was unavailable to the residents of those countries and territories with which India did not have a DTAA as on the date on which an indirect transfer of assets situated in India took place.

Regardless of the protection available under the DTAAs, the amendments were deeply unpopular and led to widespread criticism and condemnation of the retrospective levy. The amendments also led to the initiation of arbitration proceedings against the Indian Government under various Bilateral Investment Protection Treaties.

Vodafone B.V. was one such entity that took the Government to the Permanent Court of Arbitration (‘**PCA**’) challenging the retrospective levy of tax as a violation of the India-Netherlands Bilateral Investment Treaty (‘**BIT**’). Vodafone B.V. ultimately succeeded and was awarded damages to cover the tax demands, interest, legal and other costs.

A similar dispute was brought before the PCA by the Cairn Group of the UK for the violation of the India-UK BIT, resulting in an award of USD 1.2 billion plus interests and costs against the Government. As per its own admission, two more arbitration proceedings have been initiated against the Government under the India-Netherlands and the India-UK BITs.

Taxation Laws (Amendment) Act, 2021 – Relief after all

Cognizant of the criticism faced from various stakeholders and in a bid to attract foreign investment in India to help the economy recover from the Covid-19 pandemic, the Amendment Act has been recently passed. The Amendment Act has sought to dilute the impact of levy on indirect transfers by nullifying its retrospective applicability.

The Government is seeking to grant relief in the case of both pending and concluded proceedings involving income from the indirect transfer of an asset or a capital asset situated in India where the transfer has been made prior to 28th May 2012.

[2] [2013] 354 ITR 316 (Andhra Pradesh)

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In case of pending proceedings, i.e. cases where orders making assessment or re-assessment or rectification or demand of TDS shortfall are yet to be passed, the Amendment Act provides that such orders will be passed without applying Explanation 5 to Section 9(1)(i) to indirect transfers made prior to 28 May 2012. If in such cases taxes have been already paid on such indirect transfers (say either under protest or by way of TDS), the same would be refunded in the normal course upon completion of assessments along with applicable interest.

In other cases where proceedings have been completed and assessment orders or penalty orders have already been passed in respect of income from indirect transfers made prior to 28th May 2012, it shall be deemed as if such orders were never passed. However, this benefit will apply only to those taxpayers who satisfy the following conditions:

- Where the taxpayer has filed any appeal or writ petition against any order in respect of the said income, it must either withdraw or undertake to withdraw the same;
- Where the taxpayer has initiated any arbitration, conciliation or mediation proceedings, or given any notice thereof under any law in force or under any BIT or any other treaty, it must either withdraw or undertake the same;
- The taxpayer undertakes to waive its right to pursue any remedy or claim in relation to the said income which may be available to him under any law in force or in equity or under any statute or under any BIT or any other treaty; and
- Any other condition which may be prescribed.

Moreover, in case of these concluded proceedings, refund will be granted of the amounts already deposited by the taxpayers but without any interest under section 244A of the IT Act. In other words, the Government will return the amounts already paid by the taxpayers but will not shell out any interest from its pocket for the period for which the money was lying with it.

Taxation of Royalty – The contentious issue

While the Government has decided to nullify the retrospective levy on indirect transfer of assets situated in India, it has not provided any relief in respect of retrospective levy on certain transactions which were deemed to be royalty *vide* Finance Act, 2012 and sought to be taxed at source in India.

The retrospective amendments were made by inserting Explanations 4, 5 and 6 into Section 9(1)(vi) with retrospective effect from 1 June 1976. Through these explanations, the Government artificially expanded the meaning of the term 'royalty' even further.

The purpose behind the insertion of the said explanations was to overcome certain judicial decisions favouring taxpayers wherein the Courts had held that payments made for licensing software or satellite transmission services could not be considered to be 'royalty' payments under Section 9(1)(vi) of the IT Act.

The amendments made to the definition of royalty were wide in ambit and contrary to not only the judicial precedents in India but also the accepted international practice regarding taxation of income from software and satellite transmission. These widely worded provisions enabled the Department to retrospectively bring into the ambit of Section 9(1)(vi) transactions that were earlier out of its purview, such as leased line charges, satellite uplinking and downlinking

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charges, etc. In the absence of any relief in respect of these provisions, for the time being, the only protection against this retrospective levy under Section 9(1)(vi) are the provisions of DTAAs.

Conclusion

Following the amendments introduced by the Amendment Act, some of the taxpayers such as Vodafone B.V. and Cairn have already expressed their interest in settling the disputes under the new provisions by accepting the olive branch extended by the Government. These entities are willing to forego significant amounts of interest and costs awarded to them in arbitration to avoid further legal battle with the Government.

Another interesting thing to note is that while the Government has responded to the criticism regarding the retrospective taxation of indirect transfers of assets situated in India, it has chosen not to amend other similarly criticised provisions introduced by the Finance Act, 2012 for the retrospective taxation of software licence fee and satellite transmission charges under royalty.

Regardless of everything, the Amendment Act is a welcome move on the part of the Government that should boost investor confidence in India by providing some much-needed tax certainty.

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Notifications & Circulars

Determination of income of Category III Alternative Investment Funds

Sections 10(4D) of the IT Act provides for exemption to certain incomes of a specified fund, being Category III Alternative Investment Fund located in IFSC. Section 115AD(1A) of the IT Act provides for concessional rate of taxation for income of such specified funds. The benefits of exemption and the concessional rate are available in respect of incomes of the specified fund, attributable to units held by non-resident (not being a permanent establishment of non-resident).

Vide Notification No. 90, the Central Board of Direct Taxes (‘**CBDT**’) has prescribed rules specifying the methods for computation of income of such funds for purposes of Sections 10(4D) and 115AD(1A).

The income for exemption under Section 10(4D) shall be computed as per Rule 21-AI, and the income for concessional rate of taxation under Section 115AD(1A) shall be computed as per Rule 21-AJ. The specified funds will be required to furnish annual statements of exempt income under Section 10(4D) in Form 10-IG, and income for concessional rate of taxation under Section 115AD in Form 10-IH.

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Manner of re-computation of books profits and determination of MAT liability in case of advance pricing agreement or secondary adjustment

Sub-section (1) of Section 115JB of the IT Act levies a minimum alternative tax ('**MAT**') on a company if the amount of income-tax payable under the general provisions of the IT Act is less than 15% of its 'book profits'.

Finance Act, 2021 had inserted sub-section 2(D) to Section 115JB to provide relief in MAT payable by the assessees, by providing for re-computation where there is increase in book profits of the previous year due to income of past year(s) being included in the book profits, on account of an advance pricing agreement or secondary adjustment.

For claiming the relief, the assessee will be required to make an application to the AO for the recomputation of the book profit of the past year(s) and tax liability of the previous year.

The CBDT has now prescribed the manner of re-computation of book profits and determination of tax liability, to be followed by the AO, and Form 3CEAA in which application is to be filed by the assessee, by way of insertion of Rule 10RB in the IT Rules *vide* Notification No. 92.

Calculation of taxable interest in case of excess contribution in a provident fund

Previously, the interest income from contribution in a provident fund or a recognised provident fund was exempt from tax. Sections 10(11) and 10(12) of the IT Act were amended *vide* Finance Act, 2021 to provide that from AY 2022-23, interest on an employee's contribution to provident funds made on or after 1 April 2021, would be taxable in following circumstances:

- Interest relatable to contribution made in excess of INR 2.5 lakh will be taxable.
- In case contribution is in a fund in which there is no contribution by the employer, interest relatable to such contribution made in excess of INR 5 lakh will be taxable.

It was also provided that manner of calculating taxable interest would be prescribed.

Vide Notification No. 95, the manner of computing taxable interest has now been prescribed through the insertion of Rule 9D.

From FY 2021-22, separate accounts would have to be maintained for taxable and non-taxable contributions made by a person. Interest accruing in taxable contribution account will be taxable in the hands of account-holder.

- Calculation of non-taxable contributions:
  - (a) Closing balance in the account on 31 March 2021;
  - (b) Contribution made by the person during FY 2021-22 and in subsequent years up to INR 2.5 lakh or INR 5 lakh, as the case may be;
  - (c) Interest accrued on the (a) and (b) above, as reduced by withdrawal from such account.
- Calculation of taxable contributions:
  - (a) Contribution made by the person during FY 2021-22 and in subsequent years in excess of INR 2.5 lakh or INR 5 lakh, as the case may be.
  - (b) Interest accrued on (a) above, as reduced by withdrawal from such account

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Introduction of Rule 14C to ease electronic verification in Faceless Assessment Proceedings

Vide Notification No. 101, the CBDT has introduced Rule 14C which provides that for the purposes of faceless assessment, an electronic record shall be deemed to be authenticated under electronic verification code if the record has been submitted by logging into the person's registered account on the income-tax portal.

Time limits for filing of various forms extended

Due to the difficulties being faced by taxpayers in the electronic filing of certain forms, in exercise of its powers under Section 119 of the IT Act, the CBDT has extended the due dates for furnishing the same:

Particular	Erstwhile due Date	Extended Due Date
Form No. 10A - Application for registration or intimation or approval under Sections 10(23C), 12A, 35(1)(ii)/(iia)/(iii) or 80G	31.08.2021	31.03.2022
Form No.10AB - Application for registration or approval under Sections 10(23C), 12A, or 80G	28.02.2022	31.03.2022
Equalization Levy Statement for FY 2020-21 in **Form No.1**	31.08.2021	31.12.2021
Form No. 15CC - Quarterly statement to be furnished by authorized dealer in respect of remittances made for the **quarter ending on 30 June 2021**	31.08.2021	30.11.2021
Form No. 15CC - Quarterly statement to be furnished by authorized dealer in respect of remittances made for the **quarter ending on 30th September 2021**	15.10.2021	31.12.2021
Uploading of declarations received from recipients in **Form No. 15G/15H** during the **quarter ending 30 June 2021**	31.08.2021	30.11.2021
Uploading of declarations received from recipients in **Form No. 15G/15H** during the **quarter ending 30 September 2021**	15.10.2021	31.12.2021
Form II SWF - Intimation by Sovereign Wealth Fund in respect of investments made by it in India for the **quarter ending on 30 June 2021**	30.09.2021	30.11.2021
Form II SWF - Intimation by Sovereign Wealth Fund in respect of investments made by it in India for the **quarter ending on 30 September 2021**	31.10.2021	31.12.2021

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Particular	Erstwhile due Date	Extended Due Date
Form No. 10BBB - Intimation by a Pension Fund in respect of investment made by it in India for the **quarter ending on 30 June 2021**	30.09.2021	30.11.2021
Form No. 10BBB - Intimation to be made by a Pension Fund in in respect of investment made by it in India for the **quarter ending on 30 September 2021**	31.10.2021	31.12.2021
Form No. 3CEAC - Intimation of parent entity or alternate reporting entity, by a constituent entity, resident in India, of an international group, the parent entity of which is not resident in India, for the purposes of Section 286(1)	30.11.2021	31.12.2021
Form No. 3CEAD – Country-by-Country Report ('**CBCR**') by the parent entity or alternate reporting entity or constituent entity under section 286(2) or 286(4)	30.11.2021	31.12.2021
Form No. 3CEAE – Intimation of constituent entity, designated for filing CBCR on behalf of an international group for the purposes of proviso to section 286(4) (where there are more than one constituent entities in India)	30.11.2021	31.12.2021

Direct Tax Vivad se Vishwas – Dates for making payment extended

Vide Notification No. 94, the CBDT has further extended the time limit to make payments under the Direct Tax Vivad se Vishwas Act ('**VSV Act**'):

- Due date of payment without any additional amount has been extended from 31 August 2021 to 30 September 2021;
- The date of making payment with additional amount has been extended from 1 September 2021 to 1 October 2021. There is no change in the last date of making payment with additional amount i.e. 31 October 2021.

Authorising Interim Resolution Professional, Resolution Professional and Liquidator to verify returns and act as authorized representative in case of Companies and LLPs

Section 140 of the IT Act specifies the persons who can verify returns in case of different assessees, including companies and LLPs. It further provides that in case of companies and LLPs, 'any other person' as may be prescribed, can verify returns.

Section 288 of the IT Act specifies the persons who can act as authorized representatives of an assessee and provides that '*any other person as may be prescribed*', may also act as authorized representative.

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Vide Notification No. 93, the CBDT has inserted Rule 12AA and Rule 51B in the IT Rules to provide that the person appointed by the NCLT as an interim resolution professional, a resolution professional, or a liquidator, as the case may be, under the Insolvency and Bankruptcy Code, 2016 and the rules and regulations made thereunder, will be a person who can verify returns under Section 140 of the IT Act, and act as authorised representative under Section 288 of the IT Act, for companies and LLPs.

Boards for Advance Rulings notified

One of the major amendments brought about by Finance Act, 2021 was the replacement of the Authority for Advance Rulings ('**AAR**') with the Board for Advance Rulings ('**Board**'). This new scheme of advance ruling was introduced by making amendments to Chapter XIX-B of the IT Act. These amendments allowed the Central Government to notify the date on which the transition to the Board would take place.

Pursuant to these amendments, the CBDT has issued Notification Nos. 96 & 97, whereby it has been provided that:

- The AAR shall cease to operate on and from 1 September 2021.
- Three Boards will become operational for the purposes of giving advance rulings on or after 1 September 2021:
  - Board for Advance Rulings-I headquartered at Delhi
  - Board for Advance Rulings-II headquartered at Delhi
  - Board for Advance Rulings-III headquartered at Mumbai
- As a part of this transition, all applications pending before the AAR shall be transferred to the Board on 1 September 2021. An application would be said to be pending if either:
  - no order for allowing or rejecting the application has been passed before 1 September 2021, or
  - no advance ruling with respect to the application has been pronounced before 1 September 2021.

Ratio Decidendi

Depreciation on software cannot be disallowed by applying Section 40(a)(i) for non-deduction of tax at source on purchase

The assessee purchased software from a foreign company. The software so purchased was capitalised and depreciation was claimed. During the assessment, this claim of the assessee was rejected by the AO on the ground that the payment made by the assessee for purchase of software was in the nature of royalty on which TDS was not deducted and therefore, the claim of depreciation was not allowable in terms of Section 40(a)(i) of the Income-tax Act ('**IT Act**').

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In appeal, the CIT(A) held that even though the expenditure was in the nature of royalty, in view of the decision in *SKOL Breweries Ltd.*[3]**,** disallowance under Section 40(a)(i) of the IT Act was not warranted. Appeals were filed against this order by the assessee as well as the department. In second appeal, the ITAT upheld the CIT(A)'s order. However, this order of the ITAT was vacated by the Karnataka High Court and the matter was remanded back to the ITAT for its failure to consider the High Court's decision in *Wipro Ltd.* v. *DCIT*[4].

The ITAT in its order after remand, placed reliance on the decision of the Karnataka High Court in the case of *PCIT* v. *Tally Solutions Pvt. Ltd.*[5] The ITAT held that the sum contemplated under Section 40(a)(i) refers to an outgoing amount chargeable under the IT Act and subject to TDS under Chapter XVII-B. Depreciation is not an outgoing expenditure but is a statutory deduction available to the assessee on an asset owned by it. Therefore, the provisions of Section 40(a)(i) do not apply in the case of an assessee whose claim is for depreciation. The issue was accordingly decided in favour of the assessee. [*ITO* v. *Kawasaki Microelectronics Inc.* – Order dated 5 August 2021 in IT(IT)A No. 1221/Bang/2014, ITAT Bengaluru]

Payments made for services of advertising, marketing and rental use of IT infrastructure to non-resident are not 'royalty'

Assessee-Company sells its products mainly through online marketing. To facilitate such sale, Assessee placed advertisements on the platform of Facebook, Ireland, used the bulk mail facility offered by Rocket Science Group, USA and further availed of Amazon's Web Services offered by Amazon Inc., USA.

The AO held that the payments made to all the three companies was in the nature of 'Royalty' liable for deduction of tax at source under Section 195 of the IT Act and since there was failure to deduct tax at source by the assessee, the assessee was treated as assessee-in-default and demand was raised under Section 201(1) of the IT Act along with applicable interest. On appeal, the CIT(A) after perusing the patent documents and relying on the decision of the jurisdictional High Court in *Samsung Electronics Co. Ltd.*[6] held that consideration paid by assessee to the non-resident payees was in the nature of royalty.

The ITAT relied on the decision of the Supreme Court in the case of *Engineering Analysis*[7] and held that the relevant DTAA provisions should be considered for determining whether the nature of payments is royalty or not. With regard to the payments made to Facebook and Rocket Science Group, it observed that the assessee was given access to certain facilities developed by these companies upon entering into an agreement with them to avail advertising/bulk mail services. These facilities were only provided for mutual benefit i.e. to create an environment in which the advertising content could be easily created by the assessee and easily hosted by the companies. Thus, the ITAT noted that use of these facilities was intertwined with the activity of advertising/bulk mailing and that the main purpose for making payments was to place advertisements and not to use the facilities provided by the companies. It observed that therefore, it was clear that the copyright over those facilitating software was not shared with the assessee and the payments were not in the nature of royalty.

With respect to the case of Amazon Web Services, the ITAT noted that the assessee was

[3] 29 taxmann.com 111
[4] 383 ITR 179 (KAR
[5] [2021] 123 taxmann.com 21

[6] [TS-733-HC-2011(KAR)]
[7] [TS-106-SC-2021]

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making a payment only for use information technology infrastructure facilities on rental basis. It noted that the payment would depend on the extent of usage of these facilities and as there was no transfer of copyright over these facilities from Amazon Web Services to the assessee, even this payment was not in the nature of royalty.

Accordingly, the ITAT held that there was no liability to deduct tax at source under Section 195 since the afore-mentioned payments did not give rise to any income chargeable in India. [*Urban Ladder Home Décor Solutions Pvt. Ltd.* v. ACIT – Order dated 17 August 2021 in IT(IT)A No.615 to 620/Bang/2020, ITAT Bengaluru]

Foreign Tax Credit – Article 23 of India-Tanzania DTAA to be interpreted in the same manner as Article 23 of India-Korea DTAA

The assessee-company was in the business of executing turnkey projects. In AY 2014-15, it rendered these services to a company in Tanzania. For rendering such services, it earned revenue of INR 63.32 crore. Out of the said amount its profits were INR 10.27 crore. As per the provisions of local tax law, the Tanzanian company withheld tax amounting to INR 1.71 crore. However, the AO only allowed a sum of INR 3.71 lakh as foreign tax credit (‘**FTC**’) relief under Section 90 of the IT Act since this would be tax payable on the income from Tanzania in India. The order of the AO was upheld by the CIT(A).

In appeal before the ITAT, the assessee-company contended that the AO had erred in considering only the amount mentioned on the TDS certificate as its income and failing to consider the total turnover of INR 63.32 crores as its income from Tanzania while computing the foreign tax credit relief. Moreover, it was contended that the asssessee’s case fell within the purview of Section 90(1)(a)(ii) and thus, the assessee would be eligible to claim FTC on the entire income that was chargeable to tax in Tanzania.

The ITAT followed the decision in *Ittiam Systems Pvt. Ltd.* v. *ITO* [ITA Nos.2464 & 2465/Bang/2017] wherein Article 23 of the India-Korea DTAA was interpreted to hold that as per this article FTC in India is available to the taxes paid in Korea and such credit shall not exceed the taxes payable in India on doubly taxed income. The ITAT had in the relied upon case held that there was a difference in FTC available to assessee on taxes paid in USA, Japan and Germany *vis-s-vis* Korea. Holding that Article 23 of India-Tanzania DTAA was in *pari-materia* with Article 23 of India-Korea DTAA, the Tribunal in the present case directed the AO to grant FTC on the amount which was lower of the following, i.e., tax paid on income outside India, or payable in India on such doubly taxable income. [*Promac Engineering Industries Ltd.* v. *ACIT* - Order dated 17 August 2021 in ITA No.501/Bang/2018, ITAT Bengaluru]

iPads are not complete substitutes for computers and hence, ineligible for depreciation at 60%

The Assessee claimed depreciation on Apple iPads at the rate applicable to computers i.e. 60% under Section 32 of IT Act. However, the AO restricted the depreciation on Apple iPads at general rate of 15% basis that iPad has more similarity with iPhone and thus, was a phone and not a computer. The CIT(A) upheld the action of the AO. The main issue before ITAT was whether iPad qualifies to be a computer or a mobile phone.

Observing that ‘Computer’ was not defined under IT Act, the ITAT analyzed the definition under the Information Technology Act and observed that

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iPad and smart phones are akin to computers within the meaning of computers as per the Information Technology Act.

However, ITAT held that said definition cannot be imported for the purpose of Section 32 of IT Act. It, for this purpose, relied on the judgement of Mumbai ITAT in *DCIT* v. *Datacraft India Ltd* [TS-5590-ITAT-2010(MUMBAI)-O] wherein it was held that the definition of 'computer' under Information Technology Act cannot be applied in context of Section 32 of IT Act as the rationale behind Information Technology Act was different from IT Act as evident from the preamble. The ITAT also held that in order to determine whether a particular machine can be classified as a computer or not, the predominant function, usage and common parlance understanding would have to be taken into account.

It held that the predominant purpose of iPad was communication and not to act a computing device, as its main features were Email, WhatsApp, Facetime calls, music, films, etc., even though iPad may discharge some of the functions of computers. Therefore, ITAT held that iPad is not a substitution of computer/laptop and hence depreciation at the rate of 60% cannot be applicable on iPad. [*Kohinoor Indian Pvt. Ltd.* v. *ACIT* - Order dated 16 August 2021 in ITA NO. 234 & 316/Asr/2017, ITAT Amritsar]

Refund withheld without reasoned order not sustainable – Calcutta HC allows refund with interest

Assessee Company filed a writ petition before the Calcutta High Court against the action of Assessee Officer (AO) withholding TDS refund and applicable interest claimed by the Assessee. The AO had withheld the refund under Section 241A of IT Act. The Revenue claimed a tax demand against the assessee for different periods and hence, invoked provisions of Section 245 of IT Act under which refunds can be set off against any tax demand payable by the Assessee. Apart from this submission, Revenue cited no specific reason for withholding the refund.

The Assessee contended that no demand was pending against the Assessee at the time when it became entitled to refund and that demand which the revenue was referring to came into existence only after a year when the refund was required to be made.

The High Court observed that under Section 241A of IT Act, the Revenue can withhold the refund only when the grant of refund is likely to adversely affect the revenue and thereafter with the prior approval of Chief Commissioner or Commissioner. The Court observed that the very essence of the order under Section 241A was application of mind by the Assessing Officer to the issues which are germane for withholding the refund. Relying on *Maple Logistics Pvt. Ltd.* v. *PCIT* [2020 420 ITR 258] and *Vodafone idea Ltd. v. DCIT* [421 ITR 253], it observed that it is essential that the AO passes a speaking order recording the reasons to substantiate why withholding of refunds is necessary and how the refund will adversely affect the revenue.

Noting that there was absence of any reasons declaring that refund will adversely affect the revenue, the court held that withholding of refunds was not sustainable and that the assessee should be allowed full refund with interest. It also noted that no demand as against the assessee was pending on the date when refund was notified and therefore, the AO could not have kept the refund withheld to link such refund with any subsequent demand which was not in existence when refund was notified.

The Court also held that the Assessee must also be given an opportunity of hearing before reasons are recorded for withholding the refund. In absence of these proceedings being followed

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the action of the AO withholding refund is amenable to judicial review by way of writ petition under Article 226 of the Constitution of India. The High Court relied upon the principle laid down by the judgment in *Nazir Ahmad* v. *King Emperor* [AIR 1936 PC 253] that 'if a statute provides an act to be done by a particular authority and in a particular manner, it should only be done by that authority and in that manner or not at all.' [*McNally Bharat Engineering Company Limited and Anr*. v. *ACIT* – Order dated 6 August 2021 in WPO 80 of 2020, Calcutta High Court]

SGPC eligible for registration under Section 80G, as it provides services to all humanity without discriminating on religion, caste, creed or sex, etc.

In this case, an appeal was filed before ITAT against order of CIT rejecting the application filed by Shirmoni Gurdwara Parbandhak Committee ('**SGPC**') under Section 80G of IT Act on the ground that the same was hit by clause (iii) of Section 80G(5) of IT Act. The assessee contended that CIT wrongly denied exemption on the basis that the assessee was allegedly benefitting a particular religious community. It contended that its purpose is neither wholly or substantial religious. Its main function is to manage properties of SGPC such as Gurudwaras, schools, colleges, hospitals etc. It is a statutory body having general superintendence over all 'Communities of Sikh Gurudwaras' and has not been formed for the benefit of Sikh communities only. Revenue relied on the CIT's order and submitted that though some activities were charitable, religious activities cannot be segregated from main activities, and since the dominant purpose of the assessee was religious one, assessee could not be granted registration under Section 80G.

The ITAT observed that applicability of clause (iii) of Section 80G(5) depends on how funds were used by the Institution/trust and not on the phraseology used in the formation document of such institution. The language used in the formation document is to be understood and interpreted in the light of activities of the institution. The ITAT held that CIT wrongly rejected the plea of assessee merely on the basis of various clauses of SGPC Act and also wrongly held that the dominant object of the assessee was religious activities.

ITAT held that Assessee was engaged in various charitable activities which are not restricted to Sikh community only but extended to all, irrespective of caste, creed, religion, or sex and serving the cause of humanity and that this was not doubted by the CIT. Moreover, religious expenses of SGPC was under 5% of total income, therefore, by virtue of Section 80G(5B) of IT Act, the assessee was entitled to registration u/s 80G of IT Act.

ITAT relied on the SC ruling in *Dawoodi Bohara Jamat* [TS-148-SC-2014], the Punjab & Haryana High Court ruling in *Christian Medical College* [TS-5813-HC-2014(PUNJAB & HARYANA)-O] and the Delhi HC ruling in *Indian Society of the Church of Jesus Christ of Latter-Day Saints* [TS-6013-HC-2017(DELHI)-O] and held that the assessee was entitled to registration under Section 80G. [*Shirmoni Gurdwara Parbandhak Committee* v. *Commissioner* – Order dated 16 August 2021 in ITA No. 530/Asr/2009, ITAT Amritsar]

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