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By Harshit Khurana

Amongst various tax amendment proposals announced this year, proposal for taxing ‘cash’ benefits and perquisites is likely to have a wide-reaching impact on the taxpayers, especially in the context of waiver of debts due from a corporate debtor. More than the corporate debtor, the amendment may prove to be burdensome for the lender waiving such debts due to withholding tax liability imposed upon such lender. The article in this issue of Direct Tax Amicus aims to discuss the proposed amendment and its impact in the context of waiver of debt. Discussing about taxation of benefits or perquisites, impact of amendment on waiver of trading liabilities, impact of amendment on waiver of loan, and potential arguments for non-applicability of Section 194R of the Income-tax Act, 1961, the author is of the view that in the context of waiver of debt or loan, the amendment proposed by Budget 2023 is like rubbing salt on the wound. Accordingly, he is of the view that it is necessary that before enactment of the proposed amendment, suitable clarifications are issued to restrict the applicability of said provisions to certain scenarios

Tax on 'Cash' benefits and perquisites – Applicability on waiver of debts

Every year, the announcement of the Union Budget is eagerly awaited as one of the key tax policy events in India. This year was no different.

Amongst various tax amendment proposals announced this year, proposal for taxing 'cash' benefits and perquisites is likely to have a wide-reaching impact on the taxpayers, especially in the context of waiver of debts due from a corporate debtor. More than the corporate debtor, the amendment may prove to be burdensome for the lender waiving such debts due to withholding tax liability imposed upon such lender.

This article aims to discuss the proposed amendment and its impact in the context of waiver of debt.

Taxation of benefits or perquisites

The Income-tax law provides for taxing of any benefit or perquisite arising from business or exercise of profession in the hands of the recipient *[Section 28(iv) of the Income Tax Act* ('**IT Act**')*]*. There also exists a withholding tax provision, which requires the provider of such benefit to withhold tax *[Section 194R of the IT Act]*.

Taxation of 'cash' benefit or perquisite under Section 28 has been a litigative issue since ages. In 2018, the Apex Court of India in the case of *Mahindra & Mahindra Ltd.* [2018] 93 taxmann.com 32 (SC), brought much needed respite for the taxpayers by holding that Section 28(iv) of the IT Act is applicable only in case of non-monetary benefits and waiver of loan will not be taxable in the hands of the borrower.

Now, with amendment proposed by Union Budget 2023, the law laid down by Apex Court has been proposed to be legislatively amended. The amendment provides that 'cash' benefit or perquisite arising from business or exercise of profession shall be chargeable to tax as income from business or profession. Also, the withholding tax provision has been amended to specifically provide that the provider of such 'cash' benefit or perquisite shall be required to withhold tax.

Interestingly, even prior to the amendment, the Central Board of Direct Taxes (CBDT) had clarified that withholding tax provision shall be applicable even for cash benefit or perquisite. However, the taxpayers could have argued that said clarification is not binding upon the taxpayers and the position as enunciated in *Mahindra & Mahindra* (supra) shall continue to be applicable.

Now, with legislative amendment, the taxpayers will not be able to take shield of the Apex Court judgment.

Impact of amendment on waiver of trading liabilities

In case a taxpayer had claimed a particular liability as an expense/ loss in any prior year and subsequently, the taxpayer receives benefit by way of cessation or remission of said liability, the said benefit is already chargeable to tax under Section 41 of the IT Act. However, earlier the taxpayers could have taken a position that the provider of such benefit shall not be required to withhold tax under Section 194R of the IT Act.

Now with the amendment, the creditor waiving the debt may be under obligation to withhold tax under Section 194R of the IT Act at the rate of 10% of such waiver. The same may result in increased burden for the creditor.

Apart from suffering a loss due to non-recovery of debts, the creditor may also be required to bear the withholding tax liability as the creditor may not be able to recover the said TDS amount from the debtor. The problem is acute in cases where proceedings have been initiated against the corporate debtor under the Insolvency and Bankruptcy Code (IBC) as the amount of tax withheld will surely not be recoverable from the corporate debtor owing to ill financial health.

Impact of amendment on waiver of loan

As usually a loan is not claimed as deduction by the borrower, the provisions of Section 41(1) of the IT Act may not get attracted due to waiver of such loan. In such scenario, the amended provisions of Section 28(iv) of the IT Act may be invoked to tax such cash benefits, which earlier were not taxable in the light of the Apex Court judgment. Also, the withholding tax provision shall also come into play in the hands of the provider of such benefit.

Where the loan has been waived by banks and certain specified financial institutions (specified in Circular No. 18/ 2022), the withholding tax provision shall not be applicable. However, in case waiver is done by lenders other than specified banking/financial institutions, the provisions of Section 194R shall get attracted.

Potential arguments for non-applicability of Section 194R of the IT Act

As is apparent, said section is applicable only when the benefit or perquisite is '**arising from business or profession'** carried on or exercised by the recipient of such benefit. In case at the time of waiver of such debt, the recipient of the benefit is not carrying on any business, it can be argued the so-called benefit has not arisen out of the business or profession of the debtor. Accordingly, said section shall not be applicable. The argument may specifically be suited in cases where IBC proceedings have been initiated against the debtor.

The strength of the argument will vary depending upon facts of each case.

Conclusion

In the context of waiver of debt or loan, the amendment proposed by Budget 2023 is like rubbing salt on the wound. Apart from taking a haircut on the funds lent, the lender may also be burdened to discharge withholding tax liability out of its own pocket. It is necessary that before enactment of the proposed amendment, suitable clarifications are issued to restrict the applicability of said provisions to certain scenarios. If not all, exemption should surely be granted for cases where debt is waived during IBC proceedings.

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Notifications & Circulars

- Scheme for centralised processing of Equalisation Levy Statement notified
- Updated return under Section 139(8A) – Ineligibility – Corrigendum w.r.t Para 28.5 of the Explanatory notes to Finance Act, 2022 issued
- Updated ITR forms for AY 2023-24 notified
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- Faceless Assessment Proceedings – CBDT amends list of specified Income-tax Authorities directed to exercise powers and functions of AO concurrently

Notifications & Circulars

Scheme for centralised processing of Equalisation Levy Statement notified

Vide Notification No. 03/2023 dated 7 February 2023, the CBDT has notified the 'Centralised Processing of Equalisation Levy Statement Scheme, 2023'. The Scheme applies w.r.t. processing of the Equalisation Levy Statement ('**EL Statement**') under Section 167 of the Finance Act, 2016. The salient provisions of this Scheme are briefly captured below:

A. EL Statements must be furnished by the assessee/e-commerce operator within the prescribed due dates.

B. The Commissioner (i.e., the CIT, Centralised Processing Centre as defined in para 2(d) of Centralised Processing of Returns Scheme, 2011) may declare an EL Statement as invalid for non-compliance of procedure for using any software not validated and approved by the Director General [i.e., the Pr. DGIT(Systems) or DGIT (Systems)] or due to incomplete information in the EL Statement.

C. The detailed procedure of processing of the EL Statement in the Centralised Processing Centre (as referred to in para 2(c) of the Centralised Processing of Returns Scheme, 2011) ('**Centre**') has been elaborated.

D. Assessees/e-commerce operators are not required to appear personally or through authorised representative before the Centre w.r.t. any proceedings. The Centre can call for such clarification/evidence/document for facilitating the processing of EL Statements and the same shall be furnished electronically. Further, written/electronic communication from such person/authorised representative in the format specified by the Centre will be treated as sufficient compliance of the query/clarification received from the Centre.

E. Service of an intimation/notice/communication under this Scheme from the Centre to an assessee/e-commerce operator or its authorised representative shall be made electronically by Centre's email or by uploading a copy on the registered electronic account of the person on the designated portal or by any of the modes mentioned in Section 282(1) of the IT Act. Such notice/intimation/order shall be computer-generated and need not carry the physical signature of the person signing the same.

F. The Director General has the power to specify, with the approval of CBDT, procedures and processes for effective implantation and functioning of the Scheme, in an automated and mechanised manner.

Updated return under Section 139(8A) – Ineligibility – Corrigendum w.r.t Para 28.5 of the Explanatory notes to Finance Act, 2022 issued

Vide Finance Act, 2022, sub-section (8A) was inserted in Section 139, w.e.f. 1 April 2022, which provided that any person, whether or not he has furnished a return for an AY under Section 139(1) or (4) or (5), can file an updated return of his income or the income of any other person, w.r.t. which he is assessable, in the prescribed form at any time within 24 months from the end of such AY.

The second proviso to Section 139(8A) provides that a person shall not be eligible to file the aforesaid updated return in the following situations where:

a.) in case of such person, a search u/s 132, IT Act has been initiated or books of accounts or other documents or any assets are requisitioned u/s 132A; or

b.) in case of such person, a survey u/s 133A [other than Section 133A(2A)] has been conducted; or

c.) a notice has been issued to the effect that any money/bullion/jewellery/valuable article/thing, seized/requisitioned u/s 132 or section 132A in the case of any other person, belongs to such person; or

d.) a notice has been issued to the effect that any books of account/documents, seized/requisitioned u/s 132 or section 132A in the case of any other person, pertain/pertains to, or any other information contained therein, relate to, such person.

The second proviso to Section 139(8A) provides that in the aforesaid situations, a person is not permitted to file an updated return for the AY relevant to the previous year in which such search is initiated/survey is conducted/requisition is made and **any AY preceding such AY**.

The Explanatory Notes to the Finance Act, 2022, explaining the amendments made in direct tax laws by the Finance Act, 2022 were issued *vide* CBDT Circular No. 23/2022 dated 3 November 2022. Para 28.5(A)(I)(iii) of the said Circular contains the explanation of the second proviso to Section 139(8A) and mentioned that in the aforesaid specified situations, a person is not permitted to file an updated return for the AY relevant to the previous year in which such search is initiated/survey is conducted/requisition is made and *two AYs preceding such AY*.

Vide CBDT Circular No. 2/2023 dated 6 February 2023, a corrigendum to the Circular No. 23/2022 has been issued and the phrase 'two assessment years preceding such assessment year' in Para 28.5(A)(I)(iii) has been replaced with '*any assessment year preceding such assessment year*'.

Updated ITR forms for AY 2023-24 notified

Vide Notification No. 04/2023, dated 10 February 2023, the CBDT has issued Income-tax (First Amendment) Rules, 2023. *Vide* these Rules, the CBDT has notified the various necessary forms for filing return of income under Sections 139, 142 and 153A of the IT Act for AY 2023-24 and has accordingly amended the Income-tax Rules, 1962.

Audit Report under the amended Section 12A(1)(b)(ii) and clause (b) to tenth proviso of Section 10(23C): CBDT notifies updated Form No. 10B and Form No. 10BB

Section 10(23C) of the IT Act exempts from taxation any income received by any person on behalf of certain entities (funds/institutions/universities/trusts/educational institutions etc.) specified in Section 10(23C). *Vide* Finance Act, 2022, the existing tenth proviso to Section 10(23C) has been replaced with a new tenth proviso w.e.f 1 April 2023. As per clause (b) to the new tenth proviso of Section 10(23C), where the total income of the entity (fund/institution/trust/university/educational institution/hospital/other medical institution) referred to in Section 10(23C)(iv)/(v)/(vi)/(via), without giving effect to the provisions of these sub-clauses, exceeds the maximum amount not chargeable to tax in any previous year, such entity shall get its accounts audited in respect of that year by a specified accountant before the prescribed date and furnish by that date, an audit report in the prescribed form duly signed and verified by such accountant and setting forth the prescribed particulars.

Section 11, read with Section 12 of the IT Act exempts certain incomes (of specified trusts/institutions) derived from property held for charitable or religious purposes from taxation. Section 12A of the IT Act provides that Sections 11 and 12 will not apply w.r.t. the income of any trust/institution unless certain conditions, listed in Section 12A, are fulfilled. One such condition, contained in Section 12A(1)(b) has been substituted by the Finance Act, 2022, w.e.f. 1 April 2023. The substituted Section 12A(1)(b)(ii) provides that where the total income of a trust/institution computed under the IT Act, without giving effect to Sections 11 and 12, exceeds the maximum amount not chargeable to income-tax in any previous year, the accounts of such trust/institution for that year must be audited by a specified accountant before the prescribed date and the person in receipt of the concerned income must furnish such audit report (in the prescribed form and setting forth the prescribed particulars) by that date.

In this regard, the CBDT, *vide* Notification No. 07/2023 dated 21 February 2023, has amended the Income-tax Rules, 1962 by introducing Income-tax Amendment (3rd Amendment) Rules, 2023. The Income-tax Amendment (3rd Amendment) Rules, 2023, which come into force from 1 April 2023, have introduced the following amendments in the Income-tax Rules, 1962:

a. ***Substitution of Rule 16CC*** – the substituted Rule 16CC provides that audit report as required under clause (b) of the new proviso to Section 10(23C) shall be in Form No. 10B in the following cases:

   - Where the total income of the concerned entity, without giving effect to the provisions of Section

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10(23C)(iv)/(v)/(vi)(via), exceeds INR 5 crore during the previous year; or

- Such entity has received any foreign contributions during the previous year; or
- Such entity has applied any part of its income outside India during the previous year.

In all other cases, the aforesaid audit report shall be in Form No. 10BB.

b. ***Substitution of Rule 17B*** – the substituted Rule 17B states that the audit report required to be furnished under the new Section 12A(1)(b)(ii) shall be in Form No. 10B in the following cases:

- Where the total income of the concerned trust/institution, without giving effect to Sections 11 and 12, exceeds INR 5 crore during the previous year; or
- Such trust/institution has received any foreign contribution during the previous year; or
- Such trust/institution has applied any part of its income outside India during the previous year.

In all other cases, the aforesaid audit report shall be in Form No. 10BB.

Accordingly, the existing Form No. 10B and Form No. 10BB have also been substituted with the updated forms.

Faceless Assessment Proceedings – CBDT amends list of specified Income-tax Authorities directed to exercise powers and functions of AO concurrently

In exercise of its powers under Section 120 of the IT Act, the CBDT had issued Notification No. 61/2022 dated 10 June 2022 *vide* which it had directed Income-tax Authorities of specified units to exercise the powers and functions of Assessing Officers concurrently, to facilitate the conduct of Faceless Assessment proceedings under Section 144B of the IT Act, in respect of all persons or class of persons, or incomes or class of incomes, or cases or class of cases in the territory of India, barring the exceptions covered by some earlier notifications, i.e. Notification No. 57/2014 dated the 3 November 2014 and Notification No. 70/2014, dated the 13 November 2014. These specified Income-tax Authorities were listed in the Schedule to Notification No. 61/2022.

Vide Notification No. 10/2023 dated 1 March 2023, the CBDT has now amended the Notification No. 61/2022 by omitting 'Deputy /Assistant Commissioner of Income-tax (Review Unit)- 1(2)(2), Chandigarh, with headquarters at Chandigarh' from the list of specified Income-tax Authorities in Schedule to Notification No. 61/2022.

Ratio Decidendi

- Physician samples – Reassessment cannot be initiated for AY 2008-09 on basis of CBDT Circular No. 5/2012 stating position as effective from December 2009 – Bombay High Court
- DTAA benefits on short-term capital gains to Singapore-based assessee holding a valid tax residency certificate – Delhi HC decision in Blackstone Capital relied – ITAT Delhi
- Article 12 of the France-New Zealand DTAA applies to royalties arising in France, paid to an intermediary in a third state, but beneficially owned by a New Zealand resident – Supreme Administrative Court of France
- Assessment order passed on non-existent amalgamating company is invalid – Delhi HC relies upon SC decision in Maruti Suzuki instead of Mahagun Realtors – Delhi High Court
- Income earned by APMC from regulating the marketing of fish, poultry and eggs is exempt under Section 10(26AAB) – Delhi High Court

Ratio Decidendi

Physician samples – Reassessment cannot be initiated for AY 2008-09 on basis of CBDT Circular No. 5/2012 stating position as effective from December 2009

The Assessee company is engaged in the business of pharmaceutical formulations. The Assessee in its ITR for AY 2008-09 claimed deductions of expenditure incurred on (i) gifts as part of sales promotion expenses and (ii) distribution of physician samples of medicines manufactured by the Assessee. In the assessment order passed under Section 144C read with Section 143(3) of the Income-tax Act, 1961 ('**Act**'), the Assessing Officer ('**AO**') made *ad-hoc* disallowance of 10% of the expenses incurred on gifts as a part of sale promotion expenses, noting that the genuineness of these expenses was doubtful.

Reassessment was initiated for AY 2008-09 by issuance of notice under Section 148 to the Assessee on 27 March 2015, for the following reasons:

a. that the Central Board of Direct Taxes ('**CBDT**') in Circular No. 5 of 2012 dated 1 August 2012 had stated that the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 ('**IMC Regulations**') on 10 December 2009 had prohibited medical practitioners and their professional associations from taking any gifts, hospitality, cash etc. from pharmaceutical and allied health sector industries. Thus, the expenses incurred in providing such freebies in violation of IMC Regulations, being an expense prohibited by law, is not deductible under Section 37(1) of the Act.

b. The Assessee had debited expenses on physical samples and gift items given to healthcare professionals which are prohibited under the aforesaid CBDT Circular. The aforesaid CBDT Circular is retrospective and applies to AY 2008-09 also.

c. The Assessee has failed to disclose fully and truly all material facts necessary for assessment.

The Assessee's objections to the notice under Section 148 were rejected *vide* order dated 16 December 2015. Subsequently, the Assessee filed a writ before the Bombay High Court challenging this order dated 16 December 2015 and the notice under Section 148. The Bombay HC allowed the Assessee's writ petition and set aside the impugned notice under Section 148 and order dated 16 December 2015, holding/noting as below:

1. Reassessment can be initiated only in terms of Section 147 of the Act and not otherwise.

2. The notice under Section 148 has been issued beyond the permissible time limit of four years from the end of AY 2008-09. This notice could have been issued after four years from

the end of AY 2008-09 only in cases where taxable income of the Assessee for AY 2008-08 had escaped assessment due to Assessee's failure to, *inter alia*, disclose fully and truly all material facts necessary for assessment for AY 2008-09. Admittedly, in the present case the assessment order was passed u/s 143(3) of the Act.

3. The reasons for reopening do not show as to which material facts were not disclosed by the Assessee which were necessary for his assessment. In fact, during the scrutiny assessment, the AO had asked the Assessee to furnish details about its claim of expenses incurred on publicity and propaganda, which were duly furnished by the Assessee.

4. Although in the assessment order, the AO had doubted the genuineness of expenses, yet he had disallowed only 10% of the expenses on estimate basis. Thus, it can't be said that the Assessee had not disclosed the relevant material facts during the assessment proceedings. The Assessee was only obliged to discuss the material primary facts and was not obliged to refer to statutory provisions or the IMC Regulations of 2002 while filing his return or during the assessment proceedings.

5. CBDT Circular No. 5/2012 referred to the position of the IMC Regulations, 2002 after their amendment with effect from 10 December 2009 and thus neither the CBDT Circular No. 5/2012 nor the amended IMC Regulations will apply to the instant case pertaining to AY 2008-09.

6. The SC decision in *Apex Laboratories (P) Ltd.* v. *Dy. CIT LTU,*[1] is not applicable to the instant case because the deduction claim before the SC related to AY 2010-11 to which the amended IMC Regulations were applicable, and also that the revenue in that case had allowed partial deduction for expenses incurred till 14 December 2009 but disallowed the deduction of expenses incurred thereafter by virtue of 2009 amendment. Further, the SC also held in this case that the CBDT Circular was clarificatory and was in effect from 14 December 2009, i.e. the date of implementation of amendments to the IMC Regulations 2002.

7. Thus, there would be no tangible material or basis for the AO to have reason to believe that Assessee's taxable income for AY 2008-09 escaped assessment.

[*Abbott India Limited* v. *ACIT* – W.P. No. 685 of 2016, decided on 10 February 2023 by Bombay High Court]

DTAA benefits on short-term capital gains to Singapore-based assessee holding a valid tax residency certificate – Delhi HC decision in Blackstone Capital relied

The Assessee company acquired shares on 22 August 2016 of Dr. Fresh Healthcare Pvt. Ltd. and sold them on 2 January 2018 giving rise to a short-term capital gain. The Assessee claimed that the

[1] [2022] 135 taxmann.com 286 (SC).

short-term capital gains which arose due to sale of shares was not taxable as per Article 13 of the India-Singapore Double Taxation Avoidance Agreement ('**DTAA**').

The AO, pursuant to the direction of Dispute Resolution Professional ('**DRP**') denied the Assessee's claim on the ground that it had no economic substance or commercial substance as it was a 'shell/conduit' company. Therefore, the short-term capital gain of was held to be taxable in India. The assessee challenged this order before the ITAT.

The ITAT noted that the AO as well as the DRP ignored the Assessee's tax residency certificate, the tax assessment carried out by the Singapore tax authority as well as the financials of the Assessee for the 3 years ending 31 March 2016, 31 March 2017 and 31 March 2018. The main issue before the ITAT was whether the revenue can go behind the tax residency certificate issued by the tax jurisdiction.

The ITAT, relying strongly on the judgment of the Delhi High Court in *Blackstone Capital Partners, Singapore* [W.P.(C) 2562/2022], observed that:

i) Even though GAAR is applicable to the AY under consideration, the Assessee cannot be denied treaty benefit as the short-term capital gain is of Rs. 1,92,63,473/-, the tax on which is below the threshold set out in Rule 10U(1)(a) of the Income Tax Rules, 1962. Further, the shares were acquired by the Assessee on 22 August 2016 which is prior to the date set out in Rule 10U(1)(d) i.e. before 1 April 2017.

ii) The Assessee cannot be treated as 'shell' or 'conduit' as the veracity of the expenditure incurred by the Assessee in Singapore was scrutinized and accepted by the Singapore tax authorities. The Assessee furnished a valid residency certificate issued by Inland Authority of Singapore, audited financial statements and return of income filed along with tax assessment order by Singapore Tax Authority. Thus, as per the *Blackstone* judgment, the ITAT directed the AO to delete the impugned disallowance.

[*Reverse Age Health Services Pte. Ltd.* v. *DCIT* – ITA No. 1867/Del/2022 decided by the Delhi ITAT on 17 February 2023]

Article 12 of the France-New Zealand DTAA applies to royalties arising in France, paid to an intermediary in a third state, but beneficially owned by a New Zealand resident

Planet SARL, a French company (the '**taxpayer**') entered into a license agreement with Les Mills International Ltd. ('**New Zealand Entity'**) under which it distributed sports programmes developed by the New Zealand Entity to fitness classes. Initially the royalty payments made by the taxpayer to the New Zealand Entity under the license agreement were subject to withholding tax rate of 10%. Thereafter, since 2011, two parallel entities, namely Les Mills Belgium SPRL ('**Belgian Entity**') and Mills Euromed Limited ('**Malta Entity**'), were interposed between the taxpayer and the

New Zealand Entity. Under the new arrangement, the taxpayer entered into sub-distribution contracts with the two parallel entities and made payments to them thereunder for the period 2011-2014. While the payments *qua* the Belgian Entity were subjected to Nil-withholding tax, the payments *qua* the Malta Entity were subjected to 10% withholding tax.

The French Tax Authorities challenged the Nil-withholding tax on royalties paid to the Belgian Entity on the ground that (i) the payments made by the taxpayer to the Belgian Entity were in the nature of 'royalties' and (ii) the beneficial owner of these royalties was the New Zealand Entity, due to which the provisions of the France-New Zealand DTAA were attracted, under which 10% tax was to be withheld. However, the French Tax Authorities did not determine the beneficial owner of the payments made to the Malta Entity, because the even though these payments were in royalties, they were subject to withholding tax of 10% which was same as the withholding tax under the France-New Zealand DTAA.

The issue before the Supreme Administrative Court of France was which DTAA can be invoked by the tax payer, the DTAA applicable to the beneficial owner of the royalties (i.e. New Zealand-France DTAA) or the DTAA applicable to the immediate recipient (i.e. France-Belgium/France-Malta DTAA). The Supreme Administrative Court of France held that the DTAA between France and the beneficial owner's state, i.e. France-New Zealand DTAA should apply even in such arrangements where the immediate recipient of the payments is not the beneficial owner thereof.

The Court referred to Article 12 of the France-New Zealand DTAA, which states, *inter alia*, that royalties arising in France and paid to a New Zealand resident may be taxed in New Zealand; however, such royalties may also be taxed (at maximum 10% of the gross amount of royalties) in France if the person receiving the royalties is the beneficial owner thereof. The Court, relying on the OECD commentary, held that having regard to the principal purpose of tax treaties, i.e. to eliminate double taxation, Article 12 of the France-New Zealand DTAA would apply to royalties arising in France, paid to an intermediary in a third state, but beneficially owned by a tax resident of New Zealand. However, the Supreme Court noted that the lower appellate court did not determine who was, in fact, the beneficial owner of the royalties paid by the tax payer and hence, referred back the case to the lower appellate court. [*France* v. *Société Planet* – Decision dated 20 May 2022, Supreme Administrative Court of France]

Assessment order passed on non-existent amalgamating company is invalid – Delhi HC relies upon SC decision in Maruti Suzuki instead of Mahagun Realtors

Sony Ericsson Mobile Communications India Pvt. Ltd. (name changed to Sony Mobile Communications India Pvt. Ltd from 18 April 2012) ('**Erstwhile Company**') was merged with Sony India Pvt. Ltd ('**Assessee**') w.e.f. 1 April 2013 *vide* order of Delhi High Court dated 23 July 2013. Thereafter, the revenue was notified of the amalgamation *vide* communication dated 6 December 2013.

A notice under Section 143(2) of the IT Act was issued on 29 August 2011 when the Erstwhile Company was in existence. The AO thereafter on 2 May 2012 followed this up with a questionnaire under Section 142(1) and served the same on the Erstwhile Company. Pursuant to an upward adjustment by the Transfer Pricing Officer ('**TPO**'), a draft assessment order was framed by the AO on the Erstwhile Company on 31 March 2014. The Assessee placed its objections before the Dispute Resolution Panel ('**DRP**') which were dismissed, and final assessment order was passed by the AO on the Erstwhile Company *vide* order dated 22 December 2014.

On appeal, the ITAT quashed the final assessment order passed in the name of the non-existent Erstwhile Company, following the decision of the SC in the case of *Principal Commissioner of Income Tax, New Delhi* v. *Maruti Suzuki India Ltd.* (2019) 416 ITR 613 (SC).

In the appeal before the HC, the revenue contended that the judgment in *Maruti Suzuki (supra)* is distinguishable from the facts of the instant case as the jurisdictional notice under Section 143(2) in the instant case had been issued to the Erstwhile Company while it was still in existence and thus the judgement would not be applicable in this case. Relying on the judgment of the SC in *Principal Commissioner of Income Tax (Central)- 2* v. *Mahagun Realtors (P) Ltd. 2022 SCC OnLine SC 407*, it was contended that upon amalgamation, the amalgamating company dissolves and therefore the liability to tax can be determined in the given facts and circumstances of the case, by perusing the amalgamated company.

The HC noted that the judgment in *Mahagun Realtors (supra)* can be distinguished from the present case and the decision in *Maruti Suzuki (supra)* on account of the following facts:

(i) In that case, there was no intimation by the assessee regarding the amalgamation of the concerned company.

(ii) The return of income was filed by the amalgamating company and in the Business Reorganization column it had not mentioned anything instead marked the same as 'not applicable'.

(iii) The intimation with regard to the fact that the amalgamation had taken place was not given for the AY in issue.

(iv) The assessment order framed in that case mentioned not only the name of the amalgamating company but also the name of the amalgamated company.

(v) While participating in proceedings before the concerned authorities it was represented that the erstwhile company i.e., the amalgamating company was in existence.

On this basis the HC observed that the facts in *Mahagun Realtors* (*supra*) is distinguishable from the present case. The AO was informed on 6 December 2013 that the amalgamation had taken place and was furnished a copy of the scheme. Despite that, the AO proceeded on the wrong path and the error continued even after the DRP corrected the course. Thus, this would not be a mistake curable by Section 292B of the Act. Accordingly, the HC held that the final assessment order passed in the name of non-existing Erstwhile Company was invalid and needed to be quashed. [*Commissioner of Income Tax v. Sony Mobile Communications Ind Pvt. Ltd.* (Now merged with Sony India Pvt. Ltd.) – ITA 115/2019 decided by the Delhi High Court on 2 February 2023]

Income earned by APMC from regulating the marketing of fish, poultry and eggs is exempt under Section 10(26AAB)

The Assessee, an Agricultural Produce Marketing Committee ('**APMC**') was constituted under the Delhi Agricultural Marketing (Regulation) Act 1976 and was appointed as regulator under the Delhi Agricultural Produce Marketing (Regulation) Act, 1998 ('**DAPM Act**') to facilitate trading in fish, poultry and eggs. The Assessee filed its ITR for AY 2012-13 on 29 September 2012 declaring a loss of INR 2,23,585/- after excluding INR 6,04,06,259/- from its total income in view of exemption under Section 10(26AAB) of the IT Act. *Vide* an assessment order under Section 143(3), the income of the assessee was determined as INR 7,16,62,760/- after, *inter alia*, making an addition of INR 6,04,06,259/-.

The ITAT in this case had to decide on whether the term 'agricultural produce' would include products like fish, poultry and eggs, such that the 'fee' i.e. income derived by the Assessee for regulating the market dealing with these products would be tax-exempt under Section 10(26AAB).

In absence of any definition of the term 'agricultural produce' under the IT Act, the ITAT relied on the definition of 'agricultural produce' provided under Section 2 of the DAPM Act and answered the question in favor of the Assessee, holding that:

a. The term 'agricultural produce' has a very wide meaning under the DAPM Act.

b. the DAPM Act does not restrict the constitution of committee only for marketing agricultural products; rather it covers various other commodities, like forest products which otherwise aren't covered under the definition of 'agriculture'.

c. The IT Act has also imported the word 'agricultural produce' from the DAPM Act for providing various benefits to APMCs notified under the DAPM Act or similar Acts in other States. It could not have been the legislative intention to leave out some of the committees notified under the DAPM especially when all the committees were rendering similar services in respect of various products.

Aggrieved by the order of the tribunal, the revenue approached the High Court and contended that 'agricultural produce' is the produce yielded in the course of cultivation and unless the income is relatable to the agricultural produce, it cannot be tax-exempt u/s 10(26AAB). The High Court analysed Section 10(26AAB) and noted that:

i) It covered 'any income' of an Agricultural Produce Market Committee or Board.

ii) The concerned APMC or Board should be constituted under any law in force.

iii) The APMC's/Board's income earned should have nexus with the purpose of regulating the marketing of agricultural produce.

The HC also noted that the definition of 'agricultural produce' as per the DAPM Act is very wide and includes fish, poultry and eggs. Further, the Assessee earned a fee on account of wholesalers of produce (including fish, poultry, eggs) bringing their produce to designated spots where they are cleaned, sorted and sold to traders. Thus, it was held that the fee earned by the Assessee is for regulating the marketing of agricultural produce, which is the very purpose for which the APMC is constituted. Hence, the HC upheld the view of the ITAT and dismissed the revenue's appeal. [*PC Commissioner of Income Tax-20* v. *Fish Poultry and Egg Marketing Committee* – ITA 72/2023 decided by Delhi High Court on 8 February 2023]

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