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By Romil Hotwani, Snehal Ranjan Shukla and Ankur Kishanpuria

The Bombay High Court has recently held that the timelines for passing an assessment order specified in Section 153 of the Income Tax Act, 1961 are not to be extended in cases where the assessee takes the Dispute Resolution Panel route and the final assessment order under Section 144C(13) has to be passed within the overall timeline as prescribed under Section 153. Considering that the general practice followed by the tax officers is to pass only the draft orders within the timelines provided in Section 153, the article in this issue of Direct Tax Amicus highlights the impact of the said decision on the pending appeals and the possible arguments that may be advanced by the Revenue authorities in appeal before the Supreme Court. Elaborately discussing the interpretation of different Tribunals and Courts – both in favour of assessee and Revenue, the authors from the LKS Direct Tax practice vertical comment that the time available with each of the authorities, i.e. the TPO, AO and DRP for passing their respective orders/directions, would be considerably reduced. They also suggest that the taxpayers must, as soon as the assessment proceedings are initiated, keep the relevant information ready for submission before the income tax authorities so that they do not have to face any negative consequence due to the paucity of time available with each authority.

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Navigating limitation period labyrinth – Pitfalls in timelines of passing assessment orders under Section 144C read with Section 153

Introduction

The Hon'ble Bombay High Court in its recent judgment[1] has held that the timelines for passing an assessment order specified in Section 153 of the Income Tax Act, 1961 ('**Act**') are not to be extended in cases where the assessee takes the Dispute Resolution Panel ('**DRP**') route and the final assessment order under Section 144C(13) has to be passed within the overall timeline as prescribed under Section 153 of the Act. Considering that the general practice followed by tax officers is to pass only the draft orders within the timelines provided in Section 153, the authors have highlighted the impact of the said judgment on the pending appeals and the possible arguments that may be advanced by revenue authorities in appeal before the Hon'ble Supreme Court.

Snapshot of the relevant provisions

Normally, the assessing officer ('**AO**') passes final assessment order upon completion of assessment. The period of limitation for passing the final assessment order is provided in Section 153 of the Act.

However, in case of certain eligible assessee[2], the AO is required to pass a Draft Assessment Order ('**Draft Order**'). Thereafter the eligible assessee has the option of seeking review of Draft Order from Dispute Resolution Panel ('**DRP**').

Section 144C deals with provisions relating to DRP. It is a self-contained code which provides for mechanism of the DRP proceedings and the timelines available at various stages of such proceedings. Section 144C(13) of the Act provides that **notwithstanding anything to the contrary** in Section 153, the

[1] Shelf Drilling Ron Tappmeyer Limited v. Assistant Commissioner of Income Tax & Others, [2023] 153 taxmann.com 162 (Bombay).

[2] Defined in Section 144C(15)(b) of the Act and means any person in respect of whom transfer pricing adjustment has been made or a non-resident.

AO will pass the final assessment order within 1 month from the end of the month in which direction is received from the DRP.

Further, it should be noted that the overall timeline for completing assessment and passing assessment orders as provided under Section 153 of the Act states as under:

a) Any order of assessment under Section 143 or 144 of the Act shall be passed within 12 months from the end of the relevant assessment year ('**AY**').[3]

b) Further, in case where a reference is made to the TPO, the time limit for passing the assessment order is extended by 12 months. Accordingly, the order has to be passed within 24 months from the end of the relevant AY[4].

c) In case where the Income Tax Appellate Tribunal ('**ITAT**') has remanded the matter back to the AO for fresh consideration, the same has to be passed within 12 months from the end of the financial year in which the order of the ITAT is received by the specified authority under the Act[5].

Issue for consideration

Based on the timelines provided for passing an assessment order under Section 144C and Section 153 of the Act, the issue which arises is whether the non-obstante clause in Section 144C will have the effect of extending the overall timelines for passing the final assessment order?

If the answer to this is found to be affirmative, the AO can pass only draft orders within the timelines provided in Section 153 and the final order can thereafter be passed after completion of DRP proceedings under Section 144C.

Interpretation by Tribunal and Courts

View in favour of revenue

The ITAT had in various cases has held that the non-obstante clause in Section 144C will effectively alter the timelines provided in Section 153 of the Act.

The Delhi[6] and Bangalore[7] Benches of ITAT have held that the non-obstante clause in Section 144C of the Act excludes applicability of Section 153 of the Act and as long as the final assessment orders are passed within the timelines as prescribed under Section 144C, compliance of Section 153 of the Act will not be required.

In *Religare Capital Markets Limited* v. *DCIT,* ITA No. 1881 (Delhi) of 2014 the assessee challenged the assessment order under Section 144C(13) of the Act on account of it being barred as per the timelines prescribed under Section 153 of the Act. The Hon'ble ITAT, Delhi while favoring the revenue held that Section 144C of the Act provides a special scheme of assessment for an assessee engaged in international transaction involving transfer

[3] Section 153(1) of the Act as amended by Finance Act 2022.
[4] Section 153(4) of the Act.
[5] Section 153(3) of the Act.

[6] *Honda Trading Corp Japan* v. *DCIT*, ITA No. 1132 (Delhi) of 2015 & *Religare Capital Markets Ltd*. v. *DCIT,* ITA No. 1881 (Delhi) of 2014
[7] *Volvo India (P.) Ltd*. v. *ACIT (TP)*, Appeal No. 1537 (Bang) of 2012

pricing adjustments. The ITAT held that Section 144C of the Act is a special code in itself and therefore the provisions contained therein will only determine the timelines for passing of the final assessment order under Section 144C(13) of the Act and not as provided under Section 153 of the Act.

View in favour of Assessee

Pursuant to the ITAT order, the aforementioned issue has been answered by some of the Hon'ble High Courts in favour of the assessee in the following cases:

1. In the case of *Nokia India (P.) Ltd.* v. *DCIT* [2018] 407 ITR 20 (Delhi), the ITAT had remanded the matter to the AO for fresh consideration and subsequently the AO made reference to the TPO. The assessee filed a writ petition before the Hon'ble Delhi High Court challenging the proceedings on the account of it being time barred. The Hon'ble High Court held that the time limit for passing assessment order pursuant to remand back by the ITAT was governed by Section 153(2A)[8] and that the assessment proceedings had to necessarily be completed by the AO within the time limit specified in erstwhile Section 153(2A) of the Act.

2. In case of *Roca Bathroom Products (P.) Ltd.* v. *DRP,* [2021] 432 ITR 192 (Madras), the Hon'ble High Court of Madras - Single Judge Bench while answering the question whether the proceedings before the DRP are circumscribed by the limits of time imposed by Section 153 of the Act, held that the overall time limits have not been eschewed in the process and the argument that DRP proceedings are unfettered by limitation would run counter to the object of setting up of the DRP.

   Further, when the aforesaid judgement was appealed before the division bench of the Hon'ble Madras High Court[9], upheld the view of the single bench.

3. Similarly, the Hon'ble Bombay High Court, in *Shelf Drilling Ron Tappmeyer Ltd.* v. *ACIT* [2023] 153 taxmann.com 162 (Bombay), held that Section 153 of the Act is not excluded by the operation of Section 144C of the Act and the period of limitation under the Section 153 of the Act will be applicable in remand proceedings involving Section 144C. The Hon'ble High Court also rejected the revenue's plea that the ruling of Madras High Court (supra) is *per incuriam*. Further, it was held that specific timelines have been drawn within the framework of Section 144C of the Act to ensure prompt and expeditious finalization of the assessment but it can't mean that overall time limits provided under Section 153 of the Act have been given a go by in the process. The Hon'ble court further stated that the process to pass assessment order under Section 144C(13) of the Act has to be taken immediately and the

[8] Currently Section 153(3) of the Act.

[9] Commissioner of Income-tax v. Roca Bathroom Products (P.) Ltd, [2022] 445 ITR 537 (Madras)

object is to conclude the proceedings as expeditiously as possible and thus the AO will have no authority to pass the order after the due date as prescribed under Section 153 of the Act. With regard to the non-obstante clause, the Court stated that Section 144C(13) is for limited purpose to ensure that dehors over time limit, final order based on the directions of the DRP has to be passed within 30 days from the end of the receipt of such directions.

It may be noted here that the Income Tax Department ('**ITD**') has appealed against the judgement of *Roca Bathroom Products Pvt. Ltd. (Supra)* before the Hon'ble Supreme Court *vide* SLP No. 34673/2022.

Generally, as a matter of convention, the tax officers have been passing only the draft order within the time limits provided in Section 153 of the Act under the assumption that the proceedings thereafter can be completed within the timelines provided in Section 144C of the Act. The practice followed by tax officers was also supported by the order of ITAT. However, the subsequent High Court judgments have the effect of unsettling a catena of assessment orders which were passed outside the limits prescribed in Section 153 of the IT Act.

Considering the magnitude effect of these judgments on the pending appeals, the PCCIT (International Taxation) *vide* letter dated 11 May 2023 has requested all the PCCITs to apprise the CIT(DRs) of the SLP preferred by the Department against the judgement of Hon'ble High Court of Madras in *Roca Bathroom (supra)* so as to enable them to request stay before the concerned ITAT benches till disposal of the same by Supreme Court.

Further, pursuant to decision of Bombay High Court in *Shelf Drilling (supra)* the Department is in the process of seeking stay on operation of the said order from the Hon'ble Supreme Court. Till the time the stay petition is decided, the CCIT(West Zone) has requested the Vice President, ITAT Mumbai *vide* letter dated 8 August 2023 to grant stay to the department representatives in such matters.

Our comments

The recent High Court judgments may be used by the taxpayers to challenge the assessment order as barred by limitation. The taxpayers may cite these judgments in the pending appeals to claim relief from the appellate forums. However, considering the department appeals against the said judgements before the Supreme Court, the final word is yet to be spoken.

In the meanwhile, the tax authorities may act out of abundant caution and pass the final orders within the overall period provided in Section 153 of the Act. In such a case, the taxpayers are likely to see a lot of alterations in the overall assessment process. This can be explained with the help of an example:

Time Period for passing assessment order for AY 2022-23 (assuming matter has been referred to TPO)

Time limit for completing assessment and passing of assessment order under Section 153(1) read with Section 153(4) of the Act.	31 March 2025 (2 years from the end of relevant AY)
Time Limit for the TPO to pass an order under Section 92CA of the Act	30 January 2025 (60 days before the last date of passing assessment order)
Time limit to file Draft Order	Not specifically provided in the Act
Time limit to file objections by the assessee	30 days from receipt of Draft Order
Time limit to pass directions by DRP under Section 144C(12) of the Act.	9 months from the end of the month in which Draft Order is shared with assessee.
Time limit to pass final assessment order under Section 144C(13) of the Act.	1 month from the end of the month in which the direction of DRP is received by the AO.

Now, in case the TPO passes order on the last day i.e., 30 January 2025 then the final assessment order will be required to be passed by 31 March 2025 (within 2 months). Meaning thereby that the passing of Draft Order, filing of objections of the Assessee, issuing of directions by DRP and passing of final assessment order by the AO will be required to be done within 2 months. This will effectively render the timelines for issuance of direction of DRP provided u/s 144C(12) and timelines for issuance of final order pursuant to the direction provided under Section 144C(13) otiose. Thus, owing to the aforementioned judgements of the High Courts, if final assessment order has to be passed within the overall timelines prescribed in Section 153, the time available with each of the authorities i.e. the TPO, AO and DRP for passing their respective orders/directions would be considerably reduced.

Similarly, in case of foreign companies, where reference to TPO has not been made, the time available with AO and DRP would be shortened. In light of the above, the taxpayers must, as soon as the assessment proceedings are initiated, keep the relevant information ready for submission before the income tax authorities so that they don't have to face any negative consequence due to the paucity of time available with each authority.

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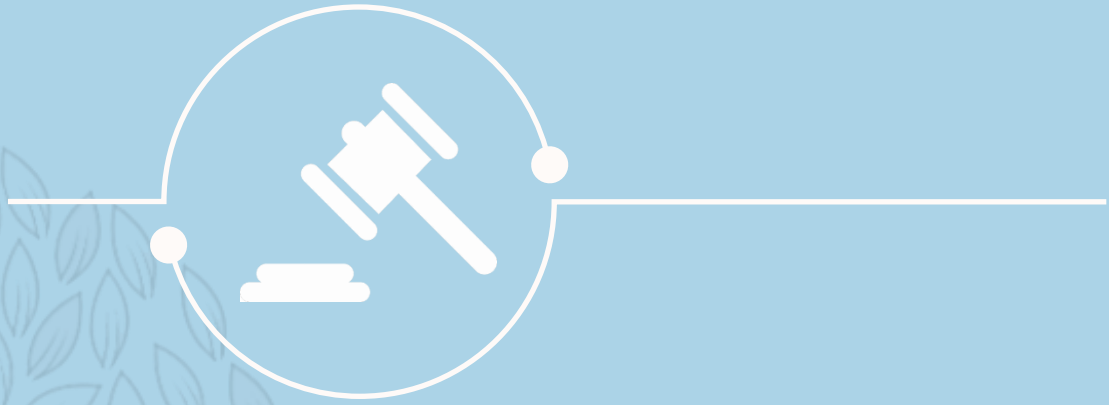
Notifications & Circulars



- Certain entities notified as 'authority' for the purpose of Section 10(46)
- 'Investment fund' definition amended for purpose of exemption from furnishing return of income
- 'Investment fund' – Revised definition incorporated in Circular No. 14 of 2019
- International Financial Services Centre ('IFSC') – Non-deduction of Tax at Source for certain entities
- Income Tax Rules amended through 12th, 13th and 14th Amendment Rules, 2023
- Delay in filing return by co-operative societies to be condoned in specified circumstances, for claiming deduction under Section 80P
- Sugar manufacturing co-operative societies – SOP issued for making application for re-computation of income

Notifications & Circulars

Certain entities notified as 'authority' for the purpose of Section 10(46)

Section 10(46) of the Act *inter-alia* exempts any specified income arising to an authority which has been constituted by the Government of India or any State Government and which is not engaged in any commercial activity and which is notified as an authority by the Central Government in the official gazette for the above clause.

In exercise of the powers conferred under Section 10(46) of the Act, the Central Board of Direct Taxes ('**CBDT**') *vide* Notification No. 48 of 2023 dated 11 July 2023 and Notification No. 55 of 2023 dated 1 August 2023 has notified 'Yamuna Expressway Industrial Development Authority' constituted by the State Government of Uttar Pradesh and 'Joint Electricity Regulatory Commission, Gurugram' constituted by the Government of India as an 'authority' for the purpose of Section 10(46) of the Act in respect of the specified income arising to these authorities and subject to the satisfaction of conditions as mentioned in the notification.

'Investment fund' definition amended for purpose of exemption from furnishing return of income

By virtue of power conferred under Section 139(1C) of the Act, the Central Government has exempted 'investment funds' from furnishing a return of income under Section 139(1) of the Act subject to satisfaction of certain conditions.

In this regard, the CBDT *vide* Notification No. 49 of 2023 dated 14 July 2023 has amended the definition of 'investment fund', which was earlier notified *vide* Notification No. 55 of 2019 dated 26 July 2019, as follows:

'investment fund' means any fund established or incorporated in India in the form of a trust or a company or a limited liability partnership or a body corporate which has been granted a certificate of registration as a Category I or a Category II Alternative Investment Fund and is regulated under the Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012, made under the Securities and Exchange Board of India Act, 1992 (15 of 1992) or regulated under the International Financial Services Centres Authority (Fund Management) Regulations, 2022 made under the International Financial Services Centres Authority Act, 2019 (50 of 2019);'

'Investment fund' – Revised definition incorporated in Circular No. 14 of 2019

The CBDT *vide* Circular No. 14 of 2019 dated 3 July 2019 had clarified the taxability of income earned by a non-resident investor from outside India (offshore investment) routed through an 'investment fund' as defined in Explanation 1 to Section 115UB. The definition of 'investment fund' as mentioned in Explanation 1 to Section 115UB was amended *vide* Finance Act, 2023 to include reference to International Financial Services Centre Authority (Fund Management) Regulations, 2022 under International Financial Services Centres Authority Act, 2019. Now, *vide* Circular No. 12 of 2023 dated 12 July 2023 the CBDT has incorporated the amended definition of 'investment fund' as provided under Explanation 1 to Section 115UB into circular no.14 of 2019. All other contents of the circular no. 14 of 2019 will remain the same.

International Financial Services Centre ('IFSC') – Non-deduction of Tax at Source for certain entities

Section 10(34B) of the Act exempts any income by way of dividend of a unit of any International Financial Services Centre ('**IFSC**') which is primarily engaged in the business of leasing of an aircraft, from a company being a unit of IFSC primarily engaged in the business of leasing of an aircraft.

In this regard, the CBDT *vide* Notification No. 52 of 2023 dated 20 July 2023 has notified that TDS under Section 194 of the Act will not be required to be deducted on the above dividend income which is exempt under Section 10(34B) of the Act. The payee will be required to furnish and get verified a statement-cum declaration in Form No. 1 and the payer though not required to deduct TDS but will have to furnish the particulars of such payment.

Further, *vide* Notification No. 57 of 2023 dated 1 August 2023, CBDT has also notified that no TDS will be withheld under Section 194-I of the Act on payment made by a lessee in the nature of lease rent or supplemental lease rent to a unit of IFSC for lease of a ship. Further, the lessor must furnish a statement-cum-declaration in Form No.1 to the lessee, giving details of the ten consecutive assessment years for which they opt for claiming deduction under Section 80LA of the Act. The lessee, upon receiving the declaration, must not deduct tax on payments made to the lessor and furnish particulars of all such payments in the prescribed manner.

Income Tax Rules through 12th, 13th and 14th Amendment Rules, 2023

The CBDT *vide* **Notification No. 50 of 2023 dated 17 July 2023** , N**otification No. 51 of 2023 dated 18 July 2023** and **Notification No. 54 of 2023 dated 1 August 2023** has notified

amendments to the following rules under Income Tax Rules, 1962 ('**Rules**').

Vide the 12th Amendment Rules, 2023

1. Rule 21AK(i) has been amended to state that any income accrued / received by a non-resident from transfer of non-deliverable forward contracts / offshore derivative instruments / over the counter derivatives or the income accrued / received from distribution of income on offshore derivative instruments, shall be exempt under Section 10(4E) of the Act.
2. Rule 114AAB of the IT Rules prescribes that the provisions of Section 139A of the Act requiring a person to apply for Permanent Account Number inter-alia shall not apply to a non-resident who has made investment in a specified fund. In addition to the funds already specified in this regard, the CBDT has now notified that the funds regulated under the International Financial Services Centres Authority (Fund Management) Regulations, 2022 made under the International Financial Services Centres Authority Act, 2019 (50 of 2019) and which is located in any International Financial Services Centre, as a 'specified fund'.
3. The CBDT in the IT Rules in Appendix II has substituted Form No. 10CCF with the amended Form No. 10CCF.

Vide the 13th Amendment Rules, 2023

1. The CBDT has notified sub-rule (5) in Rule 11UAC, prescribing that Section 56(2)(x) of the Act shall not be applicable to any movable property, such as shares or units or interest, received by the fund management entity of the resultant fund in exchange for shares or units or interest held by the investment manager entity in the original fund during relocation subject to the satisfaction of conditions mentioned below:
   i. not less than ninety per cent of shares or units or interest in the fund management entity of the resultant fund are held by the same entity(ies) or person(s) in the same proportion as held by them in the investment manager entity of the original fund; and
   ii. not less than ninety per cent of the aggregate of shares or units or interest in the investment manager entity of the original fund was held by such entity(ies) or person(s).

Vide the 14th Amendment Rules, 2023

1. The CBDT has inserted new Rule 6ABBB in the IT Rules that provides Form of statement to be furnished regarding preliminary expenses incurred under Section 35D of the Act. The new Rule 6ABBB prescribes e-filing of the statement in Form 3AF one month before the due date to file the Income Tax Return under Section 139(1) of the Act, using digital

signature or through an electronic verification code. The amendment also replaces Form No. 3AE in the IT rules, with new forms to be used for audit reports under Section 35D(4)/35E(6) of the Act.

Delay in filing return by co-operative societies to be condoned in specified circumstances, for claiming deduction under Section 80P

To claim the benefit of deductions as prescribed under Section 80P of the Act, the cooperative societies need to file the income tax return within the due date as prescribed under Section 139 of the Act. In this regard certain Co-operative societies made applications to the CBDT regarding condonation of delay in furnishing return of income under Section 139(1) of the Act stating that the delay in furnishing return of income was caused due to delay in getting accounts audited under respective state laws. The CBDT *vide* Circular No. 13 of 2023 dated 26 July 2023 has authorized Chief Commissioner of Income Tax ('**CCIT**')/ Director General of Income Tax ('**DGIT**') to admit/ deal with such applications for condonation of delay and decide such applications on merits where a person is required to get his accounts audited under respective state laws. Further, the CBDT has also laid down the conditions that shall be examined by the CCIT/DGIT while deciding such applications.

Sugar manufacturing co-operative societies – Recomputation of total income – SOP issued for making application for re-computation of income

Sugar factories operating in co-operative sectors generally pay a final amount to sugarcane growers referred as Final Cane Price ('**FCP**') which is higher than the Statutory Minimum Price ('**SMP**') fixed by the Central Government under the Sugarcane Control Order, 1996. The sugar factories were claiming this excess payment over the SMP as a business expenditure which was being disallowed by the revenue on the ground that the excess amount above SMP is in the nature of appropriation/ distribution of profit and hence not allowable as deduction.

In order to provide certainty and to encourage co-operative movement in sugar sector, *vide* Finance Act 2015 w.e.f. 1 April 2016, a new clause (xvii) was inserted in Section 36(1) of the Act, to provide deduction for an amount which is less than or equal to the price fixed with the approval of the government and paid by the sugar factories to co-operative societies.

For the pending demands and litigation for years prior to AY 2016-17, Section 155 of the Act was amended and sub-section (19) was introduced *vide* Finance Act 2023, w.e.f 1 April 2023 which provides that where a disallowance has been made for any previous year commencing on or before 1 April 2014, the AO shall

recompute the total income of an assessee who has made an application in this regard. The AO shall allow such deduction to the extent of expenditure which is incurred at a price equal to or less than the price approved by the government for that previous year.

In order to standardize the manner of filing application to the jurisdictional AO under Section 155(19) of the Act and disposal by the jurisdictional AO, the CBDT has issued an SOP *vide* Circular No. 14 of 2023 dated 27 July 2023. The SOP provides the conditions and timelines to be met out by the assessee and jurisdictional AO to give effect to the above application made by the assessee.

Ratio Decidendi

- Consideration for managerial services is not Fee For Technical Services ('FTS') under India-UK DTAA where the make available clause was not satisfied – ITAT New Delhi
- Fee for editorial services do not constitute Fees For Included Services ('FIS') under India-US DTAA where the 'make available' clause was not satisfied – ITAT New Delhi
- Protocol of a DTAA is an integral and indispensable part of Tax Treaty – CBDT circular mandating issuance of notification for applicability of protocol not applicable to DTAA where there is no mandate of issuance of such notification – ITAT Kolkata
- Permanent establishment ('PE') – 183 days-period to be calculated from date of entry of oil rig in India and not from date of commencement of actual drilling – Bombay High Court
- Section 148(A)(b) notices issued in violation of CBDT Instruction No. 1/2022 dated 11 May 2022 and Section 282A quashed – Delhi High Court

Ratio Decidendi

Consideration for managerial services is not Fee For Technical Services ('FTS') under India-UK DTAA where the make available clause was not satisfied

The assessee was a UK based company engaged in the business of providing SMS messaging solutions through cloud-based technology. During AY 2017-18, the assessee entered into an agreement with its Indian associated enterprise ('**AE**') for providing centralized services in the nature of financial support, technical support, legal support and sales support services. The AO treated the consideration received for these management support services as being FTS under Article 13 of the India-UK Double Taxation Avoidance Agreement ('**DTAA**') and thus held them to be taxable in India. The ITAT considered the provisions of the India-UK DTAA, clauses of the agreement between assessee and AE, sample copies of email correspondence between the assessee and AE and various judicial precedents. The ITAT observed that year-on-year, the assessee provides services in the nature of administrative, accounting, legal and other support services to the AE which are ancillary to the functioning of corporate management function of the AE. The ITAT held that these are essentially managerial services and thus outside the scope of meaning of FTS under Article 13(4) of the India-UK DTAA. Further, even if these services are treated as technical or consultancy services, the assessee does not make available any technical knowledge, skill, experience, know etc. and there is no transfer of any technical design/plan which can enable the AE to independently apply the same in its business in future without recourse to the assessee. Lastly, the services are provided on continuous, year-on-year basis to the AE which shows that the AE can't apply the technical knowledge provided by the assessee on its own in its business without recourse to the assessee. Thus, the ITAT held that make-available clause is not satisfied in the instant case and the consideration received by the assessee can't be treated as FTS under the India-UK DTAA. [*Infobip Limited* v. *ACIT* – ITA No. 820/Del/2022, Order dated 26 May 2023, ITAT Delhi]

Fee for editorial services do not constitute Fees For Included Services ('FIS') under India-US DTAA where the 'make available' clause was not satisfied.

The assessee was a US tax resident and during AY 2019-20, its associated enterprise ('**AE**') in India subcontracted a part of its e-publishing work to the assessee, whereby the assessee provided editorial services and received sub-contracted charges for the same. The DRP held that the sub-contracting charges constitute

FIS under Article 12(4)(b) of the India-US DTAA and accordingly assessment order was passed. On assessee's appeal, the ITAT considered Article 12(4) of the India-US DTAA and various judicial precedents and noted that the 'make available' clause is satisfied when the service-recipient is enabled to apply the technology independently in the future without the service provider's assistance. The fact that the provision of the service may require technical/consultancy input by the service provider does not per se mean that technical knowledge, skills etc. are made available to the service-recipient. The ITAT held that e-publishing work in the nature of editorial services consisting of page composition, language polishing, indexing, grammar and punctuation correction etc. sub-contracted to the assessee involves technical expertise but such expertise is not transferred by the assessee such that it can be independently applied by the AE in future on its own without recourse to the assessee. The ITAT thus held that the sub-contracting charges received by the assessee are not chargeable to tax as FIS in India in the hands of the assessee. [*SPI Global US, Inc.* v. *ACIT* – ITA No. 1662/Del/2022, Order dated 7 July 2023, ITAT Delhi]

Protocol of a DTAA is an integral and indispensable part of Tax Treaty – CBDT circular mandating issuance of notification for applicability of protocol not applicable to DTAA where there is no mandate of issuance of such notification

The assessee was an Indian resident company engaged in manufacturing and supply of capacitors and soft ferrite cores. The assessee received services from its group company based in Spain ('Spanish Group Company') in relation to procurement, controlling, logistic coordination, quality management, HR, environment protection and industrial safety, organisation etc. While making payment for the services to the Spanish Group Company, the assessee deducted TDS at a beneficial rate of 10% under the India-Spain DTAA read with the Most Favoured Nation ('MFN') clause[10] contained in its protocol instead of 10.608% (10 percent tax + 2 percent Surcharge +4 percent Cess) u/s 115A(1)(b)(B) read with Section 9(1)(vii) of the Act. It may be noted that the India-Spain DTAA by itself taxes royalty and fee for technical services at the rate of 20% but by taking the benefit of the MFN Clause, reference was

[10] With respect to royalties and FTS, the MFN clause in the protocol to the India-Spain DTAA provides that if under any Convention or Agreement of India with a third State, being an OECD Member State, which enters into force after 1.1.1990, India limits its taxation at source on royalties or fees for technical services to a lower rate lower or a more-restricted scope than the rate or scope provided for in the India-Spain DTAA, the said lower rate or restricted scope shall also apply under the India-Spain DTAA with effect from the date on which the India-Spain DTAA comes into force or the relevant Convention or Agreement of India with the third party OECD Member State, whichever enters into force later.

made to Indian tax treaty with Portugal and Sweden respectively, which provide for FTS to be taxed at 10% (inclusive of surcharge or cess). The Commissioner of Income Tax Appeals ['CIT(A)'] held that the assessee is not entitled to get benefit of the protocol appended to the India-Spain DTAA as no notification in relation to the same has been issued by CBDT specifying lower rate of TDS by following the CBDT Circular No. 3/2022 dated 3 February 2022 issued in this regard. On assessee's appeal, the ITAT Kolkata took note of the provisions of the aforesaid DTAAs, various judicial precedents (including its own decisions) and held that:

A. the protocol to a DTAA is an integral and indispensable part of the DTAA and the benefit of lower tax rate for FTS provided for in the protocol to the relevant DTAA is not dependent on any further unilateral action or issuance of notification by the respective contracting state governments;

B. no separate notification is required to be issued by the Indian Government to make a protocol to the India-Spain DTAA (including the aforesaid MFN clause) applicable, in the instant case.

C. surcharge and education cess is not leviable over and above the tax rate provided in a the applicable DTAA since the tax rate provided in a DTAA is held to be inclusive of surcharge and education cess.

Thus, the ITAT ruled in the assessee's favour by holding that the correct rate of tax as applicable in the instant case was 10% and not 10.608%. [*TDK India Pvt. Ltd.* v. *DCIT* – ITA Nos. 393-399/Kol/2023, Order dated. 12 July 2023, ITAT Kolkata]

Permanent establishment ('PE') – 183 days-period to be calculated from date of entry of oil rig in India and not from date of commencement of actual drilling

The assessee-appellant was a Singapore-resident company engaged in the business of providing jack up drilling unit and platform well operations services. On 18 June 2010, the assessee entered into an agreement with the Gujarat State Petroleum Corporation Ltd. ('**GSPC**') for providing jack up drilling unit and platform well operations. Under this contract, during FY 2010-11, the assessee earned a contractual income of INR 64.89 (approx.) crores from GSPC. However, the assessee didn't offer this income for tax under Section 44BB of the Act, under which the assessee's activities, being connected with the exploration, exploitation and extraction of mineral oil, were covered. The assessee referred to Article 5(5) of the India-Singapore DTAA which provides that a service/facility has to be provided for more than 183 days in a financial year in order to constitute a PE. The assessee argued that the rig entered the Indian territorial waters in April 2010, post-which it underwent several upgrades/repairs, necessary to meet GSPC's requirements, and once the repairs were finished, its actual drilling services commenced only from 3 December 2010 and were thus provided only for a period of 119 days in FY 2010-11. Hence, the assessee argued that it was not liable to offer its income for taxation in India under Section 44BB for AY 2011-12.

The ITAT Mumbai referred to, *inter alia*, the minutes of meeting held between the assessee and GSPC and noted that immediately after the rig arrived on 26 April 2010 in India, since the rig was not ready for use, fabrication, upgradation and enabling operations commenced on the rig to make it suitable for undertaking the contractual activities. GSPC also actively participated in the same. Only when the fabrication, upgradation and enabling operations were finished that drilling operations commenced in December 2010. The fabrication, upgradation and enabling operations are not to be viewed in isolation for considering whether the assessee had a PE in India in connection with exploration, exploitation or extraction of mineral oil in India. Thus, the ITAT held that the time period for determining existence of a PE has to be seen from the date the assessee commenced the fabrication, upgradation and enabling operations to perform drilling activity for GSPC and thus the assessee had a PE in India for the concerned year as a result of which its income would be taxable in India. The Bombay HC upheld the ITAT's decision and dismissed the assessee's appeal. [*Deep Drilling 1 Pte. Ltd.* v. *DCIT* – ITA No. 315 of 2018, Order dated 5 July 2023, Bombay High Court]

Section 148(A)(b) notices issued in violation of CBDT Instruction No. 1/2022 dated 11 May 2022 and Section 282A quashed

The assessee-petitioners, *inter alia*, challenged the legality of notices issued under Section 148A(b) of the Act which were dated 2 June 2022 but were mailed to them on 8 June 2022. The petitioners contended that these notices had lost efficacy after 3 June 2022 and therefore, the notices as well as the consequent orders under Section 148A(d) of the Act were liable to be set aside. The Delhi HC referred to the clarificatory CBDT Instruction No. 1/2022 dated 11 May 2022 issued following the judgement of Hon'ble Apex Court in *Union of India* v. *Ashish Aggarwal*, 2022(5) TMI 240 SC. In paragraph 8 of this Instruction, the CBDT lays down the procedure to be followed by AO to comply with the Supreme Court's directions in *Ashish Aggarwal* (*supra*). As per para 8.1 of this Instruction, the AO is bound to supply information and material relied upon for issuance of the extended reassessment notices [which are deemed to be show cause notices under Section 148A(b) pursuant to the decision in *Ashish Aggarwal* (*supra*)] within 30 days, i.e. by 2 June 2022.

The Delhi High Court held that the aforesaid notices issued to the petitioners violated the above mandate of the CBDT Instruction. Further, it was held that these notices also violated Section 282A of the Act because they did not contain the name and designation of the concerned officer issuing these notices. This being the case, the Delhi High Court, after relying on its own decision in *LSR Medical Pvt. Ltd.* v. *DCIT and Anr.* – W.P.(C) 5129/2023 decided on 24 April 2023, quashed the impugned notices under Section 148A(b) and orders under Section 148A(d) and allowed the writ petitions. [*Jindal Exports and Imports (P.) Ltd.* v. *DCIT* – [2023] 152 taxmann.com 609 (Delhi), Order dated 26 July 2023, Delhi High Court]

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