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An e-newsletter from **Lakshmikumaran & Sridharan**, India

April 2022 / Issue–91

Contents

Article
Crypto taxation in the Finance Act, 2022: The Indian conundrum 2

Notifications and Circulars..... 5

Ratio Decidendi........................ 8

April
2022

Article

Crypto taxation in the Finance Act, 2022: The Indian conundrum

By **Ushashi Datta**

Introduction

In November 2021, the government floated the idea that it was going to introduce *'The Cryptocurrency and Regulation of Official Digital Currency Bill, 2021'*, to lay down a framework for regulating transactions involving cryptocurrency. However, come February 2022, the Budget Session did not witness the tabling of the proposed Cryptocurrency Bill, instead it was announced that cryptocurrencies will be taxable under the Income-tax Act, 1962 ('**Act**') as 'virtual digital asset'[1]. From 1 April 2022, India will tax gains from the transfer of virtual digital assets at 30%, while TDS under Section 194-S of the Act will be deducted from 1 July 2022 at a rate of 1%, on every transaction, i.e., any buyer of virtual digital assets will have to deduct 1% of the consideration paid to the seller.

Definition of Virtual Digital Asset

The Finance Act, 2022 has inserted clause (47A) to Section 2 of the Act prescribing definition of 'virtual digital asset' ('**VDA**'). The proposed definition appears to be very wide in nature. It emphasises on certain key features of a VDA such as it being in the nature of an information or code or number or token which has been generated through cryptographic means or otherwise; digital representation of value which is exchanged with or without consideration; transferability, storage or electronic tradability. The VDA, as defined above, also has key attributes of 'money' such as store of value or unit of account or having inherent value, etc. However, the proposed definition of VDA does not make reference to it being based on 'distributed ledger technology' or 'blockchain'. It places key emphasis on 'cryptography' which is the technique of protecting information by transforming it (i.e. encrypting it) into an unreadable format that can only be deciphered (or decrypted) by someone who possesses a secret key. Cryptocurrencies such as Bitcoin, are secured *via* this technique using an ingenious system of public and private digital keys. The encrypted information is converted form of the original message sent by one user, in the form of number or a code or token. This converted form itself contains the information about the original message. Also, this definition is wider than the definition of digital asset expressed by FATF or OECD or UK Money-Laundering Laws.

Taxable event

The taxable event related to VDA can be either on its creation or on storage and transfer or on exchange or on evolution of token. However, the Finance Bill, 2022 has proposed to treat 'transfer' of VDA as the taxable event. Though in the Finance Bill, 2022 the definition of 'transfer' was not provided, but when FB 2022 received the assent of President, Section 115BBH, as introduced, was amended to specifically provide that the definition of 'transfer' as contained in Section 2(47) shall apply, irrespective whether VDA is a capital asset or not. Therefore, any transaction in VDA by which it changes hands

[1] Section 2(47A) of the Income-tax Act, 1961.

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such as, (i) disposal of VDA from one person in favour of another for a consideration; or (ii) exchange of a VDA for another VDA; or (iii) in consideration of receipt of goods or service; or (iv) gift etc., shall be treated as 'transfer' under Section 2(47) of the Act and accordingly, subject to taxation under Section 115BBH of the Act.

Computation of Income from transfer of VDA

The proposed Section 115BBH states that except cost of acquisition, deduction of any expenditure or allowance or set-off of any loss under any provisions of the Act, shall not be allowed. It further provides that loss from transfer of virtual digital asset computed under Section 115BBH shall not be allowed against income computed under any provision of the Act. Thus, income shall be arrived at after deducting 'cost of acquisition' from the consideration received on transfer of VDA. Further, if a person has acquired multiple VDAs at different points in time which are then transferred in tranches, then the proposed Section 115BBH does not provide any guidance as to how income shall be computed. That is, whether by following 'First-in-First-Out' method or 'Last-In-First-Out' method.

Income – whether taxable as PGBP or as capital gains?

Section 115BBH only deals with the rate at which income from transfer shall be taxed. It does not provide the head of income under which income from transfer of VDA shall fall. But, in the absence of any amendment in heads of income or any express indication, it cannot be argued that income from transfer of VDA shall not be included in any head of income and be treated and disclosed separately, not falling under any head of income. Determining whether income from sale of VDAs must be charged under the head PGBP or under the head capital gains is a fact specific exercise.

India's crypto-tax rate: Too harsh?

While several countries have chosen to specifically define cryptocurrencies either as a capital asset or currency for tax-treatment, India will treat cryptocurrency as an asset class, i.e., as a 'virtual digital asset', thus giving the government the power to include other (emerging) products of the block-chain ecosystem under the 30% tax rate umbrella, as it deems fit. In the wake of the announcement of taxation of cryptocurrencies, industry professionals, investors and cryptocurrency enthusiasts have expressed concerns that a 30% tax rate will increase their tax burdens and discourage trading/investing in cryptocurrencies and other digital units. In order to examine how India's taxation regime towards crypto-currencies compares with the rest of the world, it is important to monitor the tax-treatment adopted by some countries: -

Sr No.	Country	Classification	Tax Rate
1.	United States	Capital Gains	10%-37% - Short Term 0% - 20% - Long Term
2.	United Kingdom	Capital Asset	20% - additional rate taxpayers 10% - basic rate taxpayers
3.	Italy	Foreign currency	26%

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Sr No.	Country	Classification	Tax Rate
4.	Netherlands	Assets	31%
5.	Canada	Digital Asset	33%
6.	Australia	Capital Gains	50% - More than 12 months

Despite the opinion that a tax-rate as high as 30% on crypto-investments is likely to disincentivise young investors and crypto-enthusiasts in the Indian market, India fares on a reasonable scale compared to countries like Australia, USA and Canada where, tax on crypto-currencies fall within a range of 37%-50%.

Taxation of income-generating transactions in the 'Metaverse' by India

The 'Metaverse' is a platform or network of virtual worlds where users can interact with each other, through a mix of virtual and augmented reality, enhanced by the purchase and trade of digital commodities. In the recent past, we have witnessed several transactions taking place in the Metaverse. E.g. Pricewater Cooperhouse Hong Kong acquired LAND, a Non-Fungible Token (NFT) representing virtual real estate in *The Sandbox* Metaverse. Luxury brands like Gucci, Burberry, Dolce and Gabbana have partnered with platforms like Roblox, Tencent Games to create luxury clothing items as NFTs that can be collected and owned by end users. In this backdrop, there is a greater need of clarity on how similar transactions will be taxed in India?

Recently, ITC Ltd.'s, luxury chocolate brand *Fabelle* promoted one of its products 'considered as the world's most expensive chocolate, priced at INR 4.3 lakh per kg in a Metaverse wedding. ITC Ltd. distributed digital versions of *Fabelle's* chocolates as gifts during the wedding and facilitated the purchase of physical versions of the digital chocolates for consumption by the attendees. This scenario could be one of many such existing or emerging transactions that are necessary to be analysed for the purpose of taxation under the Income-tax Act, 1961. In *Fabelle's* case, the key issues are: - (i) the concept of 'gift' *vis-à-vis* Section 115BBH of the Act read with Sections 56(2) and 2(47A) and (ii) classification of the income generated to ITC Ltd, from the transfer of the virtual digital asset under Section 14 of the Act.

Under Section 115BBH, any gift in the nature of virtual digital asset as defined under Section 2(47A) of the Act, will be subject to tax in the hands of the receiver at 30% as provided in the Finance Act, 2022. However, it is not clear whether relaxations provided under Section 56(2) of the Act, on gifts given to or received from specified relatives on specific occasions, will also apply in the case of gifting virtual digital assets. Therefore, the gifts given by *Fabelle* will be liable to tax under Section 115BBH in the hands of the receiver(s) at 30% unless the relaxation under normal gifting provisions are made applicable to *Fabelle's* case as well.

Taxation of crypto gains until now and the way forward

The end of the financial year witnessed several anxious queries from concerned crypto-investors and enthusiasts regarding the application of the proposed crypto-currency tax-regime. As of now, the 30% tax proposed in the Finance Act, 2022 on gains from the sale of virtual digital assets was not levied and existing income tax rules seem to have been made applicable till the end of March 2022. However, with the new law coming into effect from 1 April 2022, crypto-investors will require guidelines to conduct their business and navigate paying taxes on crypto-gains going forward. The government has announced that it is working on preparing a Frequently Asked Questions (FAQ) document

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regarding virtual digital assets and the taxation of it for end users, for the purposes of GST and Income-tax. The Department of Economic Affairs, the Department of Revenue and the Reserve Bank of India are jointly preparing the FAQ to provide the required clarity on the taxation aspect stated in the Finance Act, 2022, for tax offices on the field as well as crypto-dealers and investors of other virtual digital assets.

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Notifications and Circulars

Faceless Jurisdiction of Income-tax Authorities Scheme, 2022 notified

The Scheme notified *vide* Notification 15/2022, provides the exercise of all or any of the powers and performance of all or any of the functions conferred on or assigned to income-tax authorities, and vesting the jurisdiction with the Assessing Officer in a faceless manner, through automated allocation.

This scheme will be applicable to Section 144B with reference to faceless assessment; Faceless Appeal Scheme, 2021; Faceless Penalty Scheme, 2021; e-Verification Scheme, 2021; e-Settlement Scheme, 2021; and e-Advance Rulings Scheme, 2022.

e-Assessment of Income Escaping Assessment Scheme, 2022 notified

The Scheme notified *vide* Notification 18/2022, provides the issuance of notice under Section 148 and the assessment, reassessment or re-computation under Section 147 in a faceless, through automated allocation, to the extent provided under the faceless assessment scheme.

Faceless Inquiry or Valuation Scheme, 2022 notified

The Scheme notified *vide* Notification 19/2022, provides the issuance of notice under Section 142(1); making inquiry before assessment under Section 142(2); directing the assessee to get his accounts audited under Section 142(2A); and estimating the value of any asset, property or investment by a Valuation Officer under Section 142A, in a faceless, through automated allocation, to the extent provided under the faceless assessment scheme.

Dispute Resolution Committee constituted

The scheme of Dispute Resolution Committee ('**DRC**') was provided for by way of Section 245MA by Finance Act, 2021 w.e.f. 1 April 2021. The CBDT has now notified Income-tax (Seventh Amendment) Rules, 2022 laying down rules to be read with Section 245MA of the Act pertaining to the DRC.

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Rule 44DAA to 44DAD of the Income-tax Rules, 1962 (‘**Rules**’) provide for following:

- Constitution of the DRC, which would be a three-member committee
- Filing of Form 34BC so as to file an application before DRC, along with a fee of INR 1,000
- DRC has been bestowed with the power to reduce or waive penalty imposable or grant immunity from prosecution or both. No immunity would be granted, however, where the prosecution proceedings were initiated before the receipt of the application by the DRC
- Immunity granted with conditions can be subsequently withdrawn, if the assessee fails to comply with any of the conditions
- Specified order to, *inter alia*, include:
  - draft order under Section 144C(1)
  - intimation under Section 143(1) or Section 200A(1) or Section 206CB(1)
  - order of assessment or reassessment
  - order of rectification under Section 154
  - order regarding TDS and TCS under Section 201 or Section 206C(6A), subject to conditions
- In addition to the specified conditions mentioned in the Act, the rules also specify non-initiation of proceedings in that assessment year under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 as one of the conditions

e-Dispute Resolution Scheme, 2022 notified

The Scheme notified *vide* Notification 27/2022, provides for the dispute resolution by the DRC in a faceless manner. The scheme is briefly as under:

- e-Application: Form No. 34BC to be sent to the official e-mail of DRC along with the proof of payment of tax on the returned income
- Screening of application
  - DRC to issue a show-cause notice as to why the application must not be rejected
  - Pursuant to the show-cause notice, opportunity of being heard, if asked for, to be provided to the assessee through video conferencing facility
  - Once the DRC admits the application and such communication is received by the assessee then the assessee is to submit the proof of withdrawal of appeal filed, if any
- Procedure
  - DRC to call for records and seek a report from the income-tax authority/ AO
  - DRC to call for further information from the assessee/ any other person
  - DRC to pass an order within six months from the end of the month in which the application was received by it
  - Assessee barred from filing a reference to the Dispute Resolution Panel or an appeal to CIT(A) in case of TP assessment, if the assessee approached DRC

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- DRC empowered to reduce or waive penalty imposable or grant immunity from prosecution or both
- No appeal or revision shall lie against the modified order (the order passed by the AO giving effect to the order of the DRC)
- Personal hearing through video conferencing to be provided to the assessee

EPFO notifies withholding tax on interest accruing on Provident Funds

The CBDT *vide* Notification 95/2021 provided that the interest relating to contribution in PF, exceeding the limit of INR 2.5 lakh shall be taxable in the hands of the employee. Now, Employees' Provident Fund Organisation ('**EPFO**') has issued guidelines *vide* Notification WSU/6(1)2019/IncomeTax/Part-I (E-33306) which are applicable from Financial Year 2021-22, at the time of annual accounts processing, back period accounting, withdrawals, transfers; in the event of death of the employees; to all EPF members including exempted establishments/trusts and also to non-resident employees.

As per the guidelines, TDS will be applicable at the following rates:

- 10% under Section 194A (PF accounts that are linked with PAN)
- 20% under Section 194A (PF accounts that are not linked with PAN)
- 30% under Section 195 (non-residents), subject to DTAA

While the said guidelines do not explicitly state the time at which the tax has to be deducted, but the Illustrations supply guidance that the TDS will be applicable on interest accruing on Taxable Contribution Account at the time of credit of interest to the PF account of the payee or at the time of withdrawal/transfer/final settlement, whichever is earlier. Further, such tax will be deducted from the closing balance of Taxable Contribution Account of that Financial Year, which means that the assessee will not be required to pay such a sum separately to the employer/trust. In the event of transfer of balances from one PF Account to another, tax will be first deducted at the time of such transfer on interest in taxable account and thereafter, at the time of credit of interest to the PF account.

Similarly, Illustrations also supply guidance as to the manner in which withdrawals from PF Account will be carried out. Withdrawals will first be deducted from the Taxable Contribution Account balance of that Financial Year and thereafter, the remaining amount to be withdrawn will be deducted from the Non-Taxable Contribution Account.

Relief from tax on income from retirement benefit account maintained in a notified country

Section 89A was inserted in the Act by way of Finance Act 2021, w.e.f. 1 April 2022. The section provided relief from tax on income from specified account maintained in a notified country by a specified person.

- ***Specified account:*** Retirement benefit account where income therefrom is not taxable on accrual basis but at the time of withdrawal or redemption by the notified country
- ***Specified person:*** Indian resident who opened the account while being a non-resident in India and resident in the notified country
- ***Notified countries so far:*** Canada, UK and USA [Notification No. 25/2022]

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Vide Notification No. 24/2022, Rule 21AAA has been inserted to provide that the income accrued in the specified account shall, at the option, be included in the taxpayer's total income of the previous year in which such income is taxed at the time of withdrawal or redemption in the notified country. Option is required to be exercised in respect of all specified accounts.

Ratio Decidendi

Immunity from reopening of assessment under the Income Declaration Scheme does not extend to non-declarants

The assessee-company filed its return of income for the year under consideration and the same was accepted without scrutiny under Section 143(1) of the Act. Search and seizure at the office premises of chairman of the assessee-group, led to the discovery that accommodation entries were being provided through various companies controlled and managed by him, and that the assessee was one of the beneficiaries of the business (of accommodation entries provided) through bogus companies. Thus, reassessment notice was issued on the basis of material submitted by the chairman of assessee's group and correlated it with the ROC data filed by the assessee. Reasons recorded stated that the chairman of assessee's group voluntarily disclosed under Income Declaration Scheme (IDS) that declarant's (Garg Logistics Pvt. Ltd.) unaccounted cash was invested as share application money in assessee-company through various companies controlled and managed by an accommodation entry provider.

On an ultimate appeal, the Apex Court noted that the IDS was introduced with the objective of enabling an assessee to voluntary disclose suppressed or undisclosed income or properties acquired through untaxed income. To this end, Section 192 of the Act affords immunity from imposition of penalty to the declarant by non-admissibility of any evidence contained in any declaration made. Thus, the Court held that the protection under IDS afforded to the declarant is limited in nature and cannot lead to immunity from taxation of income to the non-declarant. Court relied on the Supreme Court judgments in *Tanna & Modi* v. *CIT* [2006 Supp (8) SCR 914] and *Tekchand* v. *Competent Authority* [1993 (2) SCR 864] to hold that immunity granted for one purpose, cannot be extended for another. Observing that the declarant is not the same as the assessee, the Court concluded that immunity cannot be claimed by the assessee, being a non-declarant, from reopening of assessment. [*DCIT* v. *M.R. Shah Logistics (P.) Ltd.* – Judgment dated 28 March 2022 in Civil Appeal No. 2453 of 2022, Supreme Court]

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Assessment is not per se invalidated by the corporate death of the assessee-company upon amalgamation

Assessee-company amalgamated with another company by an High Court Order with retrospective effect from 1 April 2006. Consequent to a search and seizure operation, notice under Section 153A dated 2 March 2009 came to be issued to file a return. The assessee filed the return. Subsequently, the assessment order was passed on 11 August 2011 which was addressed to the assessee as represented by the amalgamated company.

On an appeal before the Court challenging the validity of notice and the assessment order in the name of the amalgamating company, the Court observed that amalgamation is different from winding up, such that upon amalgamation, the rights and liabilities of one company is transferred to another and therefore, the successor is entitled to liabilities and assets of the amalgamating company as per the terms of amalgamation. That is, unlike a winding up, there is no end to the enterprise, with the entity. The enterprise in the case of amalgamation, continues.

The Court further distinguished the earlier Supreme Court ruling in *PCIT* v. *Maruti Suzuki India Ltd*. [2019 SCCOnline SC 928], *inter alia*, on the grounds that, unlike the facts in earlier ruling, herein (a) assessee failed to intimate the aspect of amalgamation prior to the issue of the assessment order; (b) assessee undertook various compliances under the Act in its own name, even though it had ceased to exist. As on facts, the Court further noted that the return filed by assessee suppressed the fact about amalgamation. Apex Court, thus, upheld the validity of notice and passing of assessment order post amalgamation in the name of amalgamating company as represented by amalgamated company. [*PCIT* v. *Mahagun Realtors (P.) Ltd.* – Judgement dated 5 April 2022 in Civil Appeal No. 2716 of 2022, Supreme Court]

Reassessment notices cannot be issued after 31 March 2021 under the erstwhile scheme of reopening of assessment

The erstwhile scheme of re-assessment was substituted by the Finance Act, 2021 w.e.f. 1 April 2021. Yet, notices under Section 148 were issued post 31 March 2021 in accordance with the erstwhile scheme, taking shelter of The Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 ('**TOLA**') and the notifications issued thereunder. On a challenge to such notice, the Bombay High Court held as under:

- Finance Act, 2021 substituted the erstwhile scheme of reassessment with effect from 1 April 2021. Therefore, the substituted provisions cannot be utilized for issuance of notices in the absence of a savings clause.
- TOLA has no provision that notices issued under Section 148 after 31 March 2021 will relate back to the original date or that the clock is stopped on 31 March 2021 such that the provision as existing on such date will be applicable to notices issued under TOLA.
- Subordinate legislation must submit to the limits of powers vested in it by the parent legislation and therefore, the impugned Explanations to Notification Nos. 20 and 38 of 2021 seeking to 'clarify' the applicability of the erstwhile scheme of reassessment for issuance of notice under Section 148 are *ultra vires* the TOLA.
- Even if the Explanations are upheld, the same seek to extend the applicability of erstwhile Sections 148, 149 and 151 only. It does not cover Section 147, which (as amended) empowers the revenue to reopen an assessment subject to Sections 148 to 153, which includes Section 148A. Since

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mandatory procedure laid down by Section 148A has not been adhered to and hence, the notices issued under Section 148 are invalid and must be struck down for this reason as well.

In view of the above, the Bombay High Court, in line with the judgments of other High Courts on the issue, quashed the notices issued under Section 148 after 31 March 2021 but under the erstwhile provisions of re-assessment. [*Tata Communications Transformation Services Ltd.* v. *ACIT* – Judgment dated 29 March 2022 in WP Nos. 1334, 1300 of 2021 & Others, Bombay High Court]

Mere digitally signing the notice does not tantamount to issuance of notice

In this case, the notice under Section 148 was digitally signed on 31 March 2021, being the prescribed time-limit for the year under consideration. The assessee received the said notice *via* mail only on 6 April 2021 i.e., beyond the limitation time-period.

On a writ challenging the notice as being time barred, the Court closely read Sections 282 and 282A of the Act that lay down that signing of notice and issuance/communication thereof are two independent acts. The Court also noted that Rule 127A(1) of the Rules provides a procedure for issuance of every notice or other document in electronic form/electronic mail laying down that the time of issuance of notice under Section 148 read with Section 149 of the IT Act is that point of time when a digitally signed notice in the form of electronic record is entered in computer resources outside the control of the originator (assessing authority). It also relied on the Information Technology Act, 2000 to further substantiate the same.

The Court, therefore, relying on the above-stated provisions and *Kanubhai M. Patel (HUF)* v. *Hiren Bhatt* [(2011) 12 taxmann.com 198 (Guj.)], whereby the notice signed on one date was sent to the speed post center for booking on another date which was beyond limitation, quashed the notice as being time barred since notice was sent by email after the expiry of limitation period. [*Daujee Abhushan Bhandar Pvt. Ltd.* v. *UOI* – Order dated 10 March 2022 in Writ Tax No. 78 of 2022, Allahabad High Court]

Gross receipts from profession for determining monetary limit for audit under Section 44AB does not comprise of partners' remuneration

In this case, the assessee was an actor by profession and also a partner in two partnership firms. The assessee filed her return of income and declared here income from profession. The said return was ordered as being invalid on account of non-auditing of accounts by the assessee, as after including the sum of remuneration received by it from the partnership firms shall exceed the threshold limit, requiring the assessee to get the accounts audited. The assessee filed a revision application against such order, which was rejected.

On a writ petition, the Court held that the income earned by assessee as remuneration from firm cannot be regarded as carrying on profession as well as business simultaneously. Section 44AB(a) deals with business and Section 44AB(b) deals with profession, hence, are mutually exclusive. Section 44AB does not whatsoever envisages the situation where the assessee is carrying on both the profession as well as business. Therefore, the remuneration received from firms cannot be treated as part of gross receipt of the assessee from profession. Therefore, the Court held that the assessee was not required to comply with the mandatory audit under Section 44AB of the Act, being within the threshold limit. [*Perizad Zorabian Irani* v. *PCIT* – Judgement dated 9 March 2022 in WP No.1333 of 2021, Bombay High Court]

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Payment made to non-resident towards advertisement expenses are not taxable as FTS/Royalty

Assessee, being engaged in the online games services sector, made payments to Facebook, Ireland (‘**Facebook**’) towards banner advertisement expenses. The Revenue held the said payments to be in the nature of Fees for Technical Services (‘**FTS**’) rendered in India. Revenue, therefore, disallowed the payments under Section 40(a)(i) of the Act on account of non-withholding of tax.

On an appeal before the ITAT, the ITAT observed that the advertisement related information is put up at the interface provided by Facebook in the required format, and during such process, the assessee-company did not have any control over the functioning of the interface and the entire operation and maintenance of the server was under the control of Facebook. ITAT further observed that assessee-company made payments to use the standardised facility which was provided to many other global customers and that all equipment/installations are owned by Facebook and the assessee-company did not have any role to play in either maintaining or involving into any managerial activities.

ITAT also observed that application under Section 195(2) of the Act cannot be treated as a mandate in view of the words ‘may make an application’ and where the assessee-company was aware that the recipient is a non-resident and that payments made are outside the ambit of tax.

ITAT, thus, relying *inter alia* on *Urban Ladder Home Décor Solutions Pvt. Ltd.* [ITA No.615 to 620/Bang/2020], *Right Florist Pvt. Ltd.* [25 ITR (T) 639 (Trib.- Kol.)], and *Google India Pvt. Ltd.* [127 Taxmann.com 36], held that there was no element of FTS or Royalty with respect to payments made to non-residents towards advertisement expenses. In turn, therefore, there was no liability to withhold tax under Section 195. [*Play Games 24x7 Private Limited* v. *Dy CIT* – Order dated 23 March 2022 in ITA No. 1533 of 2019, ITAT-Mum.]

Subscription fees received from India by Singapore-based company for its CRM services is neither in the nature of ‘royalty’ under Section 9(1)(vi) nor under Article 12 of India-Singapore DTAA

Assessee-company, a non-resident, is a leading provider of comprehensive Customer Relationship Management (CRM) services to its customers through its website Salesforce.com. It provides web-based online access to its customer's data hosted on servers located in data centers maintained by the assessee outside India. Client inputs, stores and retrieves its proprietary data on the Salesforce.com through the CRM application software portal, which generates reports and summaries of the data. The access to such database is for a limited duration for which the subscription fee is paid by the client. The AO alleged that the amount received by the assessee from Indian clients constitutes ‘royalty’.

On an appeal to the ITAT, the ITAT observed that the assessee does not have any data centers in India and hence it cannot be considered to have a fixed place of business in India. It also noted the observation made by the CIT(A) that the assessee neither has a place of management in India nor has any equipment or personnel in India. Therefore, it held that without there being any control over the equipment belonging to the assessee with its customers, the allegation of the AO that the amount so received will constitute ‘royalty’ is unfounded. As the assessee only processes the proprietary data of the customers

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and provides the result in form of desired reports etc., it cannot be said that consideration for CRM services is either in the nature of 'royalty' under Section 9(1)(vi) of the Act or under Article 12 of India-Singapore DTAA. [*Salesforce.com Singapore Pte.* v. *Deputy Director of Income-tax* – Order dated 25 March 2022 in IT Appeal Nos. 4915 of 2016 & Others, ITAT Delhi]

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