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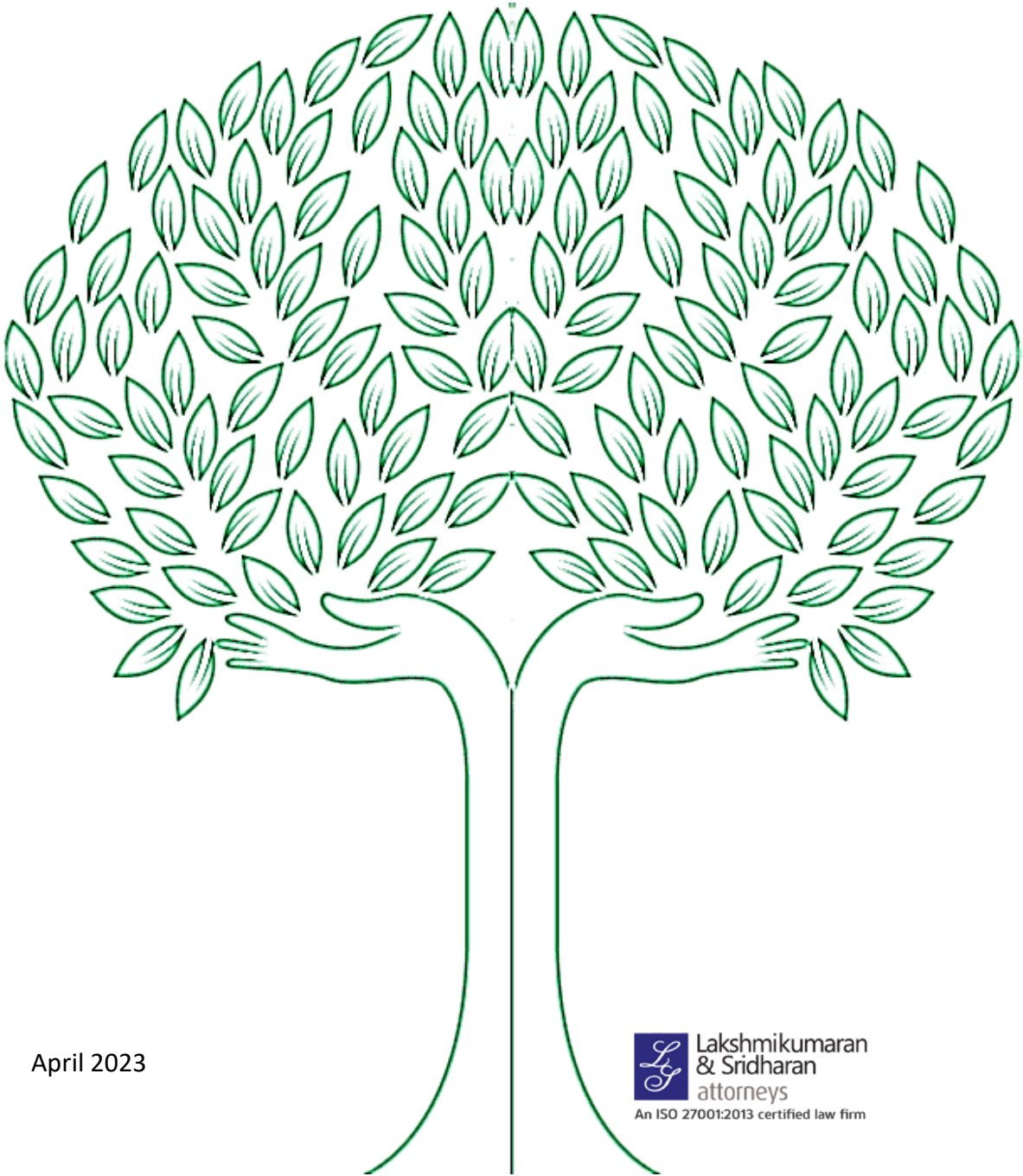

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Article

Navigating the exemption labyrinth – Pitfalls in the way of charitable institutes

By Tanmay Bhatnagar

The article in this issue of Direct Tax Amicus discusses the labyrinth of exemption available to charitable institutes under the Income Tax Act, 1961. Considering the changing landscape of the exemption regime, right from Finance Act, 2014 till the recent Finance Act, 2023, the article notes that the provisions relating to the exemption regimes under Sections 10(23C) and 11 of the Income Tax Act have undergone a multitude of wide-ranging changes having an impact on nearly every aspect associated with the operation of educational and medical institutes, resulting in a situation where a mere procedural lapse can have far reaching consequences. Analysing various procedural lapses, the article notes that any charitable entity which even inadvertently commits any lapse would potentially face a heavy tax burden. According to the author, not only would such a charitable entity have to pay tax on its accreted income, but it would also be barred from making a fresh application in the future for claiming exemption under either Section 10(23C) or Section 11. The author though notes that the benefit of a substantive provision of law should not be denied due to a mere procedural lapse, according to him, considering the express intention behind the amendments vide the Finance Act, 2023 and other changes, it would be interesting to see how the income-tax department deals with the situation.

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Navigating the exemption labyrinth – Pitfalls in the way of charitable institutes

Under the Income-tax Act, 1961 ('**IT Act**') educational and medical institutes have the option of availing the benefit of two exemption regimes, namely under Section 10(23C) and Section 11 of the IT Act. Prior to 1 July 2020, these institutes had the option of availing the benefit of both the exemption regimes simultaneously which was exercised by numerous such institutes. Thus, the income of such institutes could be exempt if they satisfied the associated conditions laid down in either of the regimes.

The changing landscape of exemption regimes – Finance Act, 2014 to Finance Act, 2023

The Legislature sought to change the aforesaid position by inserting a proviso to Section 11(7) of the IT Act *vide* the Finance Act, 2020. In order to understand the background for the same it is important to refer to the legislative history of Section 11(7).

Section 11(7) of the IT Act, which was inserted into the IT Act *vide* the Finance Act, 2014, provides that a charitable institution availing an exemption under Section 11 could not simultaneously claim exemption under Section 10 of the IT Act with the exception of clauses (1) and (23C) thereto. The said provision was inserted in the IT Act to address the problem of educational and medical institutes being registered to claim the benefit of Section 11 but claiming exemption under the general provisions of Section 10 without having to comply with the conditions relating to application of income laid down in Section 11.

The Legislature also noted that a similar situation also existed with respect to institutes approved under Section 10(23C), and in order to remedy the same, inserted the erstwhile eighteenth proviso to Section 10(23C). Therefore, educational and medical institutes registered under Section 10(23C) which did not apply their income in accordance with the said provision could not fall back on other clauses of Section 10 to claim income-tax exemption.

Subsequently, in 2020 the Legislature took note of the fact that in certain cases educational and medical institutes were registered in both Section 12AA and Section 10(23C) and were claiming exemption interchangeably in either of the provisions. Noting that since the provisions relating to such charitable institutes constitute a complete code, it was felt that once an institute had voluntarily opted for one of the aforesaid exemption

regimes, the option of switching between the two regimes at convenience should not be available.

Consequently, Section 11(7) of the IT Act was amended *vide* the Finance Act, 2020 by way of insertion of two provisos. The first of the said provisos provides that the registration of a charitable entity claiming exemption under Section 11 would become inoperative from the date on which it is approved under Section 10(23C) or in case of institutes which were already availing the benefit of both the exemption regimes, on the date on which the first proviso come into effect i.e., 1 June 2020. Thus, educational and medical institutes claiming exemption under Section 11 and Section 10(23C) were shifted to exemption regime under Section 10(23C) alone by virtue of this proviso.

However, by way of the second proviso, a one-time opportunity to switch back to the exemption regime under Section 11 was also provided to these institutes. The second proviso lays down that charitable entity whose registration becomes inoperative because of the first proviso may apply for re-registration, in which case the approval received by such charitable entity under Section 10(23C) would stand cancelled and the charitable entity would not be entitled to exemption under Section 10(23C).

In addition to the above changes, the Finance Act, 2020 also introduced a new set of provisions for grant of approval under Section 10(23C) and registration for claiming exemption under Section 11. As per the said amendments, all charitable entities had to make an application for fresh approval or registration in order to continue to enjoy the benefit of either Section 10(23C) or Section 11 respectively.

Therefore, with effect from 1 June 2020, a charitable entity which was availing the benefit of the exemption regimes under Sections 10(23C) and 11 of the IT Act, was forced to choose between one of the said regimes. Firstly, due to the operation of the first proviso to Section 11(7), the charitable entity's registration for availing exemption under Section 11 would become inoperative and it would have had the option to either apply for approval under clause (i) of the first proviso to Section 10(23C) or for registration under clause (iv) of Section 12A(1)(ac). Thereafter, the one of following sequence of events could take place:

- If it were to apply under clause (i) of the first proviso to Section 10(23C), it could only switch back to the exemption regime under Section 11 by making an application for registration under clause (iv) of Section 12A(1)(ac). If the option to switch back to Section 11 was taken up, then the charitable entity would be prevented from ever being able to claim exemption under Section 10(23C) in the future.
- If it were to apply under clause (iv) of Section 12A(1)(ac), it would become ineligible to switch back to the exemption regime under Section 10(23C) and would thereafter have to continue under Section 11.

Further amendments were made by the Finance Act, 2022 to align both the aforesaid exemption regimes and insert certain additional compliances and conditions. One of these amendments was in relation to the cancellation of registration/approval under the two exemption regimes which provided that the relevant authority could cancel the

registration/approval of a charitable entity in case of a 'specified violation', i.e., the happening of certain specified events.

Now *vide* the Finance Act, 2023, even more amendments have been made to the exemption regimes under Sections 10(23C) and 11 of the IT Act. For the purposes of the present discussion, three amendments must be considered.

The first pertains to the expansion of the meaning of 'specified violation' as used in Sections 10(23C) and 12AB, the occurrence of which would result in the cancellation of approval under Section 10(23C) or registration for availing exemption under Section 11. The Memorandum states that one of the issues which was being faced under the new system of registration/approval was that charitable institutes were being granted provisional registration/approval or re-registration/re-approval automatically without any scrutiny because of which even defective applications containing incorrect or incomplete information were being passed. Thus, in order to curb such practice, an amendment has been made to expand the scope of the expression 'specified violation' to include the filing of an incomplete application or an application containing false or incorrect information.

The second amendment relates to Section 115TTD of the IT Act which deals with the taxation of accreted income of charitable entities in case they are *inter-alia* converted to a form which is ineligible for grant of registration for availing exemption under Section 11 or approval under Section 10(23C). As per the amendment to Section 115TD, a charitable entity is considered to ineligible for registration/approval if it fails to make an application within the time specified either under the first proviso to Section 10(23C) or under Section 12(1)(ac). The said amendment has been made to address the situation whereby a charitable entity would seek to opt out of the exemption regimes without having to pay tax on accreted income under Section 115TD.

The third amendment is with respect to the registration/approval process under the two exemption regimes. The residual clause for application under both Section 12A(1)(ac) and Section 10(23C) has been amended so that registration/approval would only be given to those trusts who have already commenced activities if they have not previously claimed exemption under either Section 11 or Section 10(23C).

Therefore, the provisions relating to the exemption regimes under Sections 10(23C) and 11 of the IT Act have undergone a multitude of wide-ranging changes having an impact on nearly every aspect associated with the operation of educational and medical institutes. As will be discussed in this write-up, this has resulted in a situation where a mere procedural lapse can have far reaching consequences.

Procedural lapse or a fatal mistake?

A problem which has arisen on account of the complex nature of these provisions is with respect to educational and medical institutes which were availing the benefit of both the exemption regimes. As has been discussed above, due to the first proviso to Section 11(7), the registration for availing exemption under Section 11 became inoperative with effect from 1 June 2020. However, since no order was required to be passed by any statutory authority to give effect to the said provision, numerous

such institutes continued to operate under the assumption that they were still covered under the purview of Section 11 and therefore, applied under clause (i) to section 12A(1)(ac) for automatic re-registration.

Thus, this has resulted in certain procedural irregularities. Firstly, such educational and medical institutes have applied for re-registration for exemption under Section 11 under the incorrect provision of law. Secondly, they have also failed to make the application for re-approval under Section 10(23C) within the time stipulated under the said section.

The consequence of the first of the two irregularities is that following the amendment to expand the definition of the expression 'specified violation', the application made by the charitable entity may be considered to be one containing false or incorrect information. Thus, it may result in the cancellation of registration for availing exemption under Section 11. In addition to the above, the consequence of the second irregularity would be that the charitable entity would be considered to have been converted to a form which is ineligible to seek approval under Section 10(23C) of the IT Act.

The ultimate consequence, therefore, would be that the charitable entity would then become liable to pay tax on its accreted income under Section 115TD of the IT Act. Moreover, such a charitable entity would no longer be eligible to apply for exemption under either Section 10(23C) or Section 11 since neither does the first proviso to Section 10(23C) nor does Section 12A(1)(ac) contain any clause which would allow application by a charitable entity which has commenced operations and also previously claimed exemption under Section 10(23C).

Hence, any charitable entity which has even inadvertently committed the afore-mentioned procedural lapses would potentially face a heavy tax burden. Not only would such a charitable entity have to pay tax on its accreted income, but it would also be barred from making a fresh application in the future for claiming exemption under either Section 10(23C) or Section 11 of the IT Act.

While it is a settled position of law that the benefit of a substantive provision of law cannot be denied due to a mere procedural lapse, considering the express intention of the Legislature behind the amendments introduced *vide* the Finance Act, 2023 as well as the host of other amendments to both the exemption regimes, it would be interesting to see how the income-tax department deals with the situation discussed above.

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Notifications & Circulars

- Timeline extension of relaxation for electronic filing of Form 10F
- Tax deduction at source on salary payments by an employer under the new tax regime clarified
- No-deduction certificate under Section 195(3) – Procedure, format, and standards for filling an application therefor specified
- Manner for making PAN inoperative and the resulting consequences, prescribed

Notifications & Circulars

Timeline extension of relaxation for electronic filing of Form 10F

Section 90(4) of the Income-tax Act, 1961 ('**IT Act**') provides that a non-resident can claim tax treaty benefits if it obtains a Tax Residency Certificate ('**TRC**') from the country of its residence. Additionally, the non-resident is also required to provide certain information in Form No. 10F.

However, Rule 21AB(2) of the Income-tax Rules, 1962 ('**IT Rules**') provides that the non-resident would not be required to provide such additional information in Form 10F, if such information already forms part of the TRC.

Previously, the Central Board of Direct Taxes ('CBDT') mandated the electronic filing of Form 10F for claiming tax treaty benefits[1]. However, this resulted in several practical issues for non-resident taxpayers. To mitigate this hardship, CBDT exempted[2] non-resident taxpayers, who did not have PAN and were not required to have PAN, from mandatory electronic filing of Form 10F till 31 March 2023.

Recently, *vide* Notification F. No. DGIT(S)-ADG(S)-3/e-Filing Notification/Forms/2023/ 13420 dated 28 March 2023, the CBDT has further extended this relaxation till 30 September 2023. Accordingly, the qualifying non-residents can now file Form 10F manually, as done prior to the issuance of notification mandating electronic filing of Form 10F[3].

Tax deduction at source on salary payments by an employer under the new tax regime clarified

Recently, the Finance Act, 2023, introduced certain changes in Section 115BAC which provides for the new tax regime. Amongst other things, it has been prescribed that the new tax regime will be treated as a default tax regime with effect from AY 2024-25.

However, Section 115BAC(6) of the IT Act provides taxpayers with an option to opt out of this default tax regime (i.e., new regime). Further, taxpayers not having income from business and profession can exercise this option every year.

[1] Notification No. 3 of 2022 dated 16th July 2022
[2] F. No. DGIT(S)-ADG(S)-3/e-Filing Notification/Forms/2022/9227, dated 12th December 2022
[3] Supra at pt. 1.

In view of these amendments, CBDT received several representations expressing concern regarding the manner in which tax is to be deducted from salary income under Section 192 of the IT Act since the employers (i.e., deductors) would not know if their employees would opt out of the new tax regime or not.

To avoid this hardship, the CBDT *vide* Circular No, 4 of 2023 dated 5 April 2023, has clarified the following:

- That the employer shall seek information regarding the tax regime each of its employees intends to opt for the year under consideration.
- That the employer shall compute the employee's total income and deduct tax at source as per the option exercised by the employee.
- That employer shall compute the employee's total income and deduct tax at source as per the new tax regime in case an employee fails to provide such intimation.
- The intimation furnished to the employer would not amount to exercising the option under Section 115BAC(6) of the IT Act.

No-deduction certificate under Section 195(3) – Procedure, format, and standards for filling an application therefor specified

Section 195(3) of the IT Act provides that any person entitled to receive any interest or other sum on which income tax is to be deducted under Section 195(1) of the IT Act can make an application to the Assessing Officer for granting a certificate authorizing him to receive such sum without deduction of tax at source.

In this regard, Rule 29B(3) of the IT Rules provides that the application under Section 195(3) for the aforesaid certificate shall be made by a banking company or insurer in Form 15C and by any other person who carries on business or profession in India through a branch in Form 15D.

Now *vide* Notification No. 1 of 2023 dated 29 March 2023, the Director General of Income-tax (Systems) ('DGITS') has specified that Forms 15C and 15D shall be furnished electronically at the TRACES website. Further, DGITS has specified the format, standard, step-by-step procedure for the electronic filing of Forms 15C and 15D and the procedure for the issuance of the certificate.

Additionally, the Notification also stipulates the role of AO, Range Heads, and the Commissioner of Income-tax in the process of issuing of the certificate.

Manner for making PAN inoperative and the resulting consequences, prescribed

Section 139AA(2) of the IT Act provides that every person who has been allotted a PAN as on 1 July 2017 and is eligible to obtain Aadhaar Number, is required to intimate his Aadhaar on or before a notified date in the prescribed manner. Further, the proviso to Section 139AA(2) provides that in case of failure to intimate the

Aadhaar number, the PAN shall be made inoperative in the prescribed manner, after the notified date.

The manner for making PAN inoperative has been prescribed in Rule 114AAA of the IT Rules. The said rule was recently substituted *vide* Notification No. 15 of 2023 dated 28 March 2023, with effect from 1 April 2023. Sub-rule (1) of the substituted Rule 114AAA provides that the PAN of a person who has failed to intimate his Aadhaar on or before 31st March 2022 will become inoperative and he would become liable to pay the fee provided under Rule 114(5A).

However, as per sub-rule (2) of the substituted Rule 114AAA, if such a person intimates his Aadhaar number after 31 March 2022 and make the payment of the fee prescribed under Rule 114(5A), his PAN would become operative within 30 days of such intimation.

In addition to the above, sub-rule (3) of the substituted Rule 114AAA read with Circular No. 3 of 2023 dated 28 March 2023, prescribes that a person whose PAN become inoperative shall face the following consequences beginning from 1 July 2023 till the date the PAN becomes operative again:

- No refund of any amount of tax shall be made against such PAN;
- No interest would be payable on such refund for the period during which such PAN remains inoperative;
- TDS shall be deducted at a higher rate as per Section 206AA of the IT Act; and
- TCS shall be collected at a higher rate as per Section 206CC of the IT Act;

Thus, *vide* Circular No. 3 of 2023, the CBDT has provided some additional time until 30 June 2023 to taxpayers for intimating their Aadhar without facing the aforesaid consequences provided under sub-rule (3) of the substituted Rule 114AAA. However, the fee prescribed under Rule 114(5A) for intimating the Aadhar would still remain applicable.

Ratio Decidendi

- Consideration for sub-licensing ‘sponsorship rights’ cannot be considered ‘royalty’ under the India-Malaysia DTAA – ITAT Mumbai
- Limitation of Benefits (LoB) clause of the DTAA cannot be invoked when the non-resident has an active business role – ITAT Mumbai
- Prospective operation of Supreme Court decision in New Noble Education is only with respect to interpretation of term ‘solely’ under Section 10(23C) and not ‘education’ – ITAT Ahmedabad
- CBDT Circular No. 3/2022 dated 3 February 2022, requiring sperate notification for applicability of MFN clause, cannot be applied retrospectively – ITAT Mumbai
- Pending scrutiny assessment, not a valid ground for withholding refund under Section 241A – Delhi High Court
- Reassessment notice in the name of a non-existent entity pursuant to amalgamation is void even if it pertains to a transaction of a period prior to such amalgamation – Bombay High Court

Ratio Decidendi

1) Consideration for sub-licensing 'sponsorship rights' cannot be considered 'royalty' under the India-Malaysia DTAA
2) Limitation of Benefits (LoB) clause of the DTAA cannot be invoked when the non-resident has an active business role

The Assessee is a wholly owned subsidiary of TSA, Cayman Islands ('**TSA Cayman**'). It is *inter-alia* engaged in the business of seeking and endorsing sponsorship deals for athletes and sports teams.

TSA Cayman entered into agreements with Sri Lanka Cricket ('**SLC**') and West Indies Cricket Board Inc. ('**WICB**') for the 'sponsorship rights' of their respective cricket teams with respect to certain tournaments. The said 'sponsorship rights' included rights such as logo rights, advertising rights, promotional rights, rights to complimentary tickets and branding rights.

Both of the said agreements provided that TSA Cayman could sub-license the 'sponsorship rights'. Consequently, TSA Cayman sub-licensed the said rights to TSA, Malaysia, another one of its subsidiaries. TSA, Malaysia then further sub-licensed the said rights to the Assessee, who in turn once again sub-licensed them to another Indian company.

During the AY 2014-15, the Assessee made remittances to TSA Malaysia under the said sub-licensing agreement without deducting tax at source. The Assessing Officer ('**AO**'), however, held that the said payments were in the nature of royalty under both the Income-tax Act, 1961 ('I**T Act**') and the India-Malaysia Double Tax Avoidance Agreement ('**DTAA**'). Thus, by failing to deduct tax at source under Section 195 of the IT Act, the Assessee was an assessee-in-default.

In arriving at the said conclusion, the AO invoked Article 28 [Limitation of Benefit ('**LoB**') clause] of the DTAA to reject the Assessee's argument that by virtue of the DTAA, the said payments were not chargeable to tax in India. The AO held that TSA Malaysia was merely a conduit company, having no role in the exploitation of rights, that had been utilised solely to avail the benefits of the DTAA. Additionally, with respect to the rights taken from WICB, the AO held that the sub-licensing agreement between the Assessee and TSA, Malaysia was a colourable device since it had been entered into even before the original licensing agreement between TSA, Cayman and WICB.

In appeal, the Tribunal however observed that the Assessee had proven that TSA Malaysia was the group's head office, where the senior management team members were located, and all the

transactions of the group were routed through it. The Tribunal also noted that TCA, Malaysia's total revenue was much higher than the revenue earned out of the remittances made by the Assessee. It was further noted that TSA, Malaysia had come into existence much prior to either TSA Cayman or the Assessee. The Tribunal also noted that the sub-licensing agreement for the rights taken from WICB could also not be considered to be a colourable device since all the parties in the arrangement, including the WICB, had honoured all the agreements. Considering the said facts, the Tribunal held that TSA, Malaysia was not a conduit company and thus, the AO was wrong in invoking Article 28 of the DTAA.

Having decided that the benefit of the DTAA would be available, the Tribunal then went on to address the question whether the consideration paid for the sponsorship rights satisfied the definition of royalty under Article 12 of the DTAA. In this regard, the Tribunal held that each right in the advertising package/rights licensed by the assessee only for publicity of the sponsor either by displaying their brand logo or trademark or name as 'official sponsor'. Placing reliance on *Sahara India Financial Corporation Ltd.,* [2010] 321 ITR 459 (Delhi), the Tribunal held that since the 'sponsorship rights' sub-licensed by the Assessee did not constitute the intellectual property rights mentioned in Article 12(3) of DTAA, the consideration paid by the Assessee was not 'royalty'. Hence, the Assessee could not be treated as an assessee-in-default. [*ITO* v. *Total Sports & Entertainment India P. Ltd.* – ITA No. 5717/Mum./2016, Order dated 27 March 2023, ITAT Mumbai]

Prospective operation of Supreme Court decision in New Noble Education is only with respect to interpretation of term 'solely' under Section 10(23C) and not 'education'

The Assessee is a society registered under the Societies Registration Act. It was set up for the advancement and promotion of science and technology and dissemination of information relating to the same by developing science city project. The objects of the Assessee included:

a. To promoting and exhibit interaction of science and technology with human life through personal experience-based presentations.

b. To undertake and encourage research and training for sustainable development, harnessing alternative sources of energy, etc.

c. To organise or assist in organising training courses, seminars, conferences etc. for the development of science and technology.

For AY 2013-14 to AY 2015-16, the Assessee claimed that its activities were in the nature of imparting education therefore, eligible for exemption under Section 11 of the Act. However, the Assessee's claim was rejected by the AO. The AO held that the

Assessee's activities were in the nature of advancing objects of general public utility ('**GPU**') and since the Assessee was carrying out activities in the nature of 'trade, commerce or business', by virtue of the proviso to Section 2(15), it was not eligible to claim exemption under Section 11 of the IT Act. In appeal, the CIT(A) allowed the Assessee's claims.

The Revenue appealed against the CIT(A)'s order before the Tribunal, wherein two issues were identified for adjudication considering the recent Supreme Court decisions in *Noble Education Society,* [2022], 448 ITR 594 (SC) and *Ahmedabad Urban Development Society,* [2022] 449 ITR 1 (SC). The first issue was whether the Assessee's activities would qualify as education under Section 2(15) of the Act. The second was if the activities were in the nature of advancing GPU, would exemption be available to the Assessee.

The Assessee contended firstly that the decision in *New Noble Education Society (supra)* would not be applicable to the present facts since it was rendered in the context of Section 10(23)(vi), where the term 'education' was interpreted narrowly along with the term 'solely'. However, the Tribunal rejected the said contention of the Assessee by holding that in the said decision the term 'education' had been narrowly interpreted by the Supreme Court for the purposes of Section 2(15), by taking into account its previous decisions in *Lok Shikshana Trust,* [1975] 101 ITR 234 (SC) and *T.M.A Pai Foundation,* [2002] 8 SCC 481. Therefore, the Tribunal held that education means imparting formal scholastic learning and that the Assessee's activities of running a science museum did not fall within the said definition.

Further, the Tribunal rejected the Assessee' contention that the decision in *New Noble Education Society (supra)* was applicable prospectively**.** The Tribunal held that the prospective applicability of the decision was only with respect to the interpretation of the term 'solely' under Section 10(23C)(vi) and not with respect to the definition of the term 'education'.

The Tribunal, however, agreed with the Assessee's contention that since the AO had considered the Assessee's activities to be commercial without applying the guidelines laid down in this regard in *Ahmedabad Urban Development Society (supra)*, the matter was to be remanded for fresh consideration. [*DCIT* v. *Gujarat Council of Science City* – ITA No. 2405/Ahd/2017, ITA No. 260/Ahd/2018, ITA No. 306/Ahd/2019 – Order dated 20 March 2023, ITAT Ahmedabad]

CBDT Circular No. 3/2022 dated 3 February 2022, requiring sperate notification for applicability of MFN clause, cannot be applied retrospectively

The Assessee is a tax resident of Germany having its permanent establishment ('**PE**') in India during AY 2018-19. The Assessee entered into a contract with GIL, Belgium to render training, supervision and consultancy services in connection with installation services to set up machinery at GIL's premises. The Assessee subcontracted the services of installation and

supervision of certain equipment to CBV, a Belgian company. However, the Assessee made the payment to CBV without deducting tax at source ('**TDS**') under Section 195 of the Act.

During the assessment proceedings, the AO rejected the Assessee's claim that there was no liability for TDS as the services rendered by CBV did not 'make available', impart or transfer any knowledge, know-how or skill to the recipient. The AO instead passed a draft assessment order holding that knowledge had indeed been imparted and thus, said payment was in the nature of fees for technical services ('**FTS**') under Article 12(4) of India-Belgium DTAA read with the India-Portugal DTAA.

Before the DRP, in addition to the contentions made before the AO, the Assessee argued that because of the applicability of the most favoured nation ('**MFN**') clause provided in the India-Belgium DTAA, the scope of FTS thereunder would be restricted after taking into consideration the 'make available' clause present in the India-Portugal DTAA. However, the DRP rejected the said contention by relying on CBDT Circular No. 3/2022 dated 3 February 2022 and holding that the legal requirement of notification under Section 90 has not been complied.

In appeal, the Tribunal agreed with both the contentions of the Assessee and overturned the findings of the DRP and the AO. The Tribunal noted that in *GRI Renewable Industries S.L.,* ITA No. 202/Pun/2021, the Pune ITAT had held that Circular No. 3/2022 could not be invoked for any AY prior to 2022. It further noted that in *Essity Hygiene & Health,* ITA No.778/Mum/2021 the Mumbai ITAT referred to *GRI Renewable Industries S.L. (supra)* to hold that there is no requirement of separate notification for importing the beneficial treatment from the agreement. Following both the decisions, the Tribunal held that Circular No. 3/2022 would not be applicable to the facts of the present case and the Assessee was entitled to claim the benefit of the restricted definition of FTS under India-Portugal DTAA. [*Dieffenbacher GmbH* v. *ACIT* – ITA No. 556/Mum/2022 – Order dated 16 March 2023, ITAT Mumbai]

Pending scrutiny assessment, not a valid ground for withholding refund under Section 241A

In this case, the Assessee had claimed a refund in its return of income for AY 2020-21. The case of the Assessee was selected for scrutiny and detailed information and documents were sought *vide* notice issued under Section 142(1) of the IT Act to which the Assessee responded. On the same day, the Assessee received an intimation under Section 143(1) of the Act determining the refund and stating that the refund would be credited to the Assessee's account within 15 days.

However, the said refund was not credited despite the lapse of several months from the receipt of said intimation. Aggrieved by the same, the Assessee filed letters before the Income-tax Department ('**Department**') seeking the refund. The Assessee was subsequently informed that its refund has been withheld on the basis of the letter received from the Faceless Assessment Unit

('**FAU**'). Aggrieved by the same, the Assessee filed a writ petition before the High Court seeking directions for the disbursal of the refund.

Before the High Court, the Department produced a letter from the FAU and another by the PCIT and contended that the said letters complied with the provisions of section 241A of the Act and therefore, the refund had been withheld. The Assessee, however, contended that the Department had failed to fulfil the requirements of the said provision since the said letters did not provide reasons for withholding refund.

The High Court agreed with the Assessee's contentions and observed that the Department had failed to correctly exercise the power under Section 241A since no reasons were recorded in writing for withholding the refund. Rather, it was simply stated that the case of the Assessee had been selected for scrutiny under CASS with a large number of 'issues' to be examined. However, no details of the said issues had been provided.

The High Court also observed that the AO is required to look into various factors such as the probable tax liability that may arise out of the scrutiny assessment *vis-à-vis* the amount of refund due, the credit worthiness of the Assessee and the probable chances of tax recovery. Further, the High Court held that it was also mandatory for the AO to give reasons as to how the issue of refund would adversely affect the interest of the Revenue. Since the reasons provided by the AO were vague and the Assessee was a reputable company whose credit worthiness was not in doubt, the AO had acted incorrectly.

The High Court also placed reliance on its earlier decisions in *Maple Logistics P. Ltd.,* 2019 SCC OnLine Del 12366 and *Ingenico International India Pvt. Ltd.,* 2021 SCC OnLine Del 2969 to hold that the mere issuance of notice under Section 143(2) was not sufficient grounds for withholding refund under Section 241A of the IT Act. Accordingly, the matter was remanded to the AO for fresh consideration. [*OYO Hotels and Homes Private Limited* v. *Dy. ACIT and Anr.* – W.P.(C) 16698/2022 – Order dated 23 March 2023, Delhi High Court]

Reassessment notice in the name of a non-existent entity pursuant to amalgamation is void even if it pertains to a transaction of a period prior to such amalgamation

The Assessee was a company which was amalgamated with ETPL, as per a scheme of amalgamation approved by High Courts of Gujarat and Bombay. Post such amalgamation, the AO issued a notice under Section 148 of the IT Act to initiate reassessment proceedings against ETPL.

In response to such notice, the Assessee stated that ETPL was a non-existent entity on account of its amalgamation with the Assessee and therefore, the notice was void *ab initio*. However, the AO disregarded this explanation and proceeded to pass a reassessment order by stating that the reassessment proceedings

had been initiated with respect to a transaction which had taken place before the date of amalgamation. The AO also issued notice for initiation of penalty proceedings. Aggrieved by the same, the Assessee filed a writ petition before the High Court for setting aside of the reassessment order and penalty notice.

The High Court noted that the Assessee had apprised the AO of ETPL of the fact of amalgamation both after the scheme of amalgamation had been approved and also when the notice under Section 148 was received.

Relying on the decisions in *PCIT* v. *Maruti Suzuki India Ltd.,* [2019] 107 taxmann.com 375 (SC) and *CLSA India Private Limited* v. *DCIT,* WP (OS) 2462 of 2022, Bombay HC, the High Court held that the contention of the Revenue that the reassessment proceedings could be initiated for a period prior to the specified date as per the scheme of amalgamation a non-existent entity was incorrect. Consequently, the High Court set aside the reassessment order and the penalty notice issued in the name of ETPL. [*Sterlite Technologies Limited* v. *DCIT and Ors.* – WP NO. 2855 and 2955 of 2022 – Order dated 27 March 2023, Bombay High Court]

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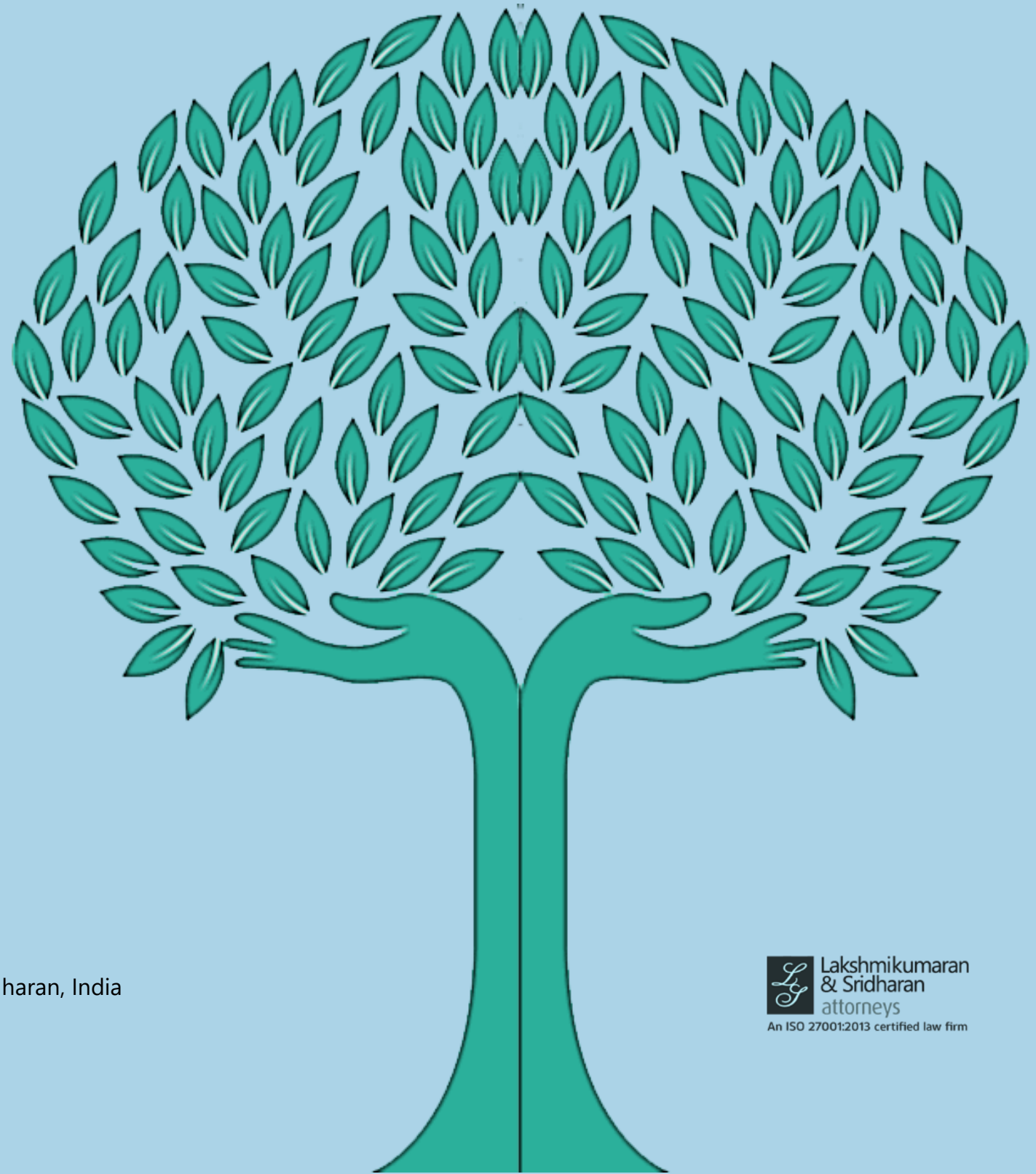

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