Direct Tax

amicus

January 2023 / Issue – 100

Dear Reader

It gives me great pleasure to address you through this **100th issue of Direct Tax Amicus**. I have always believed that the wealth of knowledge should be shared. We began this journey of sharing periodic newsletters in May 2011 recalling the Sanskrit verse that the unique wealth of knowledge increases with spending or expending. Income tax was initially covered in Tax Amicus and a separate newsletter for Direct Tax was started only in August 2014.

I hope over these years we have been able to give business critical inputs and academic inputs in a timely manner. These days information is available practically everywhere but value addition results when relevant information is properly digested and communicated in a systematic manner. We intend to continue this endeavour. Your feedback to improve the newsletter is welcome.

Warm regards

V. Lakshmikumaran

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An e-newsletter from
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January 2023

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Article

‘Penalty under Sections 221 & 271C for non-deduction/ short deduction of tax at source

By Venkat Ramanan and Abhinov Vaidyanathan

The article in this issue of Direct Tax Amicus deals with a peculiar issue of simultaneous applicability of two penal provisions being Sections 221 and 271C of the Income Tax Act, 1961, which may be fastened on the assessee for non-deduction/ short deduction of tax at source. The authors for this purpose consider the relevant provisions, applicability of Rule of Double Jeopardy and various judicial precedents on applicability of two penalty provisions for the short deduction of TDS. Observing that uncertainty regarding applicability of dual penalty for non-deduction/ short deduction of tax at source persists, the authors are of the view that the said issue may get resolved if the CBDT issues necessary clarification

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Penalty under Sections 221 & 271C for non-deduction/ short deduction of tax at source

Introduction

The Income-tax Act, 1961 ('**IT Act**') provides for various obligations which are to be carried out by an assessee. One such obligation is to deduct tax at source at applicable rates when an income is chargeable to tax under Section 4(1) of the IT Act. Chapter XVII of the IT Act provides for various types of incomes on which an assessee would be liable to deduct tax at source. However, when an assessee fails to carry out the said obligation, the assessee may be subject to penal consequences provided for under the IT Act. The authors in this article would be dealing with a peculiar issue of simultaneous applicability of two penal provisions being Sections 221 and 271C which may be fastened on the assessee for non-deduction/ short deduction of tax at source.

Relevant provisions

Per Section 201, when an assessee who is required to deduct any sum in accordance with the provisions of the IT Act fails to deduct or pay the tax, then the assessee would be deemed to be an assessee in default in respect of such tax. Section 221 of the IT Act provides that an assessee in default shall be liable to a penalty not exceeding the amount of tax arrears.

Section 271C of the IT Act provides that if any person fails to deduct the whole or part of the tax as required in terms of the Act, then such person shall be liable to pay, by way of penalty, a sum equal to the amount of tax which such person failed to deduct or pay.

From this it can be seen that if an assessee fails to deduct tax at source at applicable rates, he/she could be imposed with penalty under two provisions simultaneously.

Can an assessee be penalized twice for the same default?

Applicability of Rule of Double Jeopardy

As per Article 20(2) of Constitution of India, no person shall be prosecuted and punished for the same offense more than once. The said rule of double jeopardy is also embodied in Section 26 of the General Clauses Act which in more specific terms provides that where an act or omission constitutes an offense under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for

the same act or omission, by way of two separate penalties, which in nature, belong to the same genus.

The Hon'ble AP High Court in *CIT* v. *Maduri Rajeswar*[1] made an interesting observation that proceedings entailing a penalty under the IT Act cannot be equated to the prosecution attracting punishments for *'offences'* under Article 20(1).[2] It was further observed that penalty under the IT Act is levied for an act or omission of the assessee, not because it is an offence but because it is an attempt at evasion in the payment of tax. The inference which can be drawn from the said decision is that an act or omission by an assessee for which penalty can be levied under the IT Act cannot be categorised as an offence as referred to in Articles 20(1) & 20(2) of the Constitution of India. If such an inference is made, the rule of double jeopardy as per Article 20(2) may not be applicable to cases where penalty under two provisions may be levied for the same default under the IT Act.

Judicial Precedents on applicability of two penalty provisions for the short deduction of TDS

Reference in this regard shall be made to the decision of the Hon'ble Calcutta ITAT in *ITO (TDS)* v. *Titagarh Steels Limited*[3]. There was a lapse on part of the assessee wherein instead of 15%, it had deducted TDS at 8% which resulted in short deduction of TDS. In view of the default, proceedings under Section 201(1) were initiated. Further, the AO also initiated penalty proceedings under Sections 271C and 221 also. The question before the Hon'ble Tribunal was whether an assessee can be penalized twice for the same offence. It was observed that an assessee cannot be punished twice for the same act or omission, by way of two separate penalties which, in nature, belong to the same genus. It was further observed that penalty proceedings are quasi criminal proceedings and therefore, the underlying principle of Article 20(2) of the Constitution of India, as also of Section 26 of the General Clauses Act, would apply to penalty proceedings under the IT Act. The Hon'ble ITAT held that since Sections 221 and 271C belong to the same genus, both the penalties cannot be imposed as a consequence of the same lapse of short deduction of tax at source.

The consequent question that further arises for consideration when only one penalty is imposable, under which provision can such a penalty be imposed.

In order to analyze the same, it is imperative to elaborate on the insertion of Section 271C of the IT Act. Section 271C was inserted *vide* Direct-tax Amendment Act, 1987 w.e.f. 1 April 1989. The CBDT *vide* Circular No. 551 dated 23 January 1990 explained the intent behind introduction of the said provisions. It stated that prior to 1 April 1989, no penalty was provided for failure to deduct tax at source and that the said default only attracted prosecution under Section 276B. Thereafter, it was decided that the default which relates to failure to deduct the tax at source should be made liable to levy of penalty, while the default which relates to failure to pay the tax deducted to the Government, which is a more serious offence, should continue to attract

[1] (1977) 107 ITR 832 (AP) (APP.)

[2] Section 20(1) - (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

[3] (2001) 79 ITD 532.

prosecution. Therefore, Section 271C was inserted to provide for imposition of penalty on any person who fails to deduct tax at source as per Chapter XVIIB.

This issue was also dealt by the Hon'ble ITAT in *Titagarh* decision (*supra*). The Hon'ble ITAT observed that Section 271C is a specific provision dealing with assessee's failure of non-deduction/short deduction. By applying the maxim *'generalia specialibus non derogant'* i.e., specific provisions override general provisions, it was observed that to the extent a default is covered by the specific provisions of Section 271C, such default cannot be subject matter of penalty under Section 221(1) of the IT Act. Therefore, it was held that penalty under Section 221(1) cannot be imposed for the cases of non-deduction/short deduction of tax at source, which are undisputedly covered by the specific provisions of Section 271C after 01.04.1989.

The Hon'ble Mumbai ITAT in *Industrial Development Bank of India* v. *ITO*[4] agreed to the views taken by the Hon'ble Calcutta ITAT in *Titagarh* decision. Additionally, the Hon'ble ITAT observed that Sections 221 & 271C operate in different spheres i.e., Section 271C will get attracted if there is non-deduction or short deduction and Section 221 will get attracted only if the assessee deducts tax at source but fails to remit it to the Central Government within the specified timeline.

At this point it is pertinent to note that, Section 221 of the IT Act will get attracted once an assessee is deemed to be an assessee in default as per Section 201 of the IT Act. As per Section 201, an assessee is deemed to be an assessee in default if he/she fails to deduct tax or deducts tax but fails to pay it to the Central Government. Therefore, the author is of the view, that both Sections 221 and 271C *prima facie* may get attracted for the default of non-deduction. In other words, Section 221 has a wider scope of applicability i.e., it may also get attracted for non-deduction of tax at source.

Conclusion

It can be inferred from the above discussion that there are two possible interpretations to the peculiar issue in hand. Firstly, as per the Hon'ble ITAT decisions discussed above, one may argue that as far as default of non-deduction/short deduction of tax at source is concerned, penalty under Section 271C alone may be attracted. However, on the other hand, relying on the High Court decision in the case of *Maduri Rajeswar* (*supra*), one may make an inference that the protection from double jeopardy as enshrined in Article 20(2) [which was one of main guiding principles in the Hon'ble ITAT decisions *supra*] will not be applicable to penal proceedings under the IT Act. Resultantly, the uncertainty regarding applicability of dual penalty for non-deduction/ short deduction of tax at source persists. Therefore, the authors are of the view that the said issue may get resolved if the CBDT issues necessary clarification in this regard.

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[4] ITA No. 6439/Mum/1997

Notifications & Circulars

- Time limit for compliance to claim exemption under Sections 54 to 54GB of IT Act extended
- Co-operative societies – Dealership/ distributorship contract by itself may not constitute an event or occasion for Section 269ST(c)
- Partial relaxation granted to certain taxpayers from e-furnishing Form No. 10F

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Notifications & Circulars

Time limit for compliance to claim exemption under Sections 54 to 54GB of IT Act extended

The CBDT had, *vide* Circular No. 12 dated 25 June 2021, provided relaxation pertaining to compliances required to be made by taxpayers for claiming exemption under Sections 54 to 54GB of the Income-tax Act, 1961 ('**IT Act**'). Therein, the last date for compliances to be made between 1 April 2021 and 29 September 2021 was extended to on or before 30 September 2021.

Considering the difficulties faced due to the prevailing Covid-19 restrictions, CBDT has *vide* Circular No. 1 dated 6 January 2023 extended the current compliance window which falls between 1 April 2021 to 28 February 2022 for claiming exemption on or before 31 March 2023.

Co-operative societies – Dealership/ distributorship contract by itself may not constitute an event or occasion for Section 269ST(c)

Section 269ST of the IT Act prohibits receipt of INR 2 lakh or more ('**prescribed limit**') by a person, *inter alia*, with respect to transactions relating to one event or occasion from a person, other than by way of an account payee cheque or account payee bank draft or use of electronic clearing system through a bank account or other electronic modes as prescribed.

CBDT had received references from Milk Producers' Cooperative as to whether the said receipts (being within the prescribed limit) on a bank holiday from a distributor against sale of milk, when payments were through account payee bank on all other days, shall be considered as a single transaction or whether all such receipts in a previous year received in cash would be aggregated to treat as one event or occasion.

CBDT has *vide* Circular No. 25 dated 30 December 2022 clarified that a dealership/distribution contract in case of co-operative societies by itself may not constitute an event or occasion for the purposes of Section 269ST(c) of the IT Act. Receipt related to a dealership/ distribution contract by a co-operative society on any day in a previous year (a) which is within the prescribed limit, and (b) in compliance with respect to aggregate receipts from a person in a day and/ or in respect of a single transaction, may not be aggregated across multiple days for the purposes of determining transactions relating to one event or occasion from a person.

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Partial relaxation granted to certain taxpayers from e-furnishing Form No. 10F

In order to claim benefit of any tax treaty, a non-resident is required to file Form No. 10F along with Tax Residency Certificate, as provided for under Section 90(5) of the IT Act. *Vide* Notification No. 03 dated 16 July 2022 issued by the Directorate of Income-tax (Systems) in exercise of powers conferred under Rule 131(1)/(2) of the IT Rules, the electronic furnishing of Form 10F was mandated.

Taking into consideration the practical difficulties faced by non-resident taxpayers not having PAN to comply with the aforementioned Notification, it is now notified that such category of non-resident taxpayers who are exempted from obtaining a PAN as per the relevant provisions of the IT Act and IT Rules, are exempted from complying with the mandatory e-filing of Form No. 10F till 31 March 2023. It has also been clarified that such category of non-resident taxpayers may comply with filing Form No. 10F manually as was being done prior to issuance of the Notification No. 03 of 2022.

Ratio Decidendi

- Jurisdiction under Section 263 not to be invoked by Commissioner when there is no lack of enquiry or where one of the possible views is adopted by AO – Calcutta High Court
- Sums received by Singapore company from Indian customers for provision of disaster recovery up-linking services and playout services cannot be taxed in India – ITAT Delhi
- Director cannot be proceeded against under Section 179, where non-recovery of demand from company is not due to his negligence – Gujarat High Court
- Transfer pricing – Section 92CA is a machinery provision – Section 153 deals exclusively with limitation – Madras High Court
- Prosecution – Age of assessee ought to be taken at date of opening foreign account and not the date on which amount was not disclosed in the Return – Delhi High Court

Ratio Decidendi

Jurisdiction under Section 263 not to be invoked by Commissioner when there is no lack of enquiry or where one of the possible views is adopted by AO

For AY 2016-17, the Ld. Assessing Officer ('AO') issued a show cause notice pointing out certain discrepancies in the return filed by the Appellant as regards claim of deduction under Section 35(2AB) and prior period expenses under the head 'advertisement'. After due consideration of the reply filed by the Appellant, an assessment order was passed under Section 143(3) of the IT Act allowing the deduction claimed by the Appellant.

Subsequently, the Commissioner issued an SCN under Section 263 of the IT Act to the Appellant, seeking to examine the records of the Appellant on two grounds namely, (i) Claim of deduction under Section 35(2AB), and (ii) Prior period expenses relating to advertisement.

The Commissioner, upon considering the submissions of the Appellant, passed an Order under Section 263 of the IT Act holding that the AO had passed the assessment order without making enquiries or verification which should have been made in the instant case, resulting in the assessment order being erroneous and prejudicial to the interest of the Revenue.

The High Court held that the assessment order was passed by the AO after due consideration of the reply filed by the Petitioner. Thus, it was not a case of lack of enquiry or lack of proper enquiry and thus, the Commissioner could not have invoked jurisdiction under Section 263 of the IT Act. The High Court, relying on *Malabar Industrial Company* (2000) 243 ITR 83 (SC), observed that when the AO had adopted one of the courses permissible under law and where two views were possible, the AO had taken one view with which the Commissioner though does not agree, the order cannot be treated as being erroneous, unless the view taken by the AO is unsustainable under law. It noted that the ITAT had further observed that there was neither any revenue implication and nor any prejudice that was caused to the revenue. Thus, the Commissioner could not have invoked jurisdiction under Section 263 of the IT Act [*PCIT* v. *Britannia Industries Ltd.* – [2022] 145 taxmann.com 618 (Calcutta)]

Sums received by Singapore company from Indian customers for provision of disaster recovery up-linking services and playout services cannot be taxed in India

The Appellant is a Singapore based company engaged in providing state of the art media technology solutions, having no PE/ business connection in India for the assessment year in

question. The Appellant holds a Tax Residency Certificate issued by the Singapore Government for the concerned period. During the scrutiny proceedings, the AO noticed that the Appellant had receipts majorly from the up-linking and allied services, playout services and sale of equipment. A notice was issued to the Appellant to show cause as to why the receipts from up-linking services and playout services should not be taxed as royalty.

The Hon'ble Tribunal decided the appeal in favour of the Appellant and held as under:

Levy of Royalty

- The Appellant's customers were neither in possession, nor in control/ have liability/ risks over any equipment or had any control over the equipment used by the Appellant for providing up-linking and playout services to its customers.
- Royalty in relation to 'use of a process' indicates that the payer must use the process on its own and bear the risk of its exploitation. However, in this case, the process is used by the Appellant itself and not by its customers.
- Moreover, the Appellant's customers are not privy to the 'know how' or 'intellectual property' involved in the provision of such services. The services availed by the customers from the Appellant are standard services provided by various other players in the industry. They are not granted the use of or right to use any process during the course of service. The customers are merely availing a service and not bearing any risk with respect to the exploitation of the Appellant's equipment involved in the provision of such service.
- Therefore, the Hon'ble Tribunal held that the amount received by the Appellant from its customers in India cannot be characterized as royalty for the use or right to use of a process.

Receipts from Disaster Recovery Playout Service as FTS

- With regard to the receipts from Disaster Recovery Playout service being treated as FTS, the Hon'ble Tribunal held that the service merely involves provision of uninterrupted availability of playout service at a predetermined level.
- The Hon'ble Tribunal held that only those services which involve application of any expert technical education or skill can be classified as technical service and routine services, which do not require application of any technical knowledge or skill cannot be classified as technical service.
- While holding the above, the Hon'ble Tribunal observed that for a service to be considered ancillary or subsidiary to the payment of royalty, the service must satisfy two conditions, namely:
  a. related to the application or enjoyment of the right, property, or information for which payment in the nature of royalty is received; and
  b. predominant purpose of the arrangement under which payment of service fee is received must be for

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application or enjoyment of the right, property, or information in respect of which the royalty is received.

- The Hon'ble Tribunal held the receipts from providing these services are not in the nature of FTS as envisaged under Article 12(4)(a) of the DTAA as they are not ancillary or subsidiary to the disaster recovery up-linking and allied services.
- The Appellant has provided Disaster Recovery Playout services to its customers through its facility in Singapore and the customers are not provided with any technology knowledge, experience, skill, know-how or processes as envisaged under Article 12(4) of the DTAA. Therefore, the Hon'ble Tribunal held that payments received by the Appellant as consideration for providing disaster recovery playout services are not taxable as FTS.

[*Adore Technologies Pvt. Ltd.* v. *ACIT* – [2022] 145 taxmann.com 597 (Delhi - Trib.)].

Director cannot be proceeded against under Section 179, where non-recovery of demand from company is not due to his negligence

The Petitioners were the Directors of the assessee-company. In the assessment of the assessee-company for AY 2014-15, the AO passed an assessment order making an addition on account of bogus unsecured loans. Consequentially, the AO raised the demand. Consequently, the AO issued a notice seeking to recover the outstanding dues from the said assessee-company.

Aggrieved by the order, the assessee-company preferred an appeal before the CIT (A). The company also filed an application before the AO, seeking for stay of the demand raised. The stay application was however rejected by the AO. Thereafter, the AO issued a show cause notice under Section 179 of the IT Act to the Petitioners.

Subsequently, the AO passed an order under Section 179 of the IT Act requiring the Petitioners to pay the outstanding dues of the assessee-company. Since the Petitioners were unable to pay the huge demand raised for not having adequate means, the AO passed an order under Rule 48 to the Second schedule of the IT Act attaching the residential property of the Petitioners. Aggrieved, the Petitioners filed the present petition before the High Court of Gujarat seeking to quash the attachment on the ground that the said order has been passed without jurisdiction as the basic condition for invoking Section 179 of the IT Act was not satisfied.

Section 179 of the IT Act provides as under:

> *"where any tax due from a private company cannot be recovered, every person who is a director of the company (during the relevant previous year) shall be jointly and severally liable for the payment of such tax, unless he is able to substantiate that non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part."*

The Hon'ble Gujarat High Court observed that the AO did not take any action against the assessee-company, except for issuing a recovery notice and attaching the assessee company's bank account. It was also observed that the AO is required to take efforts for the recovery of the outstanding dues from assessee-company which had actually committed the default of non-payment of the outstanding demand.

The Court held that the petitioners cannot be held negligent merely on the ground that they did not deposit 20% of the demand sought for as per the assessment order, to seek stay of demand during the pendency of appeal before the CIT (A). The Court quashed the attachment order and held that the Directors cannot be made liable to pay assessee's outstanding tax dues without taking adequate steps to recover the same from the assessee-company [*Devendra Babulal Jain* v. *Income tax Officer* – [2022] 145 taxmann.com 553 (Gujarat)].

Transfer pricing – Section 92CA is a machinery provision – Section 153 deals exclusively with limitation

The instant writ petition was filed by the Petitioner, seeking the quashing of the draft assessment order dated 26 July 2019 passed under Section 143(3) read with Section 144C(1) of the IT Act for the AY 2015-16.

The time limit for completion of an assessment during the year under consideration was 21 months from the end of the relevant year as provided under Section 153(1) of the IT Act. Thus, for the year under consideration, the assessment order ought to have been passed on or before 31 December 2017. However, since in the present case, a reference was made to the TPO, the provisions of Section 153(4) of the IT Act were attracted and the period for completion of assessment was extended by 12 months, thus enabling the AO to pass the assessment order by on or before 31 December 2018.

During the proceedings, the TPO made a reference for Exchange of Information as per Section 90A of the IT Act on 29 October 2018 and the same was received by him on 27 March 2019. Clause (x) of Explanation 1 to Section 153 provides that the period between which a TPO awaits for information from the competent authority should be excluded for computing the period of limitation. Thus, period between 29 October 2018 and 27 March 2019 was excluded in the given case. Further, the first proviso to Section 92CA(3A) of the IT Act provides that if the TPO has a time of less than 60 days to pass a transfer pricing order, then a period of 60 days shall be allowed to him. That is, the TPO was required to pass an order by 24 May 2019.

The TPO passed the order on 24 May 2019. Thus, the assessment order ought to have been passed on or before 22 July 2019 reckoning the period of 60 days from 24 May 2019. However, the assessment order was passed on 26 July 2019 which was beyond the period of limitation. Hence, the present petition.

The Revenue contended that as per provisions of Section 92CA(4) of the IT Act, the date of receipt of the order passed by the TPO,

by the AO would constitute the effective date for computing the period of 60 days for the completion of assessment. Basis the same, the Revenue argued that the assessment order was passed within the limitation period.

The Court held that Section 92CA of the IT Act is only a machinery provision that provides procedure for passing a Transfer Pricing Order and does not constitute a straitjacket formula for computing the limitation. It further held that 60 days period as provided under the second proviso to Explanation 1 of Section 153 must run from the date of Transfer Pricing Order to provide seamless completion of assessment and held that the transmission of TPO's order to AO is an internal administrative act and cannot impact statutory limitation, which is exclusive prerogative of Section 153 of the IT Act. In the circumstances, the Court quashed the assessment order for being barred by limitation [*Pfizer Healthcare India Pvt. Ltd.* v. *DCIT* – TS 924 HC 2022 (Mad)-TP].

Prosecution – Age of assessee ought to be taken at date of opening foreign account and not the date on which amount was not disclosed in the Return

A complaint was filed by the ITO under Section 276C(1) / 276D and 277 of the IT Act against the Petitioner pertaining to AY 2006-07 on the alleged ground that the Petitioner failed to disclose both the account at HSBC London and the credit balance lying therein in its Return of Income ('**RoI**'). In the year 2011, in pursuance of an information received from the Government of France under the Tax Treaty with India, the said HSBC Bank account in London in the year 1991 was learned by the Department-Respondents. Based on the said information, a search and seizure operations were carried out at the Petitioner's residence and business premises under Section 132 of the IT Act. Pursuant to the search proceedings, notice under Section 153A of the IT Act was issued requiring the Assessee to file RoI for the Assessment Years 2005-06 to 2010-11. As regards the AY 2006-07, the Petitioner filed a revised RoI on 16 May 2015 declaring the aforesaid credit balance as his income, which he did not disclose earlier and paid additional tax for the same as well.

On 27 February 2015, an assessment order under Section 153A of the IT Act was passed and certain penalty under Section 271(1)(c) was levied on the Petitioner for not having disclosed his true income. Prosecution proceedings were also initiated against the Petitioner under Section 276C(1) / 276D / 277 of the IT Act. Aggrieved, the Petitioner filed an application before the Trial Court under Section 245(2) of CrPC seeking to quash the complaint case. The Petitioner contended before the Trial Court that the Authority cannot initiate prosecution against him on account of his age. That he would be covered by the Circular/Instruction No 5051 dated 7 February 1991 issued by the CBDT, which read as: *"Prosecution need not normally be initiated against persons who have attained the age of 70 years at the time of commission of offence"*.

The Trial Court however dismissed the application. Aggrieved, the Petitioner preferred the present criminal petition seeking to quash the complaint case registered against him under the provisions of Section 276C(1)/ 276D / 277 of the IT Act. The Petitioner argued before the High Court that at the time of commission of offence, which is non-disclosure of income in the Original RoI for AY 2006-07, the Petitioner had already attained the age of 70 years. Thus, in view of the CBDT Circular No 5051 dated 7 February 1991, no prosecution can be launched against him.

The Court held that the phrase 'commission of offence' as provided in the Circular is to be considered in the given case as the date of opening of the HSBC Account London itself which is in the year 1991 and not the date on which the account/ amount was not disclosed in the RoI or when the income was offered to tax in the revised RoI. In the given facts, the Petitioner was 55 years of age at the time of opening the HSBC Bank Account in London. That being the case, the Court held that the Petitioner cannot take shield of the Circular No. 5051, and thus dismissed the criminal petition filed and allowed for the prosecution proceedings to continue. [*Rajinder Kumar* v. *State & Anr.* – Judgement dated 16 December 2022 in Crl. M.C. 462/2017 & Crl. M.A. 2055 of 2017, Delhi High Court].

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