Lakshmikumaran & Sridharan attorneys

Direct Tax

amicus

An e-newsletter from
Lakshmikumaran & Sridharan, India

November 2021 / Issue–86

Contents

Article
Determination of year of taxability for transfers arising out of registered Joint Development Agreements 2

Notifications & Circulars 6

Ratio Decidendi 8

November
2021

Article

Determination of year of taxability for transfers arising out of registered Joint Development Agreements

By **Abhinov Vaidyanathan**

Introduction

In recent times, the most preferred mechanism adopted by the land owners to transfer their immovable property has been under a Joint Development Agreement ('**JDA**'). This mode is usually preferred by those land owners who want to develop their lands but do not have the requisite expertise to carry out the same. Therefore, they enter into a JDA with a developer for developing and marketing the land parcel to the buyers for a mutual benefit.

JDAs are entered into either under the Revenue Sharing Model or the Area Sharing Model. Out of the two methods, the Area Sharing Model is more preferred by the land owners wherein the developer will be given a share in the land and consequently, the land owner will get a share in the built-up area.

There have been disputes between the assessee and the Department with respect to determining the year of taxability of capital gains arising out of the transfer of immovable property under JDAs. Disputes relating to when a transfer will take place in case of a JDA were given a quietus in specific cases by introduction of Section 45(5A) in the Income Tax Act, 1961 ('**IT Act**') with effect from 1 April 2018. However, the disputes have continued for transactions entered previously or not covered by Section 45(5A).

This article attempts to analyze the said aspect in light of the provisions of the IT Act and jurisprudence laid down by various Courts in case of registered JDAs.

Analysis of the relevant provisions under the IT Act / Scope of Section 2(47)(v)

Section 45 of the IT Act provides that any profits or gains arising from the transfer of a capital asset effected in the previous year shall be chargeable to income-tax under the head 'capital gains' and shall be deemed to be the income of the previous year in which the transfer took place.

The fundamental features which determine the taxability of capital gain are that the gain ought to be from the transfer of a capital asset. The said provision has a large scope of operation due to the presence of the deeming fiction which states that the gain shall be the deemed income of that previous year in which the transfer took place. In other words, the profits may actually be received in any other year, but for the purposes of Section 45, the gain shall be the deemed income of the year of transfer of the capital asset. In the context of JDA transactions, it is important to analyse the point in time in which the transfer can be said to have taken place for the purposes of Section 45.

Section 2(47)(v) of the IT Act provides that 'transfer' in relation to a capital asset, includes any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in Section 53A of the Transfer of Property Act, 1882 ('**TOPA**'). In order to attract Section 2(47)(v), it is essential

© 2021 Lakshmikumaran & Sridharan, India
All rights reserved

that the conditions stipulated under Section 53A of the TOPA are satisfied.

The Bombay High Court in *Chaturbhuj Dwarkadas Kapadia of Bombay* v. *CIT*[1] observed that in order to attract Section 53A of TOPA, the following conditions need to be fulfilled:

i. There should be a contract for consideration;
ii. It should be in writing;
iii. It should be signed by the transferor;
iv. It should pertain to transfer of immovable property;
v. The transferee should have taken possession of the property;
vi. The transferee should be ready and willing to perform his part of the contract.

Date of execution of the JDA must be taken as the date of transfer

The Hon'ble Bombay High Court in *Chaturbhuj Dwarakadas Kapadia of Bombay (supra)* dealt with an issue as to whether the transfer of an immovable property took place on the date of execution of the JDA or in the year in which substantial compliances were carried by the developer as per the JDA. In the present case, the assessee entered into a JDA with a developer on 18 August 1994 and executed a limited power of attorney in favour of the developer on the same day. The developer had made substantial payments and obtained two permissions for the construction in AY 1996-97. Subsequently, the assessee executed an irrevocable license in favour of the developer on 12 March 1999 to enter the property. The assessee contented before the lower authorities that the transfer took place only when he executed the irrevocable licence in favour of the developer to enter upon the property and, therefore, liability to pay capital gain only arose during the AY 1999-2000. However, the Tribunal held that since substantial payments and permissions were obtained in AY 1996-97, the capital gains is taxable in AY 1996-97. The High Court observed that in the instant case, the agreement was a Development Agreement and the test to be applied to decide the year of chargeability was the year in which the transaction had been entered into. This view was taken for the reason that the Development Agreement does not transfer the interest in the property to the developer in general law and, therefore, by application of Section 2(47)(v), even entering into such a contract could amount to transfer from the date of the agreement itself. The Court further observed that substantial compliance would differ from officer to officer and therefore, it cannot be taken as reason to decide the year of taxability. The Court held that once under the agreement a limited power of attorney was intended to be given to the developer to deal with the property, the date of the contract/JDA viz., 18 August 1994 would be the relevant date to decide the date of transfer under Section 2(47)(v) and, in which event, the question of substantial performance of the contract thereafter did not arise.

The Bangalore ITAT in a recent decision of *Jaico Automobile Engineering Company Pvt. Ltd.* v. *ITO*[2] also dealt with a similar issue. The assessee had executed a JDA, General Power of Attorney ('**GPA**') and sale agreement with a developer on 30 March 2007. All the three documents were registered. As per the JDA, it was agreed between the parties that possession would be given to the developer in pursuance of the agreement on or before 30 November 2007. The reason for fixing the date was on the basis of

[1] (2003) 129 Taxman 497 (Bombay)

[2] [2021] 131 taxmann.com 295 (Bangalore - Trib.)

© 2021 Lakshmikumaran & Sridharan, India
All rights reserved

payment of refundable deposit of INR 35 crores. The developer had paid INR 15 crores while the agreement was executed, and the balance was required to be paid on or before 30 November 2007. The question before the ITAT was to decide whether there was a valid transfer of property on the date of executing the JDA. The assessee contended that since it was specifically agreed between the parties that possession would be handed over only on 30 November 2007 or earlier if the balance of the refundable deposit was made, there was no transfer of possession contemplated on or before 30 March 2007. The assessee further contended that the developer had not carried out any construction activity during the said period and therefore, there was no performance of the contract by way of development of the property during the relevant year. Therefore, the assessee took a stand that there was no transfer of property to the developer in AY 2007-08 as the conditions stipulated under Section 53A of TOPA were not satisfied. On the other hand, the Department contended that by virtue of the JDA, the assessee granted the developer the right of development of the site and that such right was irrevocable. Since, the assessee had also executed an irrevocable GPA in favour of the developer to develop, alienate, sale, convey and lease the constructed area, there was a valid transfer as per Section 2(47)(v) of the IT Act in AY 2007-08. The ITAT observed that from a perusal of the contents of the JDA and GPA dated 30 March 2007, it can be inferred that the assessee had provided to the developer all facilities to entry, development and even sale of the constructed built-up area. Therefore, such unhindered access provided to the developer is very much in the nature of possession even if the word as such has not been mentioned in the JDA. The ITAT further observed that the GPA also gives irrevocable powers of not only possession but, even to alienate and sell the constructed area. Therefore, the ITAT held that the transactions entered by way of JDA dated 30 March 2007 would constitute a 'transfer' in terms of Section 2(47) of the IT Act r.w. Section 53A of TOPA and therefore, the capital gains arising out of the said transfer is taxable in AY 2007-08.

The Chennai ITAT in *Tamilnadu Brick Industries* v. *ITO*[3] dealt with an issue as to whether a registered GPA along with a JDA conferring entitlement to the developer to sell, convey or deal with the property amount to transfer of property as per Section 2(47)(v) of the IT Act. The assessee in the present case had executed a JDA along with a GPA in favour of the developer on 17 September 2012. The assessee had contended that it had only permitted the developer to enter and exit the property for the purpose of development and therefore, the same shall not be construed as deliver of possession or part performance contemplated under Section 53A of TOPA. The ITAT observed that execution of a GPA in favour of the developer confers the entire possession of the property to the developer and thereby attracts Section 53A of TOPA and therefore, the date of execution of JDA along with GPA must be considered for purposes of Section 2(47)(v) of the IT Act.

Date of execution of the JDA cannot be taken as the date of transfer

The Hyderabad ITAT in *S. Ranjith Reddy* v. *DCIT*[4] dealt with an issue as to whether mere execution of a JDA without commencement of construction be held as transfer as per Section 2(47)(v) of the IT Act. The Assessee had entered into a JDA with a developer on 28 February 2006. During the relevant year, the developer had not started the construction of the project. The ITAT observed that usually in cases where an assessee enters into a contract which is a

[3] (2018) 97 taxmann.com 1
[4] (2013) 35 taxmann.com 415

© 2021 Lakshmikumaran & Sridharan, India
All rights reserved

development agreement, in the garb of agreement of sale, it is the date of the development agreement which is material to decide the date of transfer. However, it was further observed that by no stretch of logic, this legal precedent can support the proposition that all development agreements, in all situations, satisfy the conditions of Section 53A which is a *sine qua non* for invoking Section 2(47)(v). The ITAT observed that a plain reading of the Section 53A shows that for a contract to fall under the ambit of Section 53A, it is necessary that transferee should have or is willing to perform his part of the contract. Therefore, it is clear that willingness to perform for the purposes of Section 53A is something more than a statement of intent and it is the unqualified and unconditional willingness on the part of the vendee to perform its obligations. Thus, unless the party has performed or is willing to perform its obligations under the contract, and in the same sequence in which these are to be performed, it cannot be said that the provisions of Section 53A will come into play on the facts of that case. It was observed that it is only elementary that, unless provisions of Section 53A of TOPA are satisfied on the facts of a case, the transaction in question cannot fall within the scope of deemed transfer under section 2(47)(v). In light of the abovementioned observations, it was held that once it is concluded that the developer did not perform the stipulations as required by the JDA during the period under consideration and within the meaning assigned to the expression in Section 53A, it cannot be said that there was a transfer under section 2(47)(v) so as to levy capital gain tax on the date of execution of the JDA.

The Hyderabad ITAT in *Binjusaria Properties (P.) Ltd.* v. *ACIT*[5] also deals with a similar issue. The assessee had entered into a JDA-cum-GPA in AY 2006-07 with a developer. The developer had to develop the property according to the approved plan from the competent authority and deliver the assessee 38% of the constructed area in the residential part. During the relevant year, the process of construction had not been initiated and no approval for the construction of the building was obtained by the developer. The lower authorities opined that that the transfer had taken place during the relevant year, in terms of the development agreement-cum-GPA and therefore, the assessee was liable to pay capital gain tax on the date of executing the JDA. The ITAT observed that while the assessee had fulfilled its part of the obligation under the JDA, the developer had not done anything to discharge the obligations cast on it and therefore, the capital gains could not be brought to tax in AY 2006-07, merely on the basis of signing of the JDA during relevant year.

In *Rameysh Ramdas* v. *ITO*[6], the assessee had on 13 November 2011 entered into a JDA with a developer to demolish and construct residential apartments. As per the JDA, the assessee was to receive some monetary consideration along with 50% of the built-up area. Subsequently, the assessee executed a POA on 17 August 2012 granting the developer the authority to convey, sell, transfer the property. It was contended by the assessee that the transfer took place only in AY 2013-14, subsequent to executing the POA dated 17 August 2012. However, the Assessing Officer held that capital gains were liable to be taxed in AY 2012-13 since there was a transfer under Section 2(47)(v) as on the date of executing the JDA. The ITAT observed that as per the JDA, the possession had not been handed over to the developer as the assessee had only granted a right to enter into the premises for the purposes of demolition and re-construction. Additionally, it was observed

[5] (2014) 45 taxmann.com 115

[6] I.T.A No. 1399/Chny/2017 – Chennai Tribunal

© 2021 Lakshmikumaran & Sridharan, India
All rights reserved

that the POA granted in favour of the developer specifically barred the developer from selling or executing any deed for any portion of the property. Thus, it was observed that neither the JDA nor the POA complied with the conditions specified in Section 53A of TOPA. The ITAT held that the transfer in the present case took place only after execution of the POA dated 17 August 2012 in favour of the developer granting the authority to convey, sell, transfer the property. Therefore, the capital gain, if any was leviable only in AY 2013-14 and not during AY 2012-13 when the JDA was executed.

Conclusion

Therefore, it can be said that a straight-jacket formula cannot be applied in order to determine the year of taxability in cases where transfer of an immovable property takes place through registered JDAs. In other words, it cannot be said that in every case, the transfer of an immovable property would take place on the date of execution of a JDA itself. As mentioned in the cases discussed above, all the conditions stipulated under Section 53A of TOPA have to be satisfied for a transaction to qualify as a transfer for the purposes of Sections 2(47)(v) and 45 of the IT Act. Therefore, determination of the year of taxability of capital gains w.r.t. to transactions pertaining to registered JDAs will differ from facts and circumstances of each case. Willingness to perform is a necessary fact to be established in concluding whether or not there exists transfer in terms of Section 2(47)(v) of the IT Act.

[The Author is Senior Associate in Direct Tax practice team at Lakshmikumaran and Sridharan Attorneys, Chennai]

Notifications & Circulars

Exemption eligibility if loans or borrowings taken by specified funds for investment in India

Section 10(23FE) provides exemption to sovereign wealth funds and pension funds (‘**specified funds**’) on their income like dividend, interest, and long-term capital gains which arises from investments made between 1 April 2020 and 31 March 2024, subject to fulfillment of certain conditions. Seventh proviso to the section was inserted by the Finance Act, 2021 which provided that in case the specified funds have loans or borrowings, directly or indirectly, for the purposes of making the investment in India, such fund shall be deemed to be not eligible for exemption. Thereafter concerns were raised with respect to lack of clarity to the term ‘indirectly’ as the same has not been defined in the Act. Hence, to remove such difficulties, the following clarifications have been issued:

(a) If the loans and borrowings have been taken by the specified funds or any of their group concerns, specifically for the purposes of making an investment by the specified funds in India, such funds shall not be eligible for exemption; and

© 2021 Lakshmikumaran & Sridharan, India
All rights reserved

(b) If the loans and borrowings have been taken by the specified funds or any of their group concern, not specifically for the purposes of making investment in India, it shall not be presumed that the investment in India has been made out of such loans and borrowings. Accordingly, such specified fund shall be eligible for exemption under Section 10(23FE), subject to the fulfilment of all other conditions. However, the source of the investment in India by such specified fund shall not be from such loans and borrowings. Circular No. 19 of 2021, dated 26 October 2021 has been issued for the purpose.

E-Settlement Scheme, 2021 notified

CBDT has notified the e-Settlement Scheme, 2021, having the following salient features:

- The Scheme shall be applicable to pending applications in respect of which the applicant has not exercised the option under Section 245M(1) of the Income Tax Act, 1961 and which has been allotted or transferred by Central Board of Direct Taxes to an Interim Board. Section 245M(1) notifies that the assessee who had filed such application may withdraw such application within a period of three months from the date of commencement of the Finance Act, 2021 and intimate the Assessing Officer about the same.
- Interim Board shall conduct e-settlement of pending applications allocated or transferred to it and it shall have such income-tax authority, ministerial staff, executive or consultant to assist the members of the Interim Board, as considered necessary by Central Board of Direct Taxes.
- Under this scheme, all communications between the Interim Board and the applicant, or his authorised representative, shall be exchanged by electronic mode, provided that any application received in a mode other than electronic mode by the Interim Board may be forwarded to the Principal Commissioner or the Commissioner electronically, to the extent technologically feasible.
- Every notice or order or any other electronic communication under this Scheme from the Interim Board shall be delivered to the addressee, being the applicant by sending an e-mail to the registered email address of the applicant or his authorised representative.
- Applicant shall not be required to appear either personally or through an authorized representative in connection with any proceedings under this Scheme before the Interim Board or before any Income-tax Authority or ministerial staff posted with the Interim Board.
- The Scheme also provides for a detailed procedure for settlement.

Additional information to be uploaded in Form 26AS

CBDT has authorized Director General of Income-tax (Systems) to upload eight new information in Form 26AS. The new information is relating to Foreign remittance information reported in Form 15CC, Information in Annexure II of the 24Q TDS Statement of the last quarter, Information in ITR of other taxpayer, Interest on Income Tax Refund, Information in Form 61/61A where PAN could be populated, Off Market Transactions Reported by Depository/ Registrar and Transfer Agent (RTA), Information about dividend of mutual fund reported by RTA, and Information about purchase of mutual fund reported by RTA.

Declaration by company for settling retrospective tax cases – Rules notified

© 2021 Lakshmikumaran & Sridharan, India
All rights reserved

Section 119 to Finance Act, 2012 was introduced to effectuate the retrospective amendments made to Section 9(1)(i) by the Finance Act, 2012 for taxing the indirect transfers. This retrospectivity was recently nullified by the Taxation Laws (Amendment Act), 2021 pursuant to which Rules 11UE and 11UF of the Income Tax Rules, 1962 were also notified.

Ministry of Finance has now notified the Relaxation of Validation (Section 119 of the Finance Act, 2012) Rules, 2021 prescribing the forms and conditions for the declaration to be filed by the company for settling its case. The Rules seek to extend the conditions, form and manner of settling retrospective tax cases notified earlier to those cases where the tax demand was validated under a special provision.

These Rules provide that the form and manner of furnishing undertaking under Explanation to fifth and sixth proviso to Explanation 5 to Section 9(1)(i) as prescribed under Rule 11UE(1)/(3) and Rule 11UF of the Income-tax Rules, 1962, shall *mutatis mutandis* apply to clauses (i), (ii) and (iii) of the first proviso to Section 119 of the Finance Act, 2012. It is also provided that the conditions for the purposes of clause (iv) of the Explanation to fifth and sixth proviso to Explanation 5 to Section 9(1)(i) as prescribed under Rule 11UE(2) shall also *mutatis mutandis* apply to clause (iv) of the first proviso to Section 119 of the Finance Act, 2012.

Deduction available of expenditure incurred to purchase sugarcane up to the price fixed by State Government

Section 36(1)(xvii) of the Income Tax Act provides for deduction of the expenditure incurred by the co-operative societies who are engaged in the manufacture of sugar. An issue was brought to the notice of the CBDT with respect to the tax liability on the additional payment for sugarcane made by co-operative sugar mills as income distribution to farmer members.

In this regard, it has now been clarified that the 'price fixed or approved by the Government' referred to in the said provision includes price fixed by State Governments through State Acts/Orders or other legal instruments that regulate purchase price for sugarcane, including the State Advised Price which may be higher than the Statutory Minimum Price/Fair and remunerative Price fixed by the Central Government.

Ratio Decidendi

Mere signing of contract without having any other activity in India cannot trigger PE exposure in India

The assessee, a company incorporated in and a tax resident of Sweden, was engaged in the business of supply of GSM System to various cellular companies operating in India. The assessee was a wholly owned subsidiary of Ericsson Sweden ('holding company'). The holding company also has a wholly owned subsidiary in India namely Ericsson India Pvt Ltd. In the given facts, the assessee had entered into contracts with ten cellular operators for the

© 2021 Lakshmikumaran & Sridharan, India
All rights reserved

supply of hardware equipment and software. The contracts were signed in India. The supply of the equipment was on CIF basis and the assessee took responsibility thereof till the goods reached India. The equipment was not to be accepted by the customer till the acceptance test was completed in India. The question was whether the assessee has business connection and exposure to Permanent Establishment ('**PE**') in India. The assessee claimed that the income arising from the said activity was not chargeable to tax in India as it does not have any PE in India. However, both AO as well as CIT(A) held that the assessee had a 'business connection' in India under Section 9(1)(i) of the IT Act and a 'permanent establishment' under Article 5 of the DTAA between India and Sweden. It was also held that the income from supply of software was assessable as 'royalty' under Section 9(1)(vi) of the IT Act and Article 13 of the DTAA. On appeal, the Tribunal however allowed the appeal of the assessee on the following points, amongst others:

a. Signing of contract in India is of no material consequence since all the activities in connection with offshore supplies were carried outside India. Reliance was placed on the Supreme Court decision in the case of *Ishibkawajima-Harima Heavy Industries Ltd*. [288 ITR 408].

b. Though the supply of equipment was subject to the 'acceptance test' performed in India, it was not material since the contract made it clear that the 'acceptance test' was not a material event for passing of the title and risk in the equipment supplied. It was further held that the position might have been different if the buyer had the right to reject the equipment on the failure of the acceptance test carried out in India, which could then connote to having a 'business connection' in India.

c. Income from supply of software cannot be assessed as royalty under Section 9(1)(vi) of the IT Act since software was an integral part of the equipment and cannot be bifurcated. Reliance was placed on *Tata Consultancy Services* [271 ITR 401 (SC)], *Sundwiger EMFG* [266 ITR 110] and *Dassault Systems* [229 CTR 125 (AAR)].

[*Ericsson AB Sweden* v. *Assistant Commissioner of Income Tax* – Order dated 27 October 2021 in ITA No. 1735 to 1737/Del/2018, ITAT Delhi]

Absent a principal-agent relationship, deduction of TDS under Section 194H is not warranted

The respondent/assessee was engaged in the business of providing laboratory and testing services to customers through its own and through third party collection centres and allowed discounts to the collection centres. The collection centres, on receipt of payments from customers would transfer the reduced fee to the assessee/respondent, retaining the balance as discount. This discount according to the Revenue was the commission paid to the collection centres and the Respondent therefore had the obligation to deduct TDS for commission paid as per Section 194H of the IT Act.

Aggrieved, the assessee/respondent filed an appeal before the CIT(A) who allowed the appeal. The Revenue, being aggrieved, challenged the order before the ITAT. The ITAT dismissed the appeal and passed a favourable order to the assessee/respondent relying on assessee's own case for previous AY 2006-07 where the same question of law was adjudicated. The Tribunal held that the discount allowed by the assessee to the collection centres did not establish any principal-agent relationship between them but only showcased a principal and principal relationship. Hence, the provisions of Section 194H will not be attracted.

© 2021 Lakshmikumaran & Sridharan, India
All rights reserved

Revenue department's appeal to the Bombay High Court was also dismissed by the Court by upholding the findings of the ITAT. The High Court further held that for Section 194H to be made applicable, the person must be responsible for paying such amount as commission to a resident. Noting that it was the collection centre which was remitting the reduced payment to the assessee and not *vice versa*, it held that the assessee could not be subjected to the provisions of Section 194H of the IT Act.

[*Commissioner* v. *Super Religare Laboratories Ltd.* – TS-1022-HC-2021(BOM)]

Classification of agricultural land as non-agricultural by buyer not attracts capital gains in seller's hands

The assessee sold an agricultural land in favour of Kerala State Industrial Development Corporation Limited ('**buyer**'). The dispute between the Revenue and the assessee was with respect to levy and demand of capital gains tax on the land ('**scheduled property**') sold by the assessee to the buyer. In the Assessment Order, the AO stated that the assessee had converted the scheduled property as a non-agricultural land by cutting of rubber trees to sell it to the buyer who in turn was going to develop it into an industrial estate. In these circumstances, the AO held that the capital gains are attracted on the consideration received from such sale as the scheduled property was not an 'agricultural land' for the purpose of Section 2(14) of the IT Act. The Assessment Order was confirmed by the CIT(A).

Allowing the assessee's appeal, the ITAT examined whether the scheduled property was an agricultural land or not. It held that the since the scheduled property was used for agriculture purpose till the date of sale, usage of the scheduled property for non-agriculture purposes by the buyer of land cannot deny its classification as being an agricultural land for the seller. The Tribunal further went on to hold that the actual use of land on the date of sale is an important criterion to decide the application of the expression 'agricultural land'. The ITAT distinguished the Supreme Court decision in the case of *Sarifabibi Mohmed Ibrahim* [(1993) 204 ITR 631 (SC)] as there the property was not put to use for agriculture purposes for over more than 4 years preceding the date of sale.

Aggrieved, the Revenue preferred an appeal before the High Court of Kerala. The High Court after referring to various ruling of different High Courts in the cases of *V A Trivedi* [(1988) 172 ITR 95 (Bom)] and *Kalathingal Faizal Rahman* [(2019) 416 ITR 311 (Ker)] held that categorization of a land as capital asset or agricultural must be on a case to case basis and that the rulings given by various High Courts can at best be referred to as guidelines only. The High Court on examination of the facts on hand held that cutting of rubber trees by the assessee has not in any way altered the land form from its original classification and that at best made the property an arable land. [*Commissioner* v. *Cochin Malabar Estates & Industries Ltd.* – TS-1013-HC-2021(KER)]

Revisionary power under Section 263 to be exercised by Commissioner suo moto and not under any recommendation or reference

The assessee was a foreign company incorporated in Sweden and had filed a return declaring NIL income. The assessment under Section 143(3) of the IT Act was completed and the income returned by the assessee was accepted by the AO. Thereafter, the AO sent a proposal to the Commissioner of Income Tax ('**CIT**') to initiate revision proceedings u/s 263 of the IT Act to examine whether the fee received from an Indian entity on supply of software licenses and IT support services should be

© 2021 Lakshmikumaran & Sridharan, India
All rights reserved

chargeable to tax under sec 9(1)(vi) of the IT Act as 'royalty'. The CIT on examination of the facts held that the assessment order passed was completely erroneous and prejudicial to the interest of the revenue as the fee received by the assessee-company is royalty under Section 9(1)(vi) of the IT Act.

Aggrieved, the assessee challenged the order before the Tribunal. The Tribunal observed that before exercising the revisionary powers granted under Section 263 of the IT Act, the CIT must first satisfy the twin conditions as provided in the statute, i.e. (i) CIT calls for and examines the records of any proceedings under the Act, and (ii) CIT concludes that the assessment order passed is erroneous and prejudicial to the interest of the revenue. The Tribunal held that to invoke the jurisdiction under Section 263, the CIT must on its own call for and examine the record of proceedings under the Act which would lead him to consider the assessment to be erroneous. However, in the given facts, it was the proposal made by the Assessing Officer which led to the invocation of Section 263 by the CIT. The Tribunal held that this communication from the Assessing Officer cannot be said to be 'record of any proceedings under the Act' and therefore the condition for invocation of the revisionary power under Section 263 was not magnetized. It was held that the CIT must exercise the power *suo moto* and not through the recommendation of an AO. [*Alfa Laval Lund AB* v. *Commissioner* – TS-1024-ITAT-2021(PUN)]

Black Money Act can be used to trace undisclosed foreign bank accounts which existed but closed prior to its coming into force

In the instant case, the assessee, inter alia, raised the following questions before the Tribunal: (a) Whether a bank account abroad or any unaccounted asset abroad, which did not exist at the point of time when the Black Money (Undisclosed Foreign Income & Assets) and Imposition of Tax Act, 2015 ('**BMA**') came in force, can be assessed under the said legislation?; (b) Whether an undisclosed bank account abroad can be treated as an asset under Section 2(11) of BMA?; (c) Whether the provisions of BMA can be pressed into service in respect of an undisclosed foreign asset or income which was already in the knowledge of the revenue authorities at the point when the said legislation came into force?

As regards the first ground, the Tribunal held that the bank account abroad or any unaccounted asset abroad, which did not exist when BMA came into force can be assessed under BMA as there is no indication anywhere that the assessee must continue to hold the asset anywhere. Proviso to Section 3(1) on the contrary, specifically mentions about the assets held in the past inasmuch as it provides that "*Provided that an undisclosed asset located outside India shall be charged to tax on its value in the previous year in which such asset comes to the notice of the Assessing Officer*". Hence if the BMA come into force from 1st April 2016, and an asset held prior to 1st April 2016 comes to the notice of the Assessing Officer, the Assessing Officer is clearly within his powers to bring it to tax.

As regards the second ground, it is the finding of the Tribunal that "*what has been brought to tax is only the income which is clearly discernible from the bank account in question and not the value of the asset itself*". In the light of Rule 3 of Black Money Rules, the Tribunal further held that the valuation mechanism for a bank account confirms that the intent of the legislature, and understanding of policy makers, always was to include the bank account in the scope of undisclosed foreign assets. Hence, such

© 2021 Lakshmikumaran & Sridharan, India
All rights reserved

undisclosed foreign bank account *per se* can be treated as an asset under Section 2(11) of BMA.

As regards the next ground, the Tribunal held that for a general application of BMA, the material factor should be as to whether such income remains undisclosed in the return and not whether the same was in the knowledge of the Assessing Officer. [*Rashesh Manhar Bhansali* v. *Additional Commissioner* – TS-1015-ITAT-2021(Mum)]

© 2021 Lakshmikumaran & Sridharan, India
All rights reserved

NEW DELHI
5 Link Road, Jangpura Extension,
Opp. Jangpura Metro Station,
New Delhi 110014
Phone : +91-11-4129 9811

B-6/10, Safdarjung Enclave
New Delhi -110 029
Phone : +91-11-4129 9900
E-mail : lsdel@lakshmisri.com

MUMBAI
2nd floor, B&C Wing,
Cnergy IT Park, Appa Saheb Marathe Marg,
(Near Century Bazar)Prabhadevi,
Mumbai - 400025
Phone : +91-22-24392500
E-mail : lsbom@lakshmisri.com

CHENNAI
2, Wallace Garden, 2nd Street
Chennai - 600 006
Phone : +91-44-2833 4700
E-mail : lsmds@lakshmisri.com

BENGALURU
4th floor, World Trade Center
Brigade Gateway Campus
26/1, Dr. Rajkumar Road,
Malleswaram West, Bangalore-560 055.
Phone : +91-80-49331800
Fax:+91-80-49331899
E-mail : lsblr@lakshmisri.com

HYDERABAD
'Hastigiri', 5-9-163, Chapel Road
Opp. Methodist Church,
Nampally
Hyderabad - 500 001
Phone : +91-40-2323 4924
E-mail : lshyd@lakshmisri.com

AHMEDABAD
B-334, SAKAR-VII,
Nehru Bridge Corner, Ashram Road,
Ahmedabad - 380 009
Phone : +91-79-4001 4500
E-mail : lsahd@lakshmisri.com

PUNE
607-609, Nucleus, 1 Church Road,
Camp, Pune-411 001.
Phone : +91-20-6680 1900
E-mail : lspune@lakshmisri.com

KOLKATA
2nd Floor, Kanak Building
41, Chowringhee Road,
Kolkatta-700071
Phone : +91-33-4005 5570
E-mail : lskolkata@lakshmisri.com

CHANDIGARH
1st Floor, SCO No. 59,
Sector 26,
Chandigarh -160026
Phone : +91-172-4921700
E-mail :lschd@lakshmisri.com

GURUGRAM
OS2 & OS3, 5th floor,
Corporate Office Tower,
Ambience Island,
Sector 25-A,
Gurgaon-122001
Phone : +91-124-477 1300
E-mail : lsgurgaon@lakshmisri.com

PRAYAGRAJ (ALLAHABAD)
3/1A/3, (opposite Auto Sales),
Colvin Road, (Lohia Marg),
Allahabad -211001 (U.P.)
Phone : +91-532-2421037, 2420359
E-mail : lsallahabad@lakshmisri.com

KOCHI
First floor, PDR Bhavan,
Palliyil Lane, Foreshore Road,
Ernakulam Kochi-682016
Phone : +91-484 4869018; 4867852
E-mail : lskochi@laskhmisri.com

JAIPUR
2nd Floor (Front side),
Unique Destination, Tonk Road,
Near Laxmi Mandir Cinema Crossing,
Jaipur - 302 015
Phone : +91-141-456 1200
E-mail : lsjaipur@lakshmisri.com

NAGPUR
First Floor, HRM Design Space,
90-A, Next to Ram Mandir, Ramnagar,
Nagpur - 440033
Phone: +91-712-2959038/2959048
E-mail : lsnagpur@lakshmisri.com

Disclaimer: *Direct Tax Amicus* is meant for informational purpose only and does not purport to be advice or opinion, legal or otherwise, whatsoever. The information provided is not intended to create an attorney-client relationship and not for advertising or soliciting. Lakshmikumaran & Sridharan does not intend to advertise its services or solicit work through this newsletter. Lakshmikumaran & Sridharan or its associates are not responsible for any error or omission in this newsletter or for any action taken based on its contents. The views expressed in the article(s) in this newsletter are personal views of the author(s). Unsolicited mails or information sent to Lakshmikumaran & Sridharan will not be treated as confidential and do not create attorney-client relationship with Lakshmikumaran & Sridharan. This issue covers news and developments till 19 November 2021. To unsubscribe, e-mail Knowledge Management Team at **newsletter.directtax@lakshmisri.com**

www.lakshmisri.com **www.gst.lakshmisri.com**
www.addb.lakshmisri.com **www.lakshmisri.cn**

© 2021 Lakshmikumaran & Sridharan, India
All rights reserved