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CSR Regulations and charitable institutions – Recent developments

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Corporate law front:

With the advent of The Companies Act, 2013 (‘**Companies Act**’), the corporates were casted with the mandatory Corporate Social Responsibility (‘**CSR**’) obligation. Section 135 of the Companies Act provides that every company meeting a stipulated threshold shall spend at least 2% of the average net profits earned during the three immediately preceding financial years, towards CSR activities. The expenditure has to be incurred on CSR activities, as provided in the Companies Act read with The Companies (CSR Policy) Rules, 2014 (‘**CSR Rules**’). The CSR activities must be undertaken by the companies itself, or through implementing agencies provided under Rule 4(1) of the CSR Rules. Rule 4(1) of the CSR Rules, *inter-alia*, provides that charitable trusts or societies registered under Sections 12A and 80G of the Income-tax Act, 1961 (‘**IT Act**’) are eligible to work as implementing agencies.

The Ministry of Corporate Affairs (‘**MCA’**) has further amended Section 135 and the CSR Rules with effect from 22 January 2021.

This article analysis the various Income-tax implications of these amendments and related aspects, on the companies and charitable trusts/societies being Implementing Agencies (‘**IAs**’).

Pre-amendment regime – Mere disbursal or actual utilisation?

The MCA noted that the majority of the companies were executing CSR activities through IAs. The companies were merely disbursing the funds to IAs, and the same was not being actually spent by the IAs towards CSR activities. However, such disbursal itself was being seen as compliance for CSR obligations. Thus, it was evident that the IAs were not actually spending the funds towards CSR activities, and the companies were getting off scot-free without any implications under this regime. The MCA observed that this defeated the entire objective of mandatory deployment of resources towards fulfilling CSR objectives.

It is pertinent to note that contributions made to the IAs by the companies were in the form of voluntary contributions other than corpus and/or corpus contributions prior to the amendments brought in CSR Rules on 22 January 2021.

Voluntary Contributions (Other than Corpus)

As mentioned above, one of the ways in which the companies discharged their CSR obligations was to simply disburse voluntary contributions (other than corpus) to the IAs. Thereafter, there was no specific monitoring done by the company of the actual utilisation and spending of such funds by the IAs. The IAs also enjoyed the option of accumulating these funds for their application towards certain specific charitable objects in the forthcoming years. This led to a scenario wherein although, the CSR obligations of the companies were met, but there was either no spending or no substantial spending of the CSR funds.

Under the IT Act, Section 11(2) also provides a mechanism for charitable trusts or institutions to accumulate 85% of their income from its property or received through voluntary contributions for further utilisation towards specific purposes for a maximum period of 5 years. Such accumulated amount is also exempted from being included in the income. This provision also left room for Companies to merely disburse the funds to IAs which could be accumulated for application in the future without having to actually spend such funds in any given financial year, for CSR activities.

Corpus contributions

Rule 7 of the erstwhile CSR Rules permitted corpus contributions to IAs as eligible CSR expenditure. Further, *vide* Circular dated 18 June 2014,[1] the MCA clarified that contributions to the corpus of an IA would qualify as CSR expenditure, if such an IA or the said corpus has been created exclusively for a purpose related to the activities provided under the CSR framework. This enabled companies to merely contribute funds to the corpus of IAs, which qualified as a legitimate CSR expenditure. Under this regime there was no specific obligation on the IA to further spend such corpus contributions, or on the Company to monitor and ensure the actual utilisation of such CSR funds.

Under the IT Act, corpus contributions received by charitable trusts or institutions are exempt under Section 11(1)(d).

Therefore, by mere disbursal towards the corpus of the IAs the companies were duly complying with their CSR obligation, and also, the IAs were enjoying Income-tax exemptions on this amount of contributions received.

Post-amendment regime – Curbing of loopholes

In the backdrop of the mis-utilisation of the CSR provisions, the MCA amended Section 135 of the Companies Act and also notified the CSR Companies (CSR Policy) Amendment Rules, 2021 ('**CSR Amendment Rules**') with effect from 22 January 2021.

These amendments have introduced provisions to ensure that the expenditure made is actually utilised towards CSR activities. This is to ensure that a mere disbursal of funds to IAs would not lead to a fair CSR compliance. The Companies are now required to ensure that the IAs either duly spend the contributions received for executing CSR activities within the same financial year or earmark them towards multi-year ongoing projects (maximum period of 3 years). In case, the IAs are unable to spend the contributions during the financial year or during the specified period of the ongoing projects, the company is required to transfer the amount of these CSR contributions to funds specified under Schedule VII of the Companies Act ('**Schedule VII Funds'**) within a stipulated time.

Further, Rule 7 of the CSR Rules, which permitted corpus contributions as eligible CSR expenditure, has been substituted, and the amended CSR Rules do not permit the same. Subsequently, *vide* the Frequently Asked Questions on CSR,[2] ('**MCA FAQs**') dated 25 August 2021, the MCA has clarified that corpus contributions to any entity shall not be admissible as CSR expenditure.

It is abundantly clear that the intent of the Government through these amendments is to plug the loopholes prevailing in the earlier regime. The new regime would ensure actual utilisation of the CSR funds, and the Companies and IAs can no longer misuse the erstwhile provisions, as discussed above.

Income-tax front:

In furtherance of its objective to ensure that the provisions relating to corpus contributions are

[1] MCA General Circular No.21/2014 dated June 18, 2014

[2] MCA General Circular No. 14 /2021 dated August 25, 2021.

not mis-utilised, the Government has made certain amendments *vide* the Finance Act, 2021.

The Memorandum of the Finance Bill, 2021 noted that various public trusts or institutions claim corpus donations as exempt under Section 11(1)(d) of the IT Act, and simultaneously also claim application of these funds as part of the mandatory 85% application for non-corpus income exempted under Section 11(1). In order to curb such double counting, the Finance Act, 2021 introduced the following amendments to the IT Act:

- Firstly, under Section 11(1)(d) an insertion has been made which provides that corpus contributions shall be subject to the condition that such voluntary contributions are invested or deposited in one or more of the forms or modes specified under Section 11(5) specifically for such corpus. Prior to this amendment only the amount of income accumulated under Section 11(2) was required to be invested or deposited in the prescribed forms or modes.
- Secondly, Explanation 4 to Section 11(1) has been inserted which provides that any application of income out of the corpus shall not be considered as application for claiming exemption under Section 11(1). However, only when such amount is invested or deposited back, into the specified forms or modes under Section 11(5) from the income of the previous year, then such amount shall be allowed as application in the previous year in which it is deposited back to corpus to the extent of such deposit or investment.

These provisions have effectively ensured that these institutions cannot misuse the exemptions provided for corpus contributions towards charitable objects and claim double exemption on the same.

CSR expenditure under Section 80G – Question over deduction

Another important aspect related to the CSR mechanism having a bearing on the IT Act, is with respect to the exemption provided under Section 80G of the IT Act.

Explanation 2 of Section 37(1) of the IT Act provides that CSR expenditure incurred by an assessee shall not be deemed to be incurred for the business or profession of the assessee. However, Section 80G provides that any sums paid as donations by an assessee, to certain eligible entities listed under sub-Section (2), are allowed as a deduction from its income.

In light of the above, the issue which comes to surface is whether donations made for meeting CSR obligations which is specifically disallowed as per Explanation 2 of Section 37(1) is eligible for deduction under Section 80G.

This issue has been recently adjudicated upon by the Kolkata ITAT in the case of *JMS Mining Pvt. Ltd.* v. *PCIT*.[3]

In this case, the assessee claimed deduction under Section 80G on donation given to charitable trusts as contribution towards CSR activities. The ITAT held that the embargo created by the Explanation 2 to Section 37(1) was to deny the deduction for CSR expenses incurred by companies as a regular business expenditure while computing ‘income under the head business’. The said Explanation cannot be extended to CSR contributions which are otherwise eligible for deduction under Section 80G. Further, the ITAT referred to clauses (iiihk) and (iiihl) of Section 80G(2) of the IT Act, which specifically exclude donations paid to Swachh Bharat Kosh and Clean Ganga Fund in

[3] (2021) 130 taxmann.com 118 (Kol ITAT).

pursuance of CSR obligations for claiming a deduction under Section 80G. Therefore, it was held that by virtue of such specific exclusion it can be inferred that the legislature has envisaged for allowing the deduction towards CSR expenditure made towards the funds or organisations apart from the two exceptions mentioned above. Accordingly, the assessee's claim for deduction of CSR expenses/contribution under Section 80G was allowed.

Similarly, the Bangalore ITAT in the case of *Allegis services (India) Pvt. Ltd.* v. *ACIT*,[4] and *First American (India) Pvt. Ltd.* v. *ACIT*,[5] also held that deduction on account of Section 80G was allowed even on amounts which were considered as CSR expenses in the books of accounts of the companies.

These judicial pronouncements are particularly relevant in context of the recent amendments made to the CSR framework discussed above, which requires transfer of unspent CSR amounts to Schedule VII Funds. Relying on these decisions, transfer of such unspent CSR amounts to Schedule VII Funds which are covered under Section 80G(2) may be claimed as deduction.

However, it must be noted that the jurisprudence on this aspect is continuing to evolve, and this matter has not been adjudicated upon by any High Court or the Supreme Court.

Concluding remarks

The recent amendments clearly reflect the Government's intention to ensure the implementation of a comprehensive CSR framework. The companies and institutions acting as IAs must be extremely mindful of ensuring actual utilisation of the funds earmarked towards charitable purposes, as the provisions under both the Companies Act and the IT Act have been tightened with respect to the same. It would be safe to say that the Government has made major strides towards plugging the loopholes causing the abuse of the erstwhile provisions.

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Notifications & Circulars

Indirect transfer of assets/capital assets situated in India, before 28 May 2012 – Procedure for availing necessary relief from old/existing orders notified

Certain exceptions to the applicability of Explanation 5 to Section 9(1)(i) of the Income-tax Act, 1961 were recently carved out in respect of Indirect Transfers made before 28 May 2012, providing relief to taxpayers from the retrospective amendment. Explanation 5, inserted by Finance Act 2012 with retrospective effect from 1 April 1962, clarifies that any share or interest in a company or entity incorporated outside India shall be deemed to be situated in India, if the share or interest derives, directly or

[4] ITA No. 1693/Bang/2019.
[5] ITA No.1762/Bang/2019.

indirectly, its value substantially from the assets located in India ('**Indirect Transfers**').

In furtherance of the recent amendments made in Explanation 5, Rules 11UE and 11UF have been inserted recently *vide* the Income-tax (31st Amendment) Rules, 2021, dated 1 October 2021. Rule 11UE(1) and 11UF of the Income-tax Rules, 1962 ('**IT Rules**') lay downs the procedure of withdrawal of appeals/writs. Rule 11UE(2) prescribes the additional conditions to be complied with for withdrawing appeals/writs etc. These conditions impose vast variety of obligations and restrictions on the assessee, for e.g. to withdraw/terminate all sorts of appeals/ proceedings etc. initiated against the relevant order(s) and furnish evidence of such withdrawal/termination/discontinuance, to not file any such appeals/petitions proceedings etc. in the future, to waive all sorts of rights/claims etc. in relation to any award /relief etc. against India etc. Notification No G.S.R. 713(E), dated 1 October 2021 has been issued for the purpose.

Procedure laid down in Rule 11UE(1) and 11UF is as under:

- An undertaking with regard to withdrawal of appeal/writ has to be furnished in Form.1 before the jurisdictional Pr. CIT/CIT within 45 days of commencement of the Income-tax (31st Amendment) Rules, 2021, i.e. 01-Oct-2021.
- Within 15 days of receiving Form 1, the jurisdictional Pr. CIT/CIT either accepts or rejects Form 1. If Form 1 is accepted, then the said Pr. CIT/CIT grants certification in Form 2 to the concerned person. In case Form 1 is rejected, maximum 30-days extended period can be given to the person to furnish a renewed Form 1.
- Within 60 days of receipt of Form 2, the concerned person has to fulfill the conditions prescribed in Rule 11UE(2) and submit intimation in Form 3. Maximum 60-days further extension may be granted by the Pr. CIT/CIT to the concerned person for filing Form 3.
- Within 30 days of receipt of Form 3, an order granting relief (under Form 4) or declining to grant relief is to be passed by the Pr. CIT/CIT. In case the concerned person is declined the grant of relief, maximum 30 days extended period can be given to furnish a renewed Form 3.
- Within 15 days of receiving Form 4, the concerned AO has to give effect to the directions given in Form 4, pass the necessary order(s), issue refund/revoke attachments etc.
- Within 60 days of receiving Form 4, the concerned AO shall file the necessary application to withdraw any appeal /petition/proceeding filed by the Revenue with respect to the orders covered by Form 4.

Faceless assessment – Additional cases notified for exclusion

The procedure for faceless assessments has been laid down by insertion of Section 144B in the Income-tax Act, 1961 ('**IT Act**') by Taxation and Other Laws (Relaxation of Certain Provisions) Act, 2020. In pursuance of Section 144B(2), CBDT had earlier specified that assessment orders in cases assigned to Central Charges and International Taxation Charges are excluded from the purview of faceless assessment. The CBDT has now further excluded the following from the purview of faceless assessment:

1) Assessment orders in cases where pendency could not be created on Income-tax Business Application ('ITBA') because of technical reasons or cases not having a PAN, as the case may be.

2) Assessment orders in cases either set aside to be done de novo, or to be done under Section 147 of the IT Act, which is pending with the jurisdictional AO as on 11 September 2021 and for which the time limit for completion expires on 30 September 2021, and which cannot be completed as per the procedure laid down under Section 144B due to technical/ procedural constraints in the given period of limitation.

The CBDT further clarifies that the assessments in the aforesaid two cases shall be completed by the jurisdictional AO. Order F. No. 187/3/2020-ITA-I, dated 22 September 2021 has been issued for the purpose.

Time limits for filing ITRs and Reports of Audit relaxed

Due to difficulties faced by taxpayers in the electronic filing of Income-tax returns and various reports of audit, in exercise of its powers under Section 119 of the Income-tax Act, 1961, the CBDT has further extended the due dates for furnishing the same. It must be noted that these have been provided in furtherance of the relaxations provided by Circular No. 9/2021, dated 20 May 2021.

Particulars	Original due date	Erstwhile extended due date	Extended due date
Return of Income under Section 139(1) for Assessment Year ('AY') 2021-22	31.07.2021	30.09.2021	31.12.2021
Return of Income under Section 139(1) for AY 2021-22 (Corporate assessees)	31.10.2021	30.11.2021	15.02.2022
Return of Income under Section 139(1) for AY 2021-22 (assessees required to furnish report under Section 92E)	30.11.2021	31.12.2021	28.02.2022
Belated/Revised Return of Income under Section 139(1) for AY 2021-22	31.12.2021	31.01.2022	31.03.2022
Report of Audit under any provision for Previous Year ('**PY**') 2020-21	30.09.2021	31.10.2021	15.01.2022
Report from Accountant under Section 92E for PY 2020-21	31.10.2021	30.11.2021	31.01.2022

The CBDT has also clarified that the extension of dates for filing return of income under Section 139(1) for AY 2021-22 (apart from belated/revised returns) shall not apply to the Explanation 1 to Section 234A if the amount of tax reduced by amount specified under sub-clauses (i) to (iv) of Section 234(1) exceeds Rs.

1 lakh. Further, tax paid by an individual resident under Section 207(2) within the original due date provided in the Income-tax Act, 1961 shall be deemed to be the advance tax. Circular No. 17/2021, dated 9 September 2021 has been issued for the purpose.

Timelines extended under Taxation and Other Laws Act, 2020 to ease compliance

- Due date for completion of penalty proceedings under the IT Act has also been extended from **30-09-2021** to **31-03-2022.**
- Time limit for intimation of Aadhaar number to the Income tax Department for linking of PAN with Aadhaar has been extended from **30-09-2021** to **31-03-2022**.
- Time limit for issuance of notice and passing of order by the Adjudicating Authority under the Prohibition of Benami Property Transactions Act, 1988 has also been extended to **31-03-2022.**

Notification S.O. 3814(e) [No. 113/2021/f. No. 370142/35/2020-tpl-part 1], dated 17 September 2021 has been issued by the CBDT for this.

Safe Harbour Rules amended to now apply for AY 2020-21 and AY 2021-22, w.e.f. 1 April 2021

The Income-tax Act, 1961 (‘**IT Act**’) mandates that international transactions are to be done at arm’s length price (‘**ALP**’). The IT Act provides the acceptable methods of calculating the ALP which the assessee may use. In certain cases, the Income-tax authorities have the power to reject the ALP computation of the assessee and to then compute the ALP themselves. However, the determination of ALP is subject to certain ‘safe harbour rules’ as per Section 92CB of the IT Act.

These safe harbour rules are prescribed, *inter alia,* in Rule 10TD of the Income-tax Rules, 1962 (‘**IT Rules**’). Rule 10TD(1) states that the transfer price declared by an eligible assessee is to be accepted by the Revenue, in respect of an eligible international transaction provided it is in accordance with the circumstances specified in sub-rules (2) and (2A). Sub-rule (2A) lists down various eligible international transactions and the corresponding circumstances against these transactions.

Sub-rule 3B of rule 10TD provides the assessment years for which sub-rules (1) and (2A) would be applicable. Earlier, sub-rule (3B) provided that sub-rules (1) and (2A) shall apply for AY 2020-21. By way of Income-tax (Thirtieth Amendment) Rules, 2021, notified on 24-Sep-2021, sub-rule (3B) has been amended such that sub-rules 1 and 2A shall, with effect from 1 April 2021, apply for AY 2020-21 and AY 2021-22. Notification No. G.S.R. 661(E) [No. 117/2021/F. No. 370142/44/2021-TPL, dated 24 September 2021 has been issued for the purpose.

Ratio Decidendi

Amount of income-tax 'deductible' at source can be reduced while calculating advance tax for period prior to F.Y. 2012-13 – No interest liability even if tax not deducted by payer

Assessee, a non-resident company carrying on trading activities through its liaison offices in India, didn't offer any income to tax in India. The assessing officer (A.O.) in the assessment for A.Y. 1998-99 to 2004-05, held that a portion of income is attributable to its operations in India and thus is taxable in India. The A.O. further imposed interest under Section 234B of the IT Act on short payment of advance tax.

The assessee appealed before the CIT(A) in respect of imposition of interest contending that interest should not be imposable as short payment of advance tax was on account on non-deduction of tax by the payers. CIT(A) rejected the contention. On further appeal, ITAT remanded the matter back to CIT(A), which again decided the issue against the assessee. On second round of appeal before the ITAT, the ITAT allowed the appeal, relying on its earlier decision in case of assessee in respect of AY 2005-06. and decision of Delhi Special Bench in *Motorola Incorporation* v. *DCIT*, [2005] 95 ITD 269, wherein it was held that assessee was not liable for payment of advance tax and for consequent interest under Section 234B, as the entire income received by the assessee was such from which tax was deductible.

On subsequent appeal by the revenue, the High Court relying on several High Courts[4] upheld the decision of ITAT. The High Court also observed that interest under Section 234B of the IT Act cannot be imposed on an assessee for failure on the part of the payer in deducting tax at source as Section 201 specifically provides for consequences of failure to deduct tax at source.

On subsequent appeal by the revenue, the Supreme Court noted that provision of Section 234B has to be read with Section 209. The interest as provided in Section 234B is for default in payment of advance tax, which is computed as per the provisions of Section 209. Section 209(1)(d) (as it stood prior to amendment by Finance Act 2012), provides that tax *deductible or collectible at source* shall be reduced from estimated income tax for the purpose of computation of advance tax. The proviso to Section 209(1)(d) inserted by Finance Act 2012, which provides that tax deductible shall not be reduced if the payer did not deduct tax, is effective from F.Y. 2012-13. Accordingly, in respect of period prior to F.Y. 2012-13, the Supreme Court held that the amount of income-tax which is deductible at source can be reduced by the assessee while calculating advance tax and the assessee cannot be held to have defaulted in payment of its advance tax liability. Consequently, in absence of default in payment of advance tax, interest under Section 234B cannot be imposed. [*Director of Income-tax* v. *Mitsubishi Corporation* – [2021] 130 taxmann.com 276 (SC)]

[4] Uttarakhand HC in *CITt and Anr.* v. *Sedco Forex International Drilling Co. Ltd.,* [2003] 264 ITR 320, Bombay HC in *DITt (International Taxation)* v. *NGC Network Asia LLC,* [2009] 313 ITR 187 and Madras HC in *CIT* v. *Madras Fertilizers Ltd.,* [1984] 149 ITR 703.

Investments when can be presumed to have been made from interest-free funds, even if assessee does not maintain separate accounts

Assessee is scheduled bank which, in their course of their banking activities, engage in the business of investing in bonds, securities and shares. The assessee earns substantial tax-free income in the form of interests and dividends from such investments.

The assessee does not maintain any separate accounts for such investments from which tax-free income is earned ('**Investments**'). Due to this, it is not possible to identify any separate funds that might have been utilized to make such Investments. It is also thus, not possible to determine the actual expenditure, if any, incurred by the assessee to earn such tax-free income.

In absence of such separate accounts, the A.O. invoked Section 14A of the IT Act and made a proportionate disallowance of interest expenditure attributable to the funds invested to earn this tax-free income. The A.O.'s action was upheld by the CIT(A).

The ITAT noted *inter alia*¸ that the assessee had sufficient surplus funds and reserves from which such Investments can be made and accordingly accepted the assessees' contention that the Investments were not made out of any interest/cost-bearing funds. Thus, the ITAT held that no disallowance under Section 14A is warranted. However, the High Court reversed the decision of the ITAT primarily on the contention that interest-free funds were not kept in separate accounts.

The Supreme Court examined the scope of Section 14A in detail and while referring to numerous decisions[5], held that in cases where investment is made out of mixed funds (both interest-free and interest-bearing funds) and the assessee has sufficient interest-free funds, it can be safely presumed that the said investments were made out of the interest-free funds. The Apex Court further noted that there is no statutory provision which mandates maintenance of separate accounts to prove that the investments were made from interest-free funds. Thus, in the instant case, no 14A disallowance was held to be warranted as assessee had sufficient interest-free funds for making Investments. Accordingly, the Court upheld the decision of the ITAT. [*South Indian Bank Ltd*. v. *Commissioner of Income-tax* - [2021] 130 taxmann.com 178 (SC)]

Limitation – Period from 15 March 2020 to 2 October 2021 to be excluded while calculating limitation period

Witnessing the rapidly debilitating effect of the first wave of the Covid-19 pandemic and the extreme difficulties created by it for litigants across the country, especially in terms of adhering to the limitation periods prescribed under various laws, the SC had *vide* order dated 23-Mar-2020 ('**2020 Extension Order**') directed that the limitation period under various laws of the country, including the IT Act, in all proceedings before the Courts and Tribunals is extended w.e.f. 15 March 2020 until further orders.

Subsequently, when the first wave of the pandemic receded, and the country started normalizing, the SC then passed an order dated 8 March 2021 ('**March 2021 Revocation Order**') revoking the 2020 Extension order and passing certain directions for calculation of limitation period.

[5] Bombay HC in *Pr. CIT* v. *Bombay Dyeing and Mfg. Co. Ltd.,* ITA no. 1225 of 2015, SC in *CIT* v. *Reliance Industries Ltd.,* [2019] 410 ITR 466 SC*,* Bombay HC in *HDFC Bank Ltd.* v. *Dy. CIT* [2016] 383 ITR 529 *(Bom),* Gujarat HC in *CIT* v. *Suzlon Energy Ltd.,* [2013] 354 ITR 630 (Guj), Karnataka HC in *CIT* v. *Microlabs Ltd.,* [2016] 383 ITR 490 (Kar.) and Punjab and Haryana HC in *CIT* v. *Max India Ltd.,* [2016] 388 ITR 81 (P&H).

However, owing to the second wave of the Covid-19 pandemic, *vide* Order dated 27 April 2021 ('**2021 Extension Order**'), the Apex Court restored the 2020 Extension Order and directed that the limitation period prescribed under any general/special laws, whether condonable or not, is extended until further orders.

Recently, the Supreme Court has decided to restore its March 2021 Revocation Order, in view of the fact that the situation across the country is near normal, even though there are uncertainties about the third wave of the pandemic. Keeping in line with the March 2021 Revocation Order, the SC has *inter alia*, directed as under:

a.) The period from 15 March 2020 to 2 October 2021 is to be excluded while calculating:

  (i) the limitation period for any suit, appeal, application of proceeding; the balance limitation period as available on 15 March 2021 is to be available w.e.f. 3 October 2021, and

  (ii) the limitation period prescribed under any law which prescribes limitation period for instituting proceedings, outer limits (within which the court, tribunal can condone delay) and termination of proceedings.

b.) In cases where the limitation would have expired during the period from 15 March 2020 to 2 October 2021, notwithstanding the actual balance limitation period remaining, all persons to have a 90-days limitation period from 3 October 2021. In case the actual balance limitation period is more than 90 days, then the longer period will be applicable.

[In Re: *Cognizance for Extension of Limitation* – TS-901-SC-2021]

Reassessment proceedings, on or after 1 April 2021, can be initiated only in accordance with the new reassessment provisions brought by Finance Act, 2021

A batch of writ petitions were filed by various individual petitioners before the Allahabad HC, challenging the validity of initiation of re-assessment proceedings under the erstwhile Section 148 of the IT Act, by way of notices issued after 1 April 2021. The writ petitioners also challenged the validity of:

a.) Explanation to clause (A)(a) of CBDT Notification No. 20/2021, dated 31 March 2021 ('**Notification 1**') and

b.) Explanation to clause (A)(b) of CBDT Notification No. 38/2021, dated 27 March 2021 ('**Notification 2**')

The aforesaid Notifications were issued in furtherance to Section 3(1) of the Taxation and Other Laws (Relaxation of Certain Provisions) Act, 2020 ('**TOLA**'). Notification 1 provided extension of time for initiation of reassessment proceedings, by issuance of a notice under the erstwhile Section 148. Subsequently, Notification 2 again extended the time till 30 June 2021, to initiate reassessment proceedings, by issuance of a notice under the erstwhile Section 148; further in relation to the same, an 'Explanation' clause, identical to the one in Notification 1 was also added in Notification 2.

The Finance Act 2021 ('**FA 21**') amended the procedure for reassessment given under the IT Act, with the new procedure coming into effect from 1 April 2021. While the pre- amendment reassessment procedure was governed by the erstwhile Sections 147-153 ('**Erstwhile Provisions**'), the new procedure is governed by the existing Sections 147, 148, 148A, 149, 151 and 151A of IT Act (‘**New Provisions**’). Subsequently, by virtue of FA 21, the New Provisions became operative from 1 April 2021.

The challenge in these writs essentially revolved around the question whether the relevant ‘Explanation’ in each of the Notifications, can be said to extend the application of the Erstwhile Provisions beyond 31-Mar-2021, even though the FA 21 categorically states that the New Provisions shall come into effect from 1 April 2021. Thus, were the impugned notices, all issued after 1 April 2021, under the erstwhile Section 148, could be said to be validly issued.

The High Court decided in favor of the petitioners and quashed the impugned notices as being invalid and without jurisdiction. The Court categorically held that any reassessment proceedings initiated after 1 April 2021 can be initiated only in accordance with the New Provisions. For arriving at these conclusions, the Court gave the below reasonings:

a.) FA 21 substituted the Erstwhile Provisions with the New Provisions. By such acts of legislative substitution, and in absence of any express savings clause, such earlier provisions cannot survive, except for things already done or already undertaken to be done.

b.) There is no saving clause, in either the TOLA or the FA 21 which saves the applicability of the Erstwhile Provisions beyond 31 March 2021.

c.) The relevant provisions of TOLA (i.e. Section 3(1) of TOLA which extends timelines) merely protects certain proceedings from being barred by limitation – these provisions do not mention saving any proceeding from any law that may be enacted by the Parliament in the future.

d.) The non-obstante clause in Section 3(1), TOLA applies to ongoing proceedings only. The amendments brought about by the FA 21 have restricted the application of TOLA and the power to grant extension of timelines thereunder, to only such reassessment proceedings which have been initiated on or before 31 March 2021.

e.) Also, reassessment proceedings can be initiated only upon the valid assumption of jurisdiction by the assessing authority. In the facts of the case, no valid jurisdiction was assumed by the assessing authorities under the Erstwhile Provisions, i.e. no valid notice under the erstwhile Section 148 was issued, which could then be saved and given a time extension under the TOLA or the Notifications.

f.) The timelines as extended by the TOLA were further extended by the Central Government by way of delegated legislation (i.e. the Notifications) up till 30 June 2021. In absence of any specific delegation made, to allow the delegate of the Parliament to indefinitely extent the limitation periods would lead to the validity of the FA21, an enacted law, to be defeated by a purely colourable exercise of power by the delegate.

g.) In any case, the specific reference of reassessment under the Erstwhile Provisions appears only in the Notifications and not in Section 3(1), TOLA. The delegate of the Parliament, i.e. the Central Government or the CBDT, could not have issued the Notifications plainly to overreach the principal legislation, i.e. the FA 21. Here, the Allahabad High Court also clearly distinguished the opposite view taken by the Chhattisgarh High Court favoring the revenue on this issue in the recent decision of *Palak Khatuja* v. *UoI,* [2021] 130 taxmann.com 44.

h.) After enforcement of the FA 21, the TOLA applies to the New Provisions and not the Erstwhile Provisions.

i.) Consequently, the impugned Explanation in each of the Notifications must be read to be applicable only on reassessment proceedings initiated on or before 31 March 2021.

[*Ashok Kumar Agarwal* v. *Union of India* – [2021] 131 taxmann.com 32 (Allahabad)]

1. Onus, under Section 179, is on the director to show that non-recovery of dues was not attributable to gross neglect, misfeasance or breach of duty on his part

2. Private parties cannot apportion income-tax liabilities by private agreement

The petitioner along with two other promoters, formed and incorporated, the Realtech group of companies ('**Realtech group**') in 2005. Subsequently, the petitioner entered into a Memorandum of Understanding ('**MOU**') dated 2 June 2011 with one of the promoters whereby it was agreed that all income tax liabilities in respect of the Realtech group will be borne by the other promoter. Assessments of Realtech group, were made and a demand of INR 5,89,68,019 was found outstanding pertaining to Assessment Years (**AY**) 2006-07 to 2009-10. The income tax authorities served an order dated 29-Jan-2018 under Section 179 of IT Act wherein it was held that since tax dues of the Realtech group could not be recovered from the group, the petitioner along with other directors were liable of payment of the same.

The petitioner *vide* this writ petition challenged the order under Section 179 and sought to restrain the IT department from recovering the outstanding demand of the Realtech Group from the petitioner. The High Court upheld the order under Section 179 for recovery of outstanding demand from the petitioner. The Court held that despite issuing notices and attachment orders the entire outstanding tax dues could not be recovered from the Realtech group leaving the department with no other option, but to recover the same from the directors. Further, it was held that under Section 179, the onus is on the director to demonstrate that the non-recovery of dues is not attributable to gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company and the petitioner has failed to discharge such onus.

The High Court further held that the private parties cannot apportion income-tax liabilities by private agreement as the petitioner sought to do in the present case. It is well settled law that while rights in *personam* are arbitrable, rights in rem are unsuited for private arbitration and can only be adjudicated by the Courts or Tribunals. The Court referred to the decision of *Booz Allen & Hamilton Inc.* v. *SBI Home Finance Limited & Ors*. (2011) 5 SCC 532, Para 34-38 in this regard. [*Rajeev Behl* v. *Principal Commissioner of Income-tax* - W.P.(C) 7869/2021 & CM Appl. 24474-475/2021, decided on 24 September 2021, Delhi High Court]

1. Assessment in name of an amalgamating company which is not in existence at the relevant time is invalid and cannot be revised under Section 263

2. Depreciation is allowable on goodwill emerging out of scheme of amalgamation

The assessee ('**SGSL**') acquired a division of its holding company *vide* a slump sale agreement dated 29 March 2014 and recorded the excess of payment over net assets value as intangible asset being goodwill. The assessee claimed depreciation of the goodwill every year starting from AY 2014-15. Subsequently, SGSL got amalgamated with Suzlon Structures Ltd ('**SSL**') with effect from 31 March 2016 by virtue of the order of Gujarat High Court dated14 October 2016. Pursuant to amalgamation, SSL also recorded goodwill in its books of accounts and claimed depreciation on it. In AY 2016-17, SGSL and SSL claimed depreciation of the intangible assets based on the number of days the assets were put to use.

In case of SGSL, the assessment under Section 143(3) for AY 2016-17, was framed by the assessing officer in name of SGSL (amalgamating company). No assessment was made in the case of SSL for AY 2016-17, but it was processed under Section 143(1) of the IT Act. The Principal CIT invoked revision under Section 263 of the IT Act in the case of SGSL and denied the claim of depreciation on the goodwill arising out of amalgamation. The Principal CIT also pointed that the amalgamation was in the nature of merger as per Accounting Standard 14 issued by ICAI. Hence, goodwill should not have been recorded.

At first, the Tribunal held that depreciation of goodwill arising in scheme of amalgamation was claimed by SSL and not by SGSL. Thus, there was no question of disallowing the same in the revisionary proceedings of SGSL. The Tribunal further observed that to disallow the said depreciation, the PCIT should have initiated the revisionary proceedings against the intimation under Section 143(1). However, since the same was time barred, revisionary proceedings cannot be initiated against SSL.

Without prejudice to the above, the Tribunal relied on various decisions[6] to hold that the assessment made in the name of the amalgamating company (SGSL) which is not in existence at the relevant point of time is not valid in the eyes of law. Consequently, the assessment cannot be subject to revision under Section 263.

The Tribunal also considered the case on merits. It observed that provisions of 6th proviso to Section 32, Explanation 7 to 43(1) and Explanation 2 to Section 43(6)(c) provides for claim of depreciation on assets transferred by amalgamating company to amalgamated company. These provisions are not related to as asset (goodwill) emerging in the scheme of amalgamation approved by the jurisdictional High Court. The Tribunal relied on the Supreme Court judgement of *CIT* v. *Smifs Securities Ltd*. [348 ITR 302] to hold that goodwill falls within the definition of intangible assets for the purpose of depreciation under Section 32 of the Act. Hence, claim of depreciation on goodwill is allowed. In result, the appeal of assessee was allowed. [*Sulzon Global Services Limited* v. *Principal Commissioner of Income-tax* – Order dated 6 September 2021 in ITA Nos. 67-68/ AHD/ 2021, ITAT Ahmedabad]

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[6] *PCIT* v. *Maruti Suzuki India Limited*, [2019] 416 ITR 613 (SC); *CIT* v. *Lark Chemicals Ltd*, [2014] 368 ITR 655 (Bombay); *Pr. CIT* v. *Kaizen Products (P.) Ltd.,* [2018] 406 ITR 311 (Delhi).

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