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Article

Proviso to Section 115BAA(3) – Sowing confusion or certainty?

By **Neethu James and Parvathy Kartha**

Introduction

Section 115BAA is a reduced corporate taxation scheme introduced for domestic companies *vide* the Taxation Laws (Amendment) Act, 2019 (w.e.f. AY 2020-21). Once opted for, the domestic company would be taxed at 25.17% (effective tax rate inclusive of surcharge and cess) during the lifetime of the said company in respect of its total income.

This Article addresses an issue that may arise regarding the treatment of unclaimed portion of additional depreciation in respect of companies with substantial capital expansion in the relevant assessment year while opting for Section 115BAA of the Income Tax Act, 1961 (**"IT Act"**).

Treatment of additional depreciation under Section 115BAA

The benefit under Section 115BAA of the IT Act is available subject to computation of total income in the prescribed manner, wherein certain deductions are restricted which are otherwise available for a domestic company. Notable among the deductions which are disallowed is additional depreciation which is to be claimed in terms of the provisions of Section 32(1)(iia) of the IT Act.

Section 32(1)(iia) of the IT Act provides for additional depreciation at 20% of the actual cost of plant or machinery to an assessee engaged in the business of manufacture or production of any article or thing. However, in cases where the plant or machinery has been put to use for a period less than 180 days during the assessment year, the deduction shall be restricted to 50% of the amount computed for the said assessment year and the deduction for balance 50% would be allowed in the immediately succeeding assessment year.

In terms of Section 115BAA(2) of the IT Act, the total income shall be computed without claiming additional depreciation under Section 32(1)(iia) of the IT Act. Further, any loss carried forward or depreciation from any earlier assessment years shall not be set off against the income if such losses or depreciation is attributable to additional depreciation. Even though such carried forward loss or depreciation cannot be set off while computing the total income, Section 115BAA(3) of the IT Act provides that any loss or depreciation of the aforesaid nature shall be deemed to have been given full effect and no further deduction for such loss or depreciation shall be allowed for any subsequent assessment year.

The proviso[1] to Section 115BAA(3) of the IT Act clarifies the treatment to be given to the written down value (**"WDV"**) of the block of assets in respect of which depreciation of the aforesaid nature is foregone. In terms of the said proviso, in cases where the depreciation allowance has not been given full effect to,

[1] The Proviso to Section 115BAA(3) of the IT Act reads in the following manner:
"Provided *that where there is a depreciation allowance in respect of a block of asset which has not been given full effect to prior to the assessment year beginning on the 1st day of April, 2020, corresponding adjustment shall be made to the written down value of such block of assets as on the 1st day of April, 2019 in the prescribed manner, if the option under sub-section (5) is exercised for a previous year relevant to the assessment year beginning on the 1st day of April, 2020."*

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corresponding adjustment shall be made to the written down value of such block of assets upon opting for reduced taxation under Section 115BAA of the IT Act. The proviso also states that such adjustment to WDV will have to be made in a manner prescribed. However, till date no rules have been introduced prescribing the manner of making such adjustment. The question that arises is whether the adjustment referred to in the Proviso is an upward adjustment which increases the WDV of the block or is a downward adjustment which reduces the WDV of the block of asset?

The query attains particular significance in respect of additional depreciation where the asset was put to use for a period less than 180 days in the earlier assessment year. In such a scenario, the assessee would claim 50% of the additional depreciation in the earlier assessment year and the balance 50% of the additional depreciation is claimed in the relevant assessment year. By opting for Section 115BAA, the assessee will not be entitled to claim the balance 50% of the additional depreciation in the computation of total income for the relevant assessment year. In addition to forgoing the balance 50% of the additional depreciation, it needs to be ascertained whether an assessee opting for Section 115BAA is required to make a suitable adjustment to the WDV of the block of asset.

The following illustration unravels the puzzle:

Particulars		**FY 2018-19**	**FY 2019-20**
Opening WDV of block of assets		100.00	145.00 (before adjustment)
Additions made during the year		100.00	-
Normal depreciation @ 30% Full depreciation on WDV and depreciation at half rate on additions made (Assuming asset has been put to use for less than 180 days – only 50% allowable)	= (100 x 30%) + (100 x 15%)	45.00	43.50
Additional depreciation @ 20% (Assuming asset has been put to use for less than 180 days – only 50% allowable)		10.00	-
WDV		145.00	101.50

In the said illustration, assuming the assessee is opting for reduced taxation under Section 115BAA of the IT Act for the FY 2019-20, whether the opening WDV of the block of asset would be INR 145/- or INR 135/- (i.e. post adjusting the balance 50% of the additional depreciation)?

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Challenge posed by the Proviso

One view is that the balance 50% of the additional depreciation, being depreciation allowance, which has not been given full effect to prior to the relevant assessment year, corresponding adjustment is required to be made to the WDV of the block of assets. Since the adjustment to WDV is provided for by way of Proviso to Sub-section (3) which deems to give full effect to depreciation which has not been claimed, the adjustment to WDV is considered to be downward adjustment of WDV, thereby achieving the objective of giving full effect to additional depreciation.

The above conservative view has the merit of mitigating any risk, particularly since the failure to satisfy the conditions of computation of total income under Section 115BAA, could render the option exercised by the assessee invalid for relevant assessment years and subsequent assessment years as well. Additionally, it stands clarified that the option under Section 115BAA need not be exercised in AY 2020-21 and the assessee could opt for Section 115BAA in a subsequent assessment year after availing the additional depreciation of the relevant assessment year.

However, this conservative approach may result in significant tax cost to the assessee. Drawing reference to the aforesaid illustration, the same can be explained in the following manner:

- the assessee would be required to reduce the balance 50% of additional depreciation i.e. INR 10/- from the WDV of the block of asset resulting in a reduced WDV of INR 135/- (INR 145- INR 10) for the FY 2019-20. However, the assessee would not be allowed to set off such additional deprecation against his income for the FY 2019-20;
- additionally, the assessee would be eligible to compute depreciation for the subsequent assessment years only on the reduced WDV of INR 135/- instead of INR 145/-.

An alternative position

This leads us to the alternative proposition that the Proviso is not applicable to balance 50% of the unclaimed portion of additional depreciation and therefore no adjustment is to be made to WDV on this count during the relevant assessment year.

Section 115BAA(3) refers to depreciation which is referred to in clause (ii), being depreciation from any earlier assessment year. The Proviso is applicable only to depreciation referred to in Section 115BAA(3) which in turn refers to depreciation as claimed by the assessee during the earlier AYs. Thus 115BAA(3) is not dealing with the unclaimed portion of the balance fifty percent of additional depreciation or additional depreciation if any of the relevant assessment year but only with depreciation from earlier AY. In other words, it can be said that the depreciation referred to in Section 115BAA(3) is restricted only to the depreciation claimed but not fully adjusted during earlier AYs.

Viewed from this angle, the adjustment referred to in the Proviso could only be upward adjustment to WDV. The WDV of the asset for the relevant AY is arrived at after giving effect to the depreciation allowance of the earlier AY. WDV has been defined under Section 43(6) of the IT Act to mean:

WDV of the block of asset in the immediately preceding assessment year

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Add: Actual cost of asset acquired during the relevant assessment year

Less: Money payable on account of any asset within the block being sold or discarded or demolished or destroyed during the assessment year

Less: Depreciation actually allowed in respect of that block of asset in relation to the said assessment year

Thus, depreciation allowance of the earlier AY has been adjusted downwards to arrive at the WDV of the relevant AY. In terms of Proviso to Section 115BAA(3), where the depreciation allowance of earlier AY is deemed to have been given full effect to, the assessee is allowed an adjustment to the WDV. This adjustment could only be an upward adjustment (downward adjustment having already been provided for) with the objective of allowing the assessee to claim normal depreciation on that adjustment going forward.

Conclusion

The Proviso to Section 115BAA(3) was not part of the Taxation Laws (Amendment) Ordinance, 2019 and was introduced as part of the Taxation Laws (Amendment) Act, 2019. Thus, the proviso can be credited as conscious addition to the statute with a definite intent. The definite intent of the Proviso is however not forthcoming from the language of the section. Moreover, the fact that no rules have been introduced prescribing the manner of making such adjustment has only confounded the confusion. For instance, the Proviso speaks of adjustments where there is a depreciation allowance which has not been given full effect to prior to the assessment year beginning on the 1st day of April 2020. Where an assessee opts for Section 115BAA(3) is a subsequent year (say, AY 2023-24), whether the benefit of adjustment under the Proviso will be available to the extent of depreciation allowance which is deemed to have been given full effect to.

The newly introduced Section 115BAC which provides an alternative scheme for taxation for individuals and HUF also contains a similar Proviso. While Section 115BAC could be opted for in any AY, the Proviso provides for adjustment only in respect of depreciation allowance which has not been given full effect to prior to AY 2020-21.

A similar proviso can be found in Section 115BA of the IT Act which provides for reduced taxation to domestic manufacturing companies set up on or after Mar 1, 2016. Given that the said Section is applicable only to newly set up companies, the question of carry forward of unabsorbed depreciation does not arise and therefore, the Proviso seems to be redundant to that extent as far as Section 115BA is concerned.

The Proviso fraught with ambiguity could lead to varying interpretations. As the Proviso is a conscious addition made with a definite intent, it is imperative that the Board clarifies the objective of introducing the same by prescribing appropriate rules in this regard.

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Notifications and Circulars

Transfer of shares – Non-application of Section 56(2)(x) and Section 50CA to certain reconstruction schemes

Section 56(2)(x) provides that where any property is received without consideration or for a consideration which is less than the fair market value (**"FMV"**) of that property, the FMV or the difference between FMV and the consideration, as the case may be, would be subject to tax in the hands of the recipient of the property. In order to safeguard certain transactions from the crunches of Section 56(2)(x), the Finance Act (No.2) 2019 amended the proviso to Section 56(2)(x), thereby empowering the Central Board of Direct Taxes (**"CBDT"**) to prescribe transactions which will not be subject to Section 56(2)(x) of the Income-tax Act, 1961 (**"IT Act"**).

Recently, CBDT while exercising the said powers, *vide* Notification No. 40 of 2020, dated 29-06-2020, has amended the existing Rule 11UAC of the Income-tax Rules, 1962 (**"IT Rules"**) thereby providing that the provisions of Section 56(2)(x) will not be applicable in the following scenarios:

1. Receipt of unquoted equity shares of a company and its subsidiary[2] and the subsidiary of such subsidiary under approved resolution plan[3] subject to the satisfaction of the following conditions –
   - That the Central government has approached National Company Law Tribunal (**"NCLT"**) for suspension of the existing Board of Directors[4].
   - NCLT approves the said suspension and appoints a new board of directors under Section 242 of the Companies Act, 2013.
2. Receipt of the equity shares received by the investors or investor bank under Yes Bank Limited Reconstruction Scheme, 2020.

On similar lines, CBDT *vide* Notification No. 42 of 2020, dated 30-06-2020 has notified Rule 11UAD to provide that Section 50CA will not be applicable to the transfer of shares of a company, its subsidiary and subsidiary of its subsidiary where the Tribunal has suspended the existing board of directors and appointed new board of director and the transfer of shares is pursuant to approved resolution plan under Section 242 of the Companies Act, 2013.

The above changes are effective force from 1-04-2020, and accordingly, shall be applicable for A.Y. 2020-21 and subsequent assessment years.

Extension of due dates for undertaking compliance obligations

The current pandemic had caused widespread disruption and hardship across the board in meeting various compliance burdens/ deadlines under various taxing statutes. Recognizing the same, the Government of India had promulgated the Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 (**"Ordinance"**) extending the timelines for various compliances. Moreover, the Ordinance

[2] A company shall be a subsidiary of another company, if such other company holds more than half in nominal value of the equity share capital of the company.
[3] A plan approved under Section 242 of the Companies Act, 2013 after affording a reasonable opportunity of being heard to the jurisdictional Principal Commissioner or Commissioner.
[4] Section 241 of the Companies Act, 2013.

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has empowered the Central Government to extend time limits further as necessary. In exercise of such powers, the CBDT *vide* Notification No. 35 of 2020 and a Press Release dated 24-06-2020 has extending certain compliance deadlines further. A summary of the same is provided below:

Compliances which were/are required to be done between 20-03-2020 to 31-12-2020 can be carried out or completed on or before 31-03-2021. These would include:

- Issuance of Notice, Intimation, Notification, Approval order, Sanction order, Filing of appeal;
- Filing of Return, Statements, Applications, Reports, any other documents;
- Time limit for completion of proceedings by the authority, etc.

These extensions are with respect to certain specified laws[5] covered under the Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020.

However, these will not apply in respect of certain compliances under the Income-tax Act, 1961, for which the revised timelines are as follows:

S. No.	Details of Compliance	Revised Due Dates
1.	Filing of Income Tax return A.Y. 2019-20 (F.Y. 2018-19)	31-07-2020
2.	Filing of Income Tax return A.Y. 2020-21 (F.Y. 2019-20)	30-11-2020[6]
3.	Tax Audit Report A.Y. 2020-21 (F.Y. 2019-20)	31-10-2020
4.	Furnishing tax deducted at source (TDS) / tax collected at source (TCS) statements for the month of February 2020 or March 2020 or for the quarter ending 31-03-2020	31-07-2020
5.	Furnishing of TDS Certificate in respect of deduction of tax on payment of salary (Form 16)	15-08-2020
6.	Payment for claiming deduction under Chapter VIA- Part B (F.Y. 2019-20)	31-07-2020
7.	Extension of reinvestment date for claiming Capital Gain exemption under section 54 to 54GB (F.Y. 2019-20)	30-09-2020
8.	The date for commencement of operation for the SEZ units which received approval by March 31, 2020 for deduction under 10AA	30-09-2020
9.	Aadhar and PAN Linking	31-03-2021
10.	Implementation of new procedure for charitable trust	1-10-2020
11.	Time limit for undertaking compliance under *Direct Tax Vivad se Vishwas Act, 2020*	31-12-2020

[5] Income Tax Act, Wealth Tax Act, Prohibition of Benami Property Transaction Act, Black Money Act, Securities Transaction Tax, Commodities Transaction Tax, Equalization Levy, Direct Tax Vivad Se Vishwas Act.

[6] The extension of due date shall not apply for the purposes of Section 234A where amount of tax payable as reduced by advance tax, TDS, relief under Section 89, 90, 90A, 91 and tax credit allowed to be set off under Section 115JAA/115JD exceeds Rs.1 lakh.

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Exemptions available under the new tax regime – Income Tax Rules amended

Recently, Section 115BAC was inserted *vide* the Finance Act 2020, whereby individual taxpayers were given an option to choose either the existing tax rate or the new concessional tax rates without exemptions or deductions. However, there was a lack of clarity w.r.t to which all exemptions and deductions will not be available to the taxpayer in the new tax regime. To clarify these doubts, CBDT *vide* Notification No. 38 of 2020, dated 26-06-2020 has amended the Income Tax Rules to provide that the following exemptions shall be available under the new tax regimes as well:

- Exemption for allowance granted to meet the cost of travel on tour or on transfer.
- Exemption for any allowance, whether, granted on tour or for the period of journey in connection with transfer, to meet the ordinary daily charges incurred by an employee on account of absence from his normal place of duty.
- Exemption for allowance granted to meet the expenditure incurred on conveyance in performance of duties of an office or employment of profit.
- Additionally, blind, deaf and dumb or orthopedically handicap employees can also claim exemption of transport allowance of INR 3200 per month.

Further, as per amendment in Rule 3(7)(iii), exemption for free food and non-alcoholic beverage provided by the employer through paid vouchers shall not apply to an employee, who has opted for the new regime.

The amendment shall come into force from the 1-04-2021 and shall accordingly apply in relation to the assessment year 2021-22 and subsequent assessment years.

TDS – Income Tax Rules aligned with amendments introduced by Finance Act 2020

Recently, the Finance Act, 2020 introduced a variety of new provisions[7]. Further, it also amended[8] some of the existing TDS provisions to a certain extent. Due to these amendments, there was a mismatch between the provisions of the Income Tax Act, 1961 and the Income Tax Rules. In order to bring the Rules in line with these amendments, CBDT *vide* Notification No. 43 of 2020, dated 03-07-2020 has amended Rule 31A of the Income Tax Rules and Forms 26Q and 27Q. Rule 31A has been amended to provide the following:

1. The deductor will now be required to furnish particulars of the amount paid or credited on which the tax was not deducted or was deducted at a lower rate in view of notification issued under Section 197(1F) relating to institutions, association or bodies notified by the central government.
2. The deductor (w.e.f. 01-07-2020) at the time of preparing TDS statements shall furnish particulars of the amount paid or credited on which tax was not deducted or was deducted at a lower rate in view of –
    - Notification issued under the second proviso to Section 194N; or
    - The exemption provided in the third proviso to Section 194N; or
    - Notification issued under the fourth proviso to Section 194N.
3. The deductor at the time of preparing statements of tax deducted shall furnish particulars of the amount paid or credited on which:

[7] Section 194-O – TDS on payment of certain sums by e-commerce operator to e-commerce participants, Section 194-K – TDS on income in respect of units.

[8] Section 194N – TDS on cash withdrawal, 194J - TDS on royalty and fee for technical services, 194A- TDS on interest, etc.

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- Tax was not deducted or deducted at lower rate in view of the notification issued under Section 194A(5).
- Tax was not deducted under Section 194LBA(2A).
- Tax was not deducted in view of Section 197A(1D)(a) or (b).
- Tax was not deducted in view of the exemption provided to persons referred to in Board Circulars[9]

Further even Form 26Q (Quarterly Statement of deduction of tax in respect of payments other than salary) and Form 27Q (Quarterly Statement of deduction of tax in respect of payment other than salary made to non-residents) has been amended to bring them in line with the aforesaid amendments.

Returns for Assessment Years 2015-16, 2016-17, 2017-18, 2018-19 and 2019-20 – One time relaxation for verification

CBDT has provided a one-time measure to regularize non-filing of ITR-V for Assessment Years 2015-16, 2016-17, 2017-18, 2018-19 and 2019-20. Accordingly, in respect of the returns uploaded electronically by the taxpayer within the time allowed under Section 139 of the Income Tax Act, 1961 but which have remained incomplete due to non-submission of ITR-V Form for verification, the assessee can do verification of such returns either by sending a duly signed physical copy of ITR-V to CPC, Bengaluru through speed post or through various EVC/OTP modes by 30-09-2020. It may be noted that according to Circular No. 13/2020, dated 13-07-2020, this relaxation will not apply in those cases, where during the intervening period, Income-tax department has already taken recourse to any other measure as specified in the Act for ensuring filing of tax return by the taxpayer concerned after declaring the return as *non-est*. The Circular also states that such returns shall be processed by 31-12-2020 and intimation of processing of such returns shall be sent to the taxpayer concerned as per the laid down procedure. In refund cases, while determining the interest, provision of Section 244A(2) would apply.

Ratio Decidendi

Reimbursement of salary costs of employee deputed to Indian Company not taxable as FTS or income arising through Service PE

The assessee, a Singapore entity, engaged in the business of franchising KFC, Pizza Hut and Taco Bell brands in India, had entered into Technical License Agreement with Yum Restaurants India Private Limited (**"YRIPL"**) for operation of restaurant outlets in India, under which royalty was paid to the assessee. YRIPL in turn had appointed various franchisees for operating restaurants in India. The royalty income was offered by the assessee to tax in India as per rate provided in India-Singapore DTAA. The assessee had also deputed its Vice President - Legal ("employee") to YRIPL for which salary

[9] Board Circular No. 3 of 2002 dated 28-06- 2002, Board Circular No. 11 of 2002 dated 22-11-2002, Board Circular No. 18 of 2017 dated 29-05-2017.

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costs were reimbursed by YRIPL to the assessee. The employee was acting as director in YRIPL and was involved in day to day activities, attended board meetings, and also signed financials of YRIPL in capacity of a director. There was one more entity Yum! Restaurants Marketing Private Limited (**"YRMPL"**) which was engaged in marketing activities for YRIPL and its franchises.

The questions before the Appellate Tribunal were (a) whether the employee was rendering services to YRIPL on behalf of the assessee resulting into service PE of the assessee; (b) whether the reimbursement of salary was in nature of fees for technical services under India-Singapore DTAA; (c) whether the assessee had a dependent agent PE/fixed place PE in India.

Observing that the employee seconded to YRIPL was under direct control and superintendence of YRIPL and the assessee had discharged the employee from all obligations and rights whatsoever, including lien on employment, ITAT New Delhi held that the employee was not employee of assessee and was not rendering any services on behalf of the assessee, and therefore, there was no service PE of the assessee in India. Further, the Tribunal was of the view that reimbursement of salary costs will also not amount to payment of fees of technical services as "make available" clause under India-Singapore DTAA was not satisfied. It noted that Service PE and Fees for Technical services cannot co-exist under India-Singapore DTAA and that the employee had paid tax in India and taxation as FTS in hands of assessee will amount to double taxation. It also held that there was no dependent agent PE in India on account of marketing activities in India for the reason that the assessee was not a party to the marketing agreement and the marketing activities were carried for YRIPL and its franchises. The Tribunal held that no business of assessee company were carried on by YRIPL and therefore, there was no fixed place in India. Delhi High Court's decision in the case of *Centrica India Offshore Private Limited* [(2014) 364 ITR 336] was distinguished on facts. [*DDIT* v. *Yum! Restaurants (Asia) Pte. Ltd.* – ITA No. 6018/Del/2012, Order dated 06-07-2020, ITAT New Delhi]

Exemption to charitable trust – Proviso to Section 2(15) not applicable if dominant purpose is charitable

The assessee was set up as a not-for-profit company and was carrying on operations of ATM switching service to banks in India through mechanism of National Financial Switch (NFS). Several banks were shareholders of the assessee. The assessee was charging nominal fees of Rs.1 per transaction undertaken by customers of banks, which was gradually reduced over the years by 70%. The assessee had obtained registration under Section 12AA of the Income Tax Act, 1961 as an institution carrying on objects for general public utility under Section 2(15) of the IT Act. For the assessment year 2010-11 and 2012-13, the AO denied exemption on the ground that the assessee was rendering services to banks and was charging fees for the same and therefore, was involved in commercial activities. It held that the activities were hit by proviso to Section 2(15) and therefore, exemption under Sections 11 and 12 was denied. Another reason for denial of exemption was on ground that Section 13(1)(c)(ii) was applicable since the assessee company provided benefits to the promotor banks who were contributors falling in Section 13(3). On appeal, the CIT(A) confirmed order of the AO. The assessee appealed before the Tribunal.

The ITAT Mumbai has held that the purpose of the assessee company was to achieve broad-based social objective to bring efficiency in the clearing systems in India with a view to benefit

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society at large and not to run clearing system in a commercial manner. Hence, the assessee's objectives were to promote the welfare of general public. Further, the fee was charged by the assessee from banks to meet its operational cost. The Tribunal applied the dominant purposes test and held that the primary objects of the assessee were charitable in nature. It held that mere fact that certain fee was charged by the assessee while rendering services and surplus was generated would not disentitle the assessee to claim exemption under Section 11 and 12. The Tribunal held that the fees was same for promoter and non-promoter entities and therefore, it could not be said that any benefit was granted to promoter banks. Further, the promoter banks were merely "subscribers to capital" and not "contributors" as required under Section 13(1)(c)(ii) read with Section 13(3) of the IT Act. [*National Payments Corporation of India* v. *DCIT* – ITA Nos. 5431/Mum/2015 and 3382/Mum/2016, Order dated 06-07-2020, ITAT Mumbai]

No capital gains tax liability under Section 45(2) when character of stock-in-trade received on partition did not change

The assessee was an individual engaged in real estate business. The assessee had received certain properties which were in nature of stock-in-trade of real estate business of Hindu Undivided Family (**"HUF"**). The real estate business was carried on the assessee and the properties were treated as stock-in-trade in his books of account and were subsequently sold. The Assessing Officer held that the properties received by the assessee on partition were capital assets and since the same were converted into stock-in trade and sold, the assessee is liable to pay capital gains tax under Section 45(2) of the Income Tax Act. The CIT(A) upheld the order of the assessing officer.

On appeal, the Appellate Tribunal considered the memorandum of family arrangement and oral partition and held that the properties were held as stock-in-trade of real estate business by the joint family before they were allotted to the assessee. The assessee continued to carry on real estate business after partition and held properties as stock-in-trade. Therefore, there was no conversion of capital assets in to stock-in-trade and Section 45(2) was not applicable.

The High Court upheld the order of the Appellate Tribunal and held that the character of the assets (i.e. stock-in-trade) received on partition did not change and there is no provision in the IT Act indicating that assets received on partition are capital assets. The Court in this regard also noted that definition of capital asset under Section 2(14) excludes stock-in-trade. [*Commissioner of Income Tax* v. *C Ramaiah Reddy* – ITA No. 318/2012, Order dated 25-06-2020, Karnataka High Court]

Commissioner of Income Tax (Appeals) cannot enhance income from a new source not considered by Assessing Officer

The assessee had filed its return of income. The Assessing Officer (**"AO"**) completed assessment and determined total income after making a disallowance under Section 14A of the Income Tax Act, 1961 read with Rule 8D of the Income Tax Rules, 1962. No other aspect or issue was touched by the AO in the assessment order. The assessee challenged this disallowance in appeal before CIT(A). The CIT(A) deleted the disallowance made under Section 14A, however, he enhanced the assessment by disallowing salary expenses claimed by the assessee. The disallowance of salary expense and consequent addition was challenged by the assessee before the Appellate Tribunal on the ground that it amounts to enhancement of income from a new

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source which was not considered by the AO in the assessment and enhancement from new source was not within the powers of CIT(Appeals) under Section 251. Observing that disallowance of salary and consequent addition was enhancement of income from a new source which was not considered by the AO and since enhancement from new source was not permitted under Section 251, the ITAT Kolkata quashed the order of CIT(A). [*Sugota Industries Private Limited* v. *ITO* – ITA No. 1459/Kol/2019, Order dated 18-06-2020, ITAT Kolkata]

CSR expenditure allowable as deduction under Section 80G, subject to conditions

The assessee had made donations to meet its Corporate Social Responsibility (**"CSR"**) requirements. The assessee claimed deduction under Section 80G of the Income Tax Act, 1961. The Assessing Officer allowed deduction of donation to PM National Relief Fund under Section 80G of the Act. However, in respect other donations deduction was not granted on the ground that donations were not in the nature of 'voluntary contribution'. The Tribunal noted that the CSR expenses are required to be incurred by companies as per Section 135 of the Companies Act and the deduction under Section 37(1) of the Act is not available for CSR expenses. The Tribunal noted that the AO had allowed deduction under Section 80G of the Act in respect of contribution made to PM National Relief Fund (as it was direct contribution to the government) which was also part of CSR expense. However, the AO has not made his observations clear that no CSR expenses are eligible for deduction under Section 80G. Referring to Clauses (iiihk) relating to Swachh Bharat Kosh and clause (iiihl) relating to Clean Ganga Fund of Section 80G(2), the Tribunal held that the exceptions are provided in these clauses i.e. deduction of CSR expenditure to these funds will not be available under 80G. The Tribunal held that it can be inferred that other contributions made under Section 135 of the Companies Act are also eligible for deduction under Section 80G of the Income Tax Act, subject to assessee satisfying the requisite conditions prescribed for deduction under Section 80G. The Tribunal restored the matter before the AO for examination and verification of facts. [*Goldman Sachs Services Pvt. Ltd* v. *JCIT* – IT(TP)A No. 2355/Bang/2019, Order dated 15-06-2020, ITAT Bengaluru]

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