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Article

Capital Gains arising out of Joint Development Agreements – Analysis of Section 45(5A) of Income-tax Act

By **Janane G**

Introduction

The transfer of immovable property by land owners under mechanism of Joint development, Agreement (**'JDA')** has evolved as a preferred mode of transacting, especially in urban areas where the land owners do not have the time or expertise to develop the land and market the property on their own. They, therefore, enter into an arrangement for mutual benefit with a developer for developing and marketing the land parcels to various buyers.

Such agreements for joint development are generally entered into either under the Area Sharing Method or the Revenue Sharing Method, the more common form being the Area Sharing Method where agreements are executed to develop the land owned by the land owners. The developer gets a share in the land (**'UDS')** and in consideration for ceding the UDS, the landowner gets a share in the super built up area.

This article attempts to analyse the provisions of Section 45(5A) of the Income-tax Act, 1961 ('**IT Act**') in the context of applicability of the said provision in a scenario where the JDA entered into are unregistered.

Position prior to insertion of Section 45(5A)

Taxability of JDA under the IT Act has always been a debatable point. Where the land owners hold the land as a capital asset, the same is taxable under the head capital gains. The charge for capital gains contained in Section 45 provides for taxability of transaction of transfer of capital asset in the year in which the transfer takes place. Therefore, determination of taxability of land owners under a JDA depends on the point of transfer of capital asset.

The expression 'transfer' is defined in Section 2(47) of the IT Act. The provisions of clause (v) and (vi) to Section 2(47) of the IT Act[1] accord a wide meaning to the expression 'transfer', bringing within its ambit even to include those transactions which would have otherwise not been considered as 'transfer' under the general law. These clauses cover the following transactions:

a. any transaction allowing possession of any immovable property to be taken or retained in part performance of a contract under Section 53A of Transfer of Property Act **[Section 2(47)(v)]**

b. any transaction which has the effect of transferring or enabling enjoyment of any immovable property **[Section 2(47)(vi)]**

The law regarding the point of transfer under JDA has evolved through a catena of judgements[2], where judicial fora have held that there is a 'transfer' by the land owner to the extent of the developer's share in the land, on the date of entering the JDA itself and that capital gains is triggered in the hands of the landowner at that point in time.

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[1] Inserted by the Finance Act, 1987, w.e.f. 1 April 1988.

[2] *CIT* v. *Ramgopal* [2015] 55 taxmann.com 536 (Del); *CIT* v. *Tata Teleservices Ltd* [1980] 122 ITR 594; *Vinoj Kumar Jain* [2012] 395.

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The Bombay High Court in the case *of Charturbuj Dwarakadas Kapadia*[3] held that the 'transfer' as far as the landowner is concerned takes place on the date of entering into the JDA on the ground that possession given to a developer would also fall within the ambit of the 'transfer' under Section 53A of the Transfer of Property Act, 1882 read with Section 2(47)(v) of the IT Act.

This legal position that transfer happens on the date of entering into the JDA itself, necessitated the land owners to discharge tax liability even in the absence of receipt of any consideration in their hands, thereby causing grave hardship to them.

The above method of taxability of capital gains was posing challenges to many land owners who were constrained to discharge tax liability even before completion of project and receipt of consideration.

Taxability of unregistered JDAs

Although the position of law, as has been laid down by different Courts fixed the point of transfer in a JDA to the date of the agreement itself, the Supreme Court in the case of *Balbir Singh*[4] held that the provisions of Section 2(47)(v) and (vi) will not apply in cases where the JDA is not registered. The Court held that '*transfer of land through an unregistered document by giving possession of the property for limited purpose of development would not amount to transfer and hence Capital gains would not arise.'*

As regards application of Section 2(47)(v) on execution of JDA, it was held by the Supreme Court that 'registration is a *sine qua non* for a contract to come within the purview of Section 53A of ToPA and in the absence of such registration, the provision of Section 2(47)(v) of the IT Act would not be attracted.'

For Section 2(47)(vi) to be attracted, the Supreme Court held that the expression 'enabling the enjoyment of' would take colour from the previous word 'transfer' and hence, where possession is granted for a specific purpose with ownership rights retained, the same would not amount to transfer under Section 2(47)(vi).

Introduction of Section 45(5A) of the IT Act

As already pointed out in this article, taxing the land owner at the stage of entering into the JDA itself was causing undue financial hardship to them. With a view to alleviate the hardship, an amendment was brought in by the Finance Act, 2017 by inserting a new sub-Section (5A) to Section 45 w.e.f. 1 April 2018. The new provision states that capital gains would arise in the hands of the landowner once the completion certificate is issued by the authority on completion of the project or part of the project, as the case may be. The salient features of the new section are summed up as follows:

i. Applicable to Individuals/HUF
ii. Applicable only when capital asset held by the assessee is in the form of land/building
iii. Applicable only when 'specified agreement' is registered
iv. Not applicable when land owner transfers share of land before issuance of completion certificate

Whether provisions of Section 45(5A) would apply to JDA entered prior to 1 April 2017?

An interesting question is whether the provisions of the newly inserted section be applicable to agreements entered prior to the

[3] *Charturbuj Dwarakadas Kapadia* v. *CIT* (2003) 260 ITR 491 (Bom).
[4] *CIT* v. *Balbir Singh Maini* (2017) 398 ITR 531 (SC).

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section being made effective? The explanation given in the memorandum to the Finance Act, 2017 for insertion of the new sub section states as follows:

'With a view to minimise the genuine hardship which the owner of land may face in paying capital gains tax in the year of transfer, it is proposed to insert a new sub-section (5A) in section 45 so as to provide that in case of an assessee being individual or Hindu undivided family, who enters into a specified agreement for development of a project, the capital gains shall be chargeable to income-tax as income of the previous year in which the certificate of completion for the whole or part of the project is issued by the competent authority.'

The explanation seems to give a view that the sub-section (5A) to Section 45 has been introduced as a beneficial provision with an intent to mitigate the hardships faced by landowners.

However, the ITAT Hyderabad in the case of *K. Vijayalakshmi*[5] has held that the provisions of Section 45(5A) cannot be applied retrospectively as they are substantive provisions.

It will therefore be interesting to see how the aforesaid decision is unfolded by the higher judicial fora.

Applicability of Section 45(5A) to unregistered JDAs

The new sub-section has many essential conditions one of which is that the 'specified agreement' should be a registered document. Specified agreement is defined to be one '*whereby the land owner confers right on the Developer to develop the land or building in consideration for a share in the land or building so developed'.*

[5] K Vijaya Lakshmi v. ACIT [TS-5722-ITAT-2018(Hyderabad)].

For the purpose of this section, the right to develop the land is done by way of a JDA, hence the same shall be construed as the specified agreement.

Considering the specific condition stipulated in the section for the JDA to be registered, the provisions of the new section cannot be made applicable to unregistered JDAs.

As previously discussed, the position regarding taxability of unregistered JDA has been clarified by the Supreme Court in case of *Balbir Singh*. Therefore, one may contend that even if JDA is unregistered, the capital gains liability will not be triggered as on the date of agreement as has been the position of law in all cases prior to insertion of Section 45(5A). However, this would raise another question as to what would be the point of taxability in case of unregistered JDAs.

Interestingly, the ITAT Chennai, in the case of *Tamil Nadu Brick Industries*[6] has held that '*when a General power of Attorney is executed by the owner in favour of the developer granting all rights in favour of the property, then the same would amount to transfer under Section 2(47)(v) of the Act and that Capital gains will get triggered in the year of execution of the GPA.'*

The ratio that can be culled out from the aforesaid case is that JDA and GPA must be read together and, in a situation, where JDA is unregistered, but GPA is registered, the same would amount to transfer within the definition of Section 2(47) of the IT Act. Thus, capital gains liability would get triggered in the year in which GPA is executed.

[6] Tamil Nadu Brick Industries v. ITO (2018) 97 taxmann.com 1 (Tri-Chennai).

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Determination of consideration where execution of GPA is construed as transfer

In cases where JDAs entered are under the area-sharing method, the landowners get a share of the super built up structure as consideration. In that case, at the time of execution of GPA, the landowner would not have received any consideration as buildings/flats would not have been constructed and handed over. In such a situation, a question may arise as to how capital gains are to be determined in the hands of the landowner?

It is at this point in time that one should refer to the provisions of Section 50D of the IT Act. The section provides that where the consideration received or receivable from a transaction cannot be determined, then the fair market value of asset transferred shall be determined to be the full value of consideration.

Various courts applying the provisions of Section 50D have held that the 'fair market value of the land transferred shall be considered as the full value of consideration and construction cost of the super structure cannot be taken as the basis for computing capital gains'[7]

Conclusion

The intent of the legislature in inserting sub-section (5A) to Section 45 of the IT Act to mitigate the hardships faced by the landowners is highly commendable. The new provision also provides vast scope for interpretation as one dissects its application. One may expect interesting jurisprudence to evolve from various judicial fora on application and interpretation of the provision.

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Notifications & Circulars

Additional particulars to be furnished by deductors at the time of preparing statements of tax deducted

Rule 31A(4) of the Income-tax Rules, 1962 provides for certain compliances that the deductor must ensure at the time of preparing statements of tax deducted. The following amendments have been made in Rule 31A(4) by the Income-tax (17th Amendment) Rules, 2021:

i. *Substitution of clause (x)* – The deductor is required to furnish particulars of amount paid or credited on which tax was not deducted or deducted at lower rate in view of the notification issued under Section 194A(5) or in view of exemption provided under Section 194A(3)(x). Prior to the amendment the exemption provided under Section 194A(3)(x) was not included.

[7] *Vivekanand Padegal* v. *ACIT* (ITA 923/Bang/2018); *ACIT* v. *Shankar Vittal Motor Co.* (ITA No.35/Bang/2015).

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ii. *Insertion of clause (xiv)* – The deductor is required to furnish particulars of amount paid or credited on which tax was not deducted in view of clause (*d*) of the second proviso to Section 194 or in view of the notification issued under clause (*e*) of the second proviso to Section 194.

iii. *Insertion of clause (xv)* – The deductor is required to furnish particulars of amount paid or credited on which tax was not deducted in view of proviso to sub-section (1A) or in view of sub-section (2) of section 196D.

iv. *Insertion of clause (xvi)* – The deductor is required to furnish particulars of amount paid or credited on which tax was not deducted in view of section 194Q(5) with effect from 1st day of July, 2021.

In Appendix II, in Form 26A, in Annexure A, the words 'who is a resident' has been omitted in clause (ii). In Appendix II in Form 26Q, Sections 206AA and 206AB has been added.

TDS and TCS at higher rates – Functionality 'Compliance Check for Sections 206AB and 206CCA' introduced

The CBDT has issued a new functionality 'Compliance Check for Sections 206AB & 206CCA' through reporting portal of the Income-tax Department. These two sections have been inserted by the Finance Act, 2021 with effect from 1 July 2021. Accordingly, the tax deductor or the collector can feed the single PAN (PAN search) or multiple PANs (bulk search) of the deductee or collectee and can get a response from the functionality if such deductee or collectee is a specified person.

As per CBDT Circular No. 11 of 2021, dated 21 June 2021, a list of specified persons would be prepared as on the start of FY 2021-22, taking previous years 2018-19 and 2019-20 as the two relevant previous years. The list would contain the name of taxpayers who did not file return of income for both assessment years 2019-20 and 2020-21 and have aggregate of TDS and TCS of fifty thousand rupees or more in each of these two previous years. If any specified person files a valid return of income (filed & verified) for assessment year 2019-20 or 2020-21 during the financial year 2021-22, his name would be removed from the list of specified persons, on the date of filing. Similarly, if the aggregate of TDS and TCS, in the case of a specified person, in the previous year 2020-21, is less than INR 50,000, the name would be removed on the first due date under Section 139(1) of the Act falling in the financial year 2021-22. Belated and revised TCS & TDS returns of the relevant financial years filed during the financial year 2021-22 would also be considered for removing persons from the list of specified persons on a regular basis.

Further, as per the provisos of Sections 206AB & 206CCA of the Act, the specified persons shall not include a non-resident who does not have a permanent establishment in India.

Time limits of specified compliances extended in view of pandemic

S. No.	Particulars of compliance	Erstwhile due-date	Extended due-date
	Due-date for filing objections before the Dispute Resolution Panel ('DRP') Objections before the DRP are required to be filed within 30 days of receipt of the draft	01.06.2021 to 30.08.2021	31.08.2021

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S. No.	Particulars of compliance	Erstwhile due-date	Extended due-date
	assessment order. In cases where the due-date for filing objections is expiring on or after 01.06.2021 but before 30.08.2021, the due-date has been extended.		
	Due-date for furnishing TDS statement TDS return/statement is required to be filed on a quarterly basis. Due-date for filing return for the quarter ending March 2021 has been extended further.	30.06.2021	15.07.2021
	Due-date for furnishing TDS certificates An employer is required to annually furnish a certificate of tax deducted at source to the employees in Form 16. Due-date for furnishing this certificate for FY 2020-21 has been extended further. **Note:** Due-date for furnishing TDS certificate in Form 16A for the quarter	15.07.2021	31.07.2021

S. No.	Particulars of compliance	Erstwhile due-date	Extended due-date
	ending March 2021 also stand extended to 30.07.2021.		
	Due-date for registration/intimation/ approval of Trusts/Institutions/Research Associations The CBDT had earlier mandated trust, institutions, and other organizations to file application for fresh registration by 30.06.2021. With the CBDT circular, the due date for filing application for registration has been extended.	30.06.2021	31.08.2021
	Due-date for undertaking compliances to claim exemption from Capital Gains tax liability Exemption from Capital Gains tax liability can be claimed by a taxpayer subject to certain compliances such as purchasing or constructing house property, making	01.4.2021 to 29.09.2021	30.09.2021

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S. No.	Particulars of compliance	Erstwhile due-date	Extended due-date
	investment or deposit in specified accounts, as provided in section 54 to 54G. The due-date for undertaking these compliances which were falling between 01.04.2021 and 29.09.2021 has now been extended.		
	Due-date for Equalisation levy ('EL') statement Taxpayers who are subject to EL provisions are required to furnish a yearly statement of specified services or e-commerce supply or services in Form-1. The due-date for furnishing this statement for FY 2020-21 has now been extended.	30.06.2021	31.07.2021
	Due-date for uploading Form 15H and 15G received during 01.04.2021 to 30.06.2021 (Q1 FY 2021-22) Section 197A of the IT Act provides that tax under certain specified provisions shall not be deducted if the recipient furnishes to the payer a declaration in Form 15H/15G, as applicable. Subsequently, the payer of income is required to upload declarations received during a particular quarter at the departmental site on a quarterly basis. The due-date for uploading declarations for the quarter ending 30.06.2021 was 15.07.2021. This due-date now stands extended.	15.07.2021	31.08.2021
	Due-date for withdrawing application pending before Settlement Commission Income-tax Settlement Commission was discontinued *vide* the Finance Act 2021. In respect of the pending	27.06.2021	31.07.2021

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S. No.	Particulars of compliance	Erstwhile due-date	Extended due-date
	applications, taxpayers were given an option to withdraw their applications within 3 months from the date of commencement of the Finance Act 2021. Due-date for exercising this option has been extended.		
	Due-date for passing assessment or reassessment order in time-barring cases has been extended For cases where the due-date for passing assessment or reassessment order by the Assessing Officer ('AO') was falling between 20.03.2020 to 30.03.2021, the CBDT had earlier extended the timelines to 30.06.2021. The due-date for passing order has been extended	30.06.2021	30.09.2021
	further.		
	Due-date for passing penalty order For cases where the due-date for passing penalty order under Chapter XXI was falling between 20.03.2020 to 29.09.2021 has been extended.	30.06.2021	30.09.2021
	Linking of Aadhar with PAN As per section 139AA of the IT Act, it is mandatory to link Aadhaar number with Permanent Account Number ('PAN'). Due-date for this linkage has been extended further.	30.06.2021	30.09.2021
	Extension of timeline for sending intimation of processing of EL statement under Section 168(1) of the Finance Act 2016 Taxpayers who are subject to EL provisions are required to furnish a statement	30.06.2021	30.09.2021

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S. No.	Particulars of compliance	Erstwhile due-date	Extended due-date
	annually. Subsequently, the statement is processed by the AO and intimation specifying the amount payable or amount refundable to such person(s) is issued within one year from the end of the financial year in which such statement was furnished. For instance, the due-date for issuing this intimation for FY 2018-19 (AY 2019-20) was 31.03.2021. The same was earlier extended to 30.06.2021. Now, this due-date has further extended.		
	Due-date for payment under the DTVSV Act without any additional amount If a taxpayer opts to settle the dispute under the DTVSV Act, the taxpayer is given a waiver of certain demands such as interest, and penalty. The DTVSV Act provides the dates before which the payment should be made by the taxpayer for being eligible for the aforesaid waiver. Till now, due-date for payment of such tax for settlement of dispute was 30.06.2021. This has now been extended.	30.06.2021	31.08.2021
	Due-date for payment under the DTVSV Act with an additional amount If taxpayer fails to make payment of tax settlement of dispute within the timeframe prescribed above in (13), certain additional amount (for eg. Additional 10% of disputed tax) is required to be paid. There was no last date provided in the DTVSV Act before which the dispute can be settled with payment of an additional amount. The same has now been notified.	--	31.10.2021

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TDS on goods – Guidelines under new Section 194Q issued

The CBDT has issued the following clarifications with respect to the applicability of new Section 194Q which has been introduced from 1 July 2021:

- Applicability of Section 194Q on transactions carried through Exchanges
  - Difficulties in applying TDS as no one to one contract between buyers and sellers in case transactions are concluded on exchanges and clearing corporations
  - Clarified that Section 194Q shall not be applicable to:
    - Transactions in securities and commodities which are traded through recognized stock exchanges or cleared and settled by recognized clearing corporations (including those located in International Financial Service Centre)
    - Transaction in electricity, renewable energy certificates and energy saving certificates traded through Power Exchanges registered in accordance with Regulation 21 of CERC.
    - 'Recognised Clearing Corporation' and 'Recognised Stock Exchange' to have same meaning as provided in relevant provisions of Income-tax Act, 1961 while meaning of 'International Financial Service Centre' to be taken from SEZ Act, 2005.
  - Similar clarification was issued previously with respect to TCS under Section 206C(1H).
- Transitional issues and calculation of threshold
  - Section 194Q will not apply if either the event of credit of purchase in the books or payment has occurred before 1 July 2021.
  - Threshold of INR 50 lakh is applicable for the entire previous year (i.e. purchases between April to March). Where the value of goods purchased before 1 July 2021 exceeds INR 50 lakh, tax must be deducted on all credit or payment made on or after 1 July 2021.
- Adjustment of GST and purchase returns
  - Where the tax has to be deducted on the basis of credit to the books of account (based on invoice), tax can be

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deducted on value excluding GST component.

  - Where tax has to be deducted on payment basis (advance paid before credit in books based on invoice), tax to be deducted on the entire payment including GST component.
  - If the seller refunds the consideration on account of purchase return, the tax deducted and deposited by the buyer can be adjusted against subsequent purchase of goods.
  - No adjustment required where goods are returned by the buyer and replaced by the seller.

- Whether non-resident required to deduct tax under Section 194Q?
  - Non-resident not required to deduct tax under Section 194Q for purchasing goods from a resident seller where the purchase is not connected to a permanent establishment in India.
- Whether tax to be deducted if seller's income is exempt from tax?
  - Tax under Section 194Q not to be deducted on sums paid to a seller who as a person is exempt from tax under Income-tax or any other Act (like RBI Act, ADB Act etc).
  - Tax under Section 206C(1H) not to be collected from a buyer who as a person is exempt from tax under Income-tax or any other Act.
  - Clarification will not apply if only part of the income of the buyer/seller is exempt from tax.
- Whether tax is to be deducted on advance payment?
  - Tax under Section 194Q has to be deducted at the time of advance payment for purchase of goods
- Applicability of Section 194Q in the year of incorporation
  - Section 194Q is applicable if the turnover/gross receipts of business of the buyer exceed INR 10 crore in the preceding financial year
  - Condition cannot be satisfied in the year of incorporation and hence, no TDS liability on such buyer in the year of incorporation
- Whether receipts from non-business activity to be included for computing turnover?
  - The threshold of INR 10 crore is applicable in relation to gross receipts or turnover of the business of the buyer.
  - Receipts from non-business activities not to be included for computing the threshold of INR 10 crore.
- Cross application of Sections 194-O, 194Q and 206C(1H)

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- If tax has been deducted under Section 194-O by e-commerce operator, tax need not be deducted by buyer under Section 194Q
- If tax has been deducted under Section 194-O by e-commerce operator, tax need not be collected by seller under Section 206C(1H). The exemption will apply only if e-commerce operator has actually deducted tax under Section 194-O.
- In a transaction where both Section 194-O and Section 206C(1H) are applicable, the primary liability of tax deduction is under Section 194-O and the liability cannot be condoned even if seller has collected tax under Section 206C(1H)
- In a transaction where both Section 194Q and Section 206C(1H) are applicable, tax is required to be deducted under section 194Q. Transaction shall come out of the purview of Section 206C(1H) after the tax has been deducted by the buyer. However, considering that the rate of tax is same under both the provisions, an exemption has been granted to the buyer from tax deduction under Section 194Q where the seller, for any reason, has collected tax under Section 206C(1H) before the buyer could deduct tax.

Ratio Decidendi

Vivad Se Vishwas scheme – Eligibility when delay in filing appeal condoned by CIT(A) after filing of declaration

The Assessment Order in the case of the assessee was passed under Section 144 read with Section 147 of the IT Act on 26 December 2019. The assessee filed an appeal against the said order before the concerned CIT(A) on 6 February 2020 and also an application for condonation of delay for the same on 20 February 2020. In the affidavit filed by the Department, it was mentioned that the condonation of delay application was received on 25 December 2020. The delay in filing the appeal before the CIT(A) was condoned. Subsequently, in view of the enactment of the Direct Tax Vivad Se Vishwas Act, the assessee made an application to the designated authority on 18 December 2020 and a revised declaration and undertaking on 29 January 2021. The application was rejected on the ground that the deemed

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condonation of delay for filing the appeal before the CIT(A) was granted only on 25 December 2020, but the declaration under the DTVSV Act was filed on 18 December 2020 and hence the assessee was not qualified as the condonation of delay was not granted on the date of making the application under the DTVSV Act.

The issue before the Court was whether the assessee was an eligible appellant under the DTVSV Act. Section 2(1)(a)(i) of the DTVSV Act provides that if the appeal before the appellate forum, CIT(A) in this case, was pending before the specified date i.e. 31 January 2020, then the applicant would be an eligible appellant. The Court observed that it is a matter of first principles that the order of condonation of delay relates to the appeal and once delay has been condoned in the filing of appeal, that means in this particular case appeal has been filed in time (i.e.) before the specified date 31 January 2020 as required under the DTVSV Act thereby making the assessee an eligible appellant to avail the benefit under the said Act. The Court directed the Department to verify and accept the declaration filed by the assessee on 29 January 2021. [*Karan Ventakeshwara Associates* v. *ITO* - Order dated 24 June 2021 in WP No. 1992 of 2021, Bombay High Court]

Expenses incurred for pursuing scheme of demerger allowable when demerged entity vested in assessee

An undertaking was spun-off under the scheme of demerger approved by the High Court. The demerger came into effect from 01.04.2003. The demerged entity vested in an existing company i.e. the appellant/assessee. The assessee claimed deduction under Section 35DD of the IT Act for the expenses incurred on legal and professional expenses for pursuing the scheme of demerger from AY 2004-05 to 2008-09. The claim of the assessee was allowed only in AYs 2004-05, 2005-06 & 2006-07. The AO disallowed the claim in the AYs 2007-08 & 2008-09 on the ground that, it could be claimed only in the hands of the demerged company i.e. NIIT Ltd. and not in the hands of the assessee. The Revenue contended that Section 35DD uses the expression 'assessee' and not 'assessees', and therefore, the deduction is available only in the hands of demerged entity and cannot be claimed by the assessee being the resulting company. The Delhi High Court observed that a demerger is a legal device used very often by assessees, to restructure their business operations and that in the present case, one of the undertakings of the demerged company was transferred to another existing company being the assessee. Thus, the resulting company (assessee) was already in existence and therefore, the argument that the deduction can be claimed only by the demerged company, which was in existence, and that the word 'assessee' has been carefully used by the legislature, only to include a demerged company, is misconceived. Therefore, the Court held that the assessee being the resultant company was eligible to claim the deduction under Section 35DD of the IT Act. [*Coforge Limited* v. *ACIT* – Order dated 5 July 2021 in ITA No. 213 to 215 of 2020 (2021), Delhi High Court]

Donations by charitable trust for educational services, to charitable and religious institutions for philanthropy exempt under Section 11, even when for activities other than education

The assessee was a Trust registered under Section 12AA of the IT Act. It had filed its return of income for AY 2007-08 and claimed exemption for the amount of donation made by it under Section 11 of the IT Act. The AO denied the entire exemption on the ground that the assessee being a deemed university and having objects solely educational in nature had deviated from the objects of the trust deed by making donations to activities which were not covered by

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the ambit of the trust deed. The CIT(A) observed that the trust deed had empowered the trustees to apply the trust funds to any one or more of the specified objects of the Trust and the AO cannot interfere in the discretion of the trustees. It also observed it is immaterial whether the charitable and religious purposes for which the Trust is created are confined to the objects of the Trust and what is required is that the income must be applied or accumulated for application or set apart for application as per the provisions of the IT Act. The CIT(A) further observed that even assuming that the objects of the Trust do not empower the trustees to spend any part of the income of the Trust property for a particular purpose in India, it would be entitled for exemption under Section 11(1)(a) of the IT Act. The Madras High Court in this regard observed that there is no bar for the charitable or religious trust to claim exemption as long as its income is applied in India for such charitable or religious purposes. It further observed that as per Section 11(1)(a), exemption of 15% of income is unfettered and not subject to any condition. The High Court held that charity is clearly defined and therefore, a public charitable trust donating to activities other than education cannot be denied exemption under Section 11. [*Director of Income Tax (Exemptions)* v. *Shanmuga Arts* - Order dated 2 July 2021 in Tax Case Appeal No. 1059 of 2014, Madras High Court]

Narrow time frame to respond to SCN and dysfunctionality of e-filing portal are sufficient grounds to set aside assessment order

The assessee filed its return of income for AY 2017-18 declaring a loss. During the course of the assessment proceedings, several notices were served on the petitioner under Section 142(1) and the assessee furnished the information as and when sought. The assessee was served a show cause notice on 11 June 2021 (Friday), at about 5:44 PM. The said show cause notice, issued under Section 142(1), required the assessee to furnish confirmations and audited financial statements of non-residential investors by 11:00 AM on 14 June 2021 (Monday). The assessee was unable to respond to the said notice as the e-filing portal maintained by the revenue was not functional. As per assessee, the portal was dysfunctional even on 15 June 2021 when the impugned assessment order was passed. The Revenue, *vide* the impugned assessment order, added a part of the investments made by the non-residential investors under Section 68 of the IT Act. Observing that the time frame set out in the show cause notice was extremely narrow and that the e-filing portal was also dysfunctional, the Delhi High Court held that these were good enough reasons to set aside the impugned assessment order. The AO was directed to continue the assessment proceedings from the stage at which they were positioned when the show cause notice was issued. [*One Mobikwik Systems Private Limited* v. *DCIT* – Order dated 7 July 2021 in Writ Petition (C) No. 6168/2021, Delhi High Court]

TDS on FTS – Retrospective amendment in Section 195 not to disallow expenditure retrospectively under Section 40(a)(i)

During AY 2008-09, the assessee, a sister company of foreign service provider, paid an amount on account of Global Coordination Cost without deduction of TDS. It contended that the nature of payment does not attract the provisions of Section 195 and does not come under 'technical services' under Section 9 of the IT Act. The AO and the CITA(A), after perusing the said Agreement, held that the services provided by the parent company does come under the purview of technical services. It was therefore held that particularly after the insertion of

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explanation w.e.f. 1 April 1962 through Finance Act, 2010, the sum paid to the parent company would be taxable as FTS under Section 9(1)(vii) read with Article 12 of the Indo-US DTAA and therefore, the assessee was liable to deduct TDS on the said amount. The ITAT referred to the ruling of the Mumbai ITAT in the case of *Ashapura Mimichem*, wherein it was held that '*a retrospective amendment in law does change the tax liability in respect of an income, with retrospective effect, but it cannot change the tax withholding liability with retrospective effect*'. The ITAT observed that withholding tax obligations are to be discharged at the point of time when payment is made or credited, whichever is earlier, and such obligations can be discharged only in the light of law as it stood at that point in time. Since the assessment year in question was AY 2008-09, the ITAT observed that the Revenue was not justified in fastening the liability of tax deduction by relying on the amendment which was inserted in the year 2010 with retrospective effect from 1 April 1962. It therefore held that the disallowance under Section 40(10(i) would not be applicable. [*McCANN Erickson (India) Pvt. Ltd.* v. *ACIT* – Order dated 2 July 2021 in ITA 2252/Del/2016, ITAT Delhi]

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