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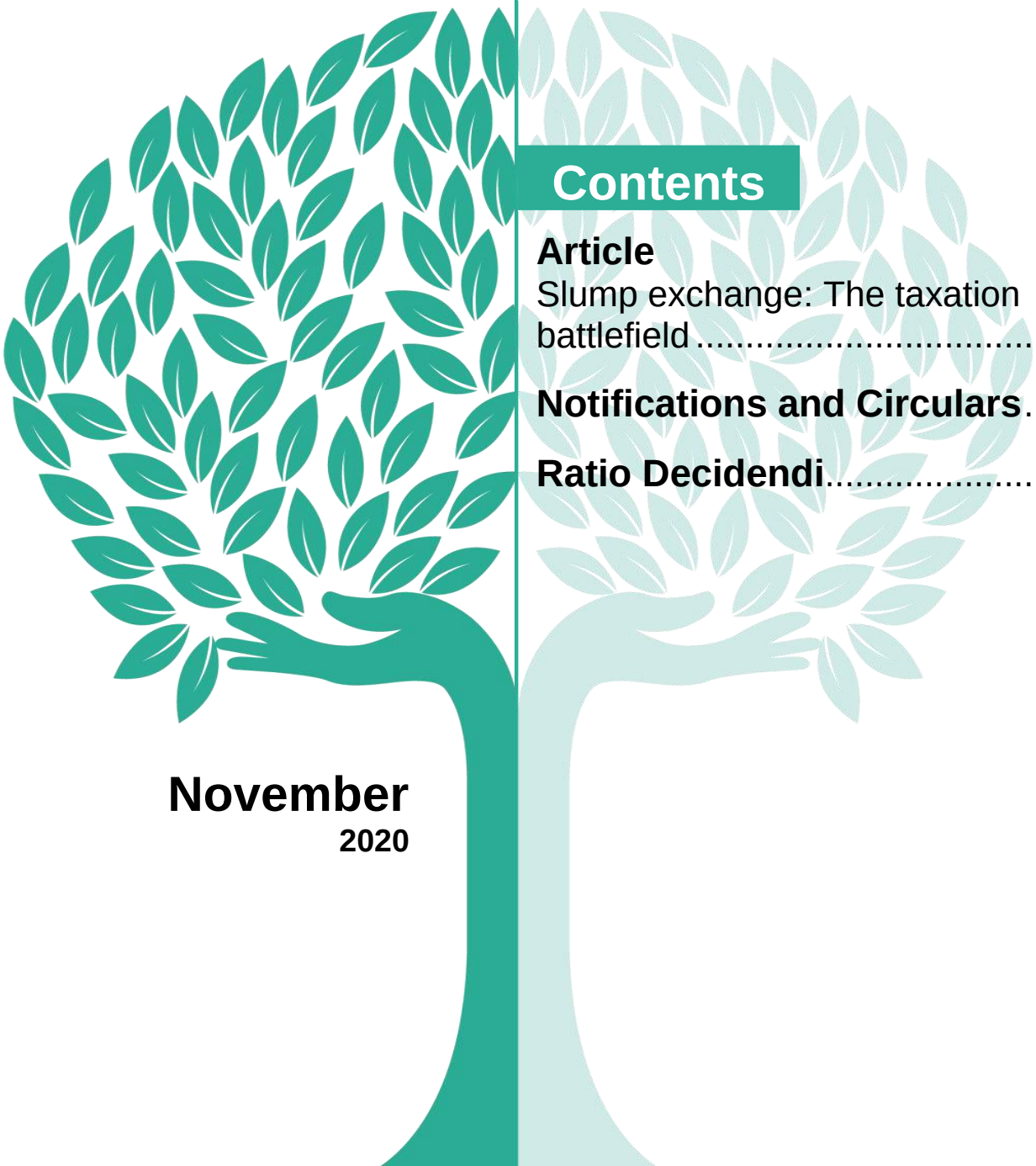

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Slump exchange: The taxation battlefield

By **Shalini Maheshwari and Aanchal Jain**

Introduction

Taxation of slump sale has always been a matter of contention. Slump sale is a popular mode of restructuring in which business is transferred as a going concern for a lump sum consideration without assigning values to individual assets and liabilities.

Until 2000, there was no specific provision in the Income-tax Act, 1961 ('**Act'**) that specifically dealt with taxation of slump sale. Considering that, an undertaking that gets transferred in a slump sale *inter-alia* includes intangible assets whose values are not determinable, it was held that surplus arising on the transfer of the undertaking will not be taxable as capital gains for reason that the computation machinery under Section 45 read with Section 48 would fail[1]. Considering the peculiarity in a slump sale where values do not get assigned to individual assets and liabilities, it was also held that the same would not be taxable under Section 41(2) and Section 50 of the Act.

As a result, slump sale was not chargeable to tax till 2000. To plug in these loopholes, the Finance Act, 1999, inserted Section 50B and Section 2(42)(C) in the Act w.e.f. 1 April 2000 to provide for taxation of slump sale. Section 50B of the Act provides machinery for computation of capital gains in case of slump sale by deeming 'net worth' as cost of acquisition.

'Slump sale' was defined by clause 42(C) of Section 2 of the Act as *the transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales.*

Considering that the definition of 'slump sale' only includes transfer by way of sale, there arises a question as to whether slump exchange would be covered by the provisions of Section 50B. If slump exchange is not covered by the provisions of Section 50B, then the decisions rendered prior to introduction of Section 50B would hold the field and the transaction would not be taxable for want of computation mechanism.

Taxation of slump exchange – The debate

Slump exchange covers those situations wherein the seller receives consideration in any form other than money. Recently, the Madras High Court in the case of *Areva T&D Ltd.*[2] held that the slump exchange does not attract provisions of Section 50B. This case highlighted the debate whether slump exchange is covered by the definition of 'slump sale' in order to be taxable under Section 50B of the Act. This issue has come under judicial scrutiny time and again.

The contention of the assessees who argue against the application of Section 50B is that in such cases, the transfer constitutes an

[1] *PNB Finance* v. *CIT*, [2008] 175 Taxman 242 (SC). In this case, reliance was placed on the decision of the Supreme Court in the case of *CIT* v. *BC Srinivasa Shetty*, 1981 AIR 972, for the proposition that if the computation cannot be made in absence of cost of acquisition, then the charging section itself would not be applicable.

[2] *Areva T & D Ltd.* v. *CIT,* [2020] 119 taxmann.com 171.

'exchange' and not a 'sale' and that, there has to be a 'sale' for a transfer to qualify as 'slump sale'. On the other hand, the Revenue's contention is that even an exchange can qualify as slump sale and hence, slump exchange should be taxable as slump sale.

Broadly, the question that arises is whether only transfer as a result of sale would be covered by provisions of Section 50B or whether slump sale includes other forms of 'transfer' as well as defined in Section 2(47) of Act. Another issue that comes to light is whether transfer for non-monetary consideration can constitute a 'sale'.

The case of Areva T&D Ltd.

In the facts of the case before the Madras High Court, the assessee had transferred its non-transmission and distribution business to its subsidiary company in exchange for equity shares under a scheme of arrangement approved by the High Court of Calcutta. Initially, the assessee contented that the transaction is slump sale and is covered by Section 50B and did not pay capital gains tax since the entire capital gains were to be invested in Tax Savings Bonds under Section 54EC. However, assessee faced a roadblock since an outer limit of Rs. 50 Lakh was set by the Finance Act, 2007 to avail exemption under Section 54EC. Later, the assessee contended that the transfer cannot be considered as a sale of business and that any transfer of an undertaking otherwise than as a result of sale will not qualify as a slump sale in the light of decision in case of *Avaya Global Connect Ltd*[3].

The Assessing Officer ('**AO**') concluded that the assessee themselves having agreed to the application of Section 50B cannot change its stand. The AO also relied on the decision of the Supreme Court in *Goetze India Ltd.* to reject the claim made by the assessee otherwise than by filing a revised return of income. The AO, thus, taxed the assessee under Section 50B of the Act. The Assessee carried the matter in appeal on the question *whether the transfer by a scheme of arrangement was a slump sale and taxable as capital gain under Section 50B of the Act.*

The revenue contented that the transfer by way of exchange would fall within the meaning of 'transfer' and hence, the same would be covered by Section 50B. The revenue relied on the decision of *SREI Infrastructure*[4] to buttress its contention.

The Court referred to Section 54 of Transfer of Property Act, 1882, to understand the meaning of 'sale'. The said section defines 'sale' as *'transfer of ownership in exchange of a price'.* 'Price' is defined in Sales of Goods Act, 1930, as money consideration for sale of goods.

By applying the above two definitions, the Court held that to fall within the ambit of term 'slump sale', the transfer should be by way of sale in exchange of monetary consideration. Consequently, if there is no monetary consideration involved in the transaction, then it would not be possible for the revenue to treat the transaction as 'slump sale'.

Further, the Court held that the decision of *SREI infrastructure* is not applicable to the facts of the present case as in that case there was a monetary consideration which is conspicuously absent in the assessee's case. The Court placed reliance on the decision of High Court of Bombay in case of *Bharat Bijlee*[5] and held Section 50B of the Act is not applicable in case of slump exchange.

The Court also observed after relying on the case of *Sadanand S. Varde*[6] that when an amalgamation takes place, the transfer of assets

[3] *Avaya Global Connect Ltd*. v. *ACIT*, 2008-TIOL-415-ITAT-Mum.

[4] *SREI Infrastructure Finance Ltd*. v. *IT Settlement Commission*, [2012] 20 taxmann.com 476 (Delhi HC).

[5] *Commissioner of Income-tax* v. *Bharat Bijlee*, [2014] 46 taxmann.com 257 (Bombay).

[6] *Sadanand S. Varde* v. *State of Maharashtra*, (2001) 247 ITR 609.

takes place by the force of the company court's order and/or by operation of law and it ceases to be a contractual or consensual transfer. The Court also placed reliance on the decision of the Supreme Court in case of *Devi Das Gopal Krishnan*[7] wherein it was held that mere passing of title to the goods absent any contract between the parties, express or implied, cannot lead to an inference of sale.

The Court observed that sale involves an agreement between the parties and if the transfer happens pursuant to an approval of a scheme or arrangement, it is not a contractual transfer, but a statutorily approved transfer and cannot be brought within the definition of the word 'sale'. Accordingly, since the transfer took place pursuant to a scheme of arrangement, the Court held that the same is not a contractual transfer, but a statutorily approved transfer and cannot be brought within the definition of the word 'sale'.

In addition to the above decision, the Courts have, in the following cases, held that only slump sale for a cash consideration will attract Section 50B:

- *Bharat Bijli Ltd*.[8]
- *Bennett Coleman & Co. Ltd*.[9]
- *Zinger Investments*[10]
- *Oricon Enterprises Limited*[11]
- *Avaya Global Connect Ltd*.[12]

The position emanating from the above judicial precedents can be summarized as follows:

- The definition of slump sale under Section 2(42C) is only restricted to transfer resulting from 'sale' and does not include other 'transfers' as given under Section 2(47) of the Act.
- Transfer by way of a scheme of arrangement is a statutorily approved transfer and not contractual or consensual transfer, hence, does not qualify as 'sale'.
- Only those transfers in which an entity is transferred as a going concern for a monetary lump sum consideration constitutes 'slump sale'. If the consideration is paid in any form other than in monetary terms, then the transaction will not qualify as 'slump sale'.

However, contrary views[13] are available from various courts to say that the term 'transfer' must be given a wider import and that it cannot just be restricted to cover 'sale'. It was held in these cases that even if the consideration for transfer of an undertaking is in the form of shares, it will still attract Section 50B of the Act.

Conclusion

The above judicial precedents make it clear that there is a conflict of opinion between various High Courts on the issue whether slump exchange is covered by the definition of 'slump sale' for the purposes of taxability under Section 50B of the Act. These cases are pending before Supreme Court and a final word on this vexed issue is eagerly awaited.

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[7] *Devi Das Gopal Krishnan* v. *State of Punjab*, (1967) 20 STC 430.
[8] *CIT* v. *Bharat Bijli Ltd*., [2014] 46 taxmann.com 257 (Bombay HC).
[9] *Bennett Coleman & Co. Ltd*., [2018] 89 taxmann.com 415 (Mumbai ITAT).
[10] *Income-tax officer* v. *Zinger Investments*, [2013] 38 taxmann.com 388 (ITAT Hyd).
[11] *Oricon Enterprises Limited* v. *ACIT*, [2018] 94 taxmann.com 250 (Mumbai ITAT).
[12] *Avaya Global Connect Ltd.* v. *Asstt. CIT*, [2008] 26 SOT 397.
[13] *SREI Infrastructure Finance Ltd.* v. *IT Settlement Commission*, [2012] 20 taxmann.com 476 (Delhi HC); *Virtual Software Training (P.) Ltd.* v. *ITO*, [2007] 17 SOT 347 (Delhi ITAT).

Notifications and Circulars

Vivad se Vishwas scheme – Cut-off date for making payment extended again

The Central Government has again relaxed the cut-off dates for making payment under the Direct Tax *Vivad se Vishwas* Act, 2020. As per Notification S.O. 3847(E), dated 27 October 2020, the new dates are as follows:

- 31 December 2020 shall be the cut-off date for filing declaration under the said Act;
- 31 March 2021 shall be the cut-off date for paying the amount payable under the said Act without additional amount;
- Additional amount would be payable if the amount payable is paid on or after 1 April 2021.

Further, the CBDT Circular No. 18/2020, dated 28 October 2020 also clarifies that where a declarant files a declaration under *Vivad se Vishwas* scheme on or before 31 December 2020, the designated authority, while issuing the certificate under Section 5(1) of the Direct Tax *Vivad se Vishwas* Act, 2020, shall allow the declarant to make payment without additional amount on or before 31 March 2021.

Transfer pricing – Tolerance range for AY 2020-21 notified

Central Board of Direct Taxes (CBDT) has notified tolerance range for transfer pricing for the Assessment Year 2020-21. As per Notification S.O. 3660 (E), dated 19 October 2020, in case the variation between the arm's length price and the price at which the transaction has actually been undertaken does not exceed 1% in respect of wholesale trading and 3% of the actual price in all other cases, then the actual price at which the transaction has been undertaken shall be deemed to be the arm's length price for AY 2020-2021. It may be noted that the tolerance range remains same as notified for AY 2019-20.

Condonation of delay in filing of Form No. 10BB for AY 2016-17 and subsequent years

Pursuant to requests for condonation of delay in filing of Form No. 10BB, the CBDT has notified that the CITs shall entertain such applications after satisfying themselves that the applicant was prevented by reasonable cause from filing such application within the stipulated time. As per CBDT Circular No. 19/2020, dated 3 November 2020, in all the cases of belated applications in filing of Form No. 10BB for years prior to AY 2018-19, the applications will be admitted for condonation of delay and be disposed of by 31 March 2021. For AY 2018-19 or for any subsequent Assessment Years, where there is delay of up to 365 days in filling the said form, the CITs have been authorised to admit belated applications for condonation of delay and decide on merits. It may be noted that as per Rule 16CC of the Income Tax Rules, 1962, the audit report of the accounts of certain fund or trust or institution or any university or other educational institution or any hospital or other medical institution is to be furnished in Form No. 10BB.

Due dates for filing of Return and Tax Audit Report for AY 2020-21 extended

The Ministry of Finance has again relaxed the last dates for furnishing of return and tax audit report for AY 2020-21. The new dates are as follows.

- Due date for furnishing the Tax Audit Report – 31 December 2020.
- Due date for filing of Income tax return in case of the assessees having tax audit/ transfer pricing report requirement – 31 January 2021.
- Due date for filing of Income tax return in case of other assessees – 31 December 2020.

Equalisation Levy Rules, 2016 amended

The CBDT has notified the Equalisation Levy (Amendment) Rules, 2020 [S.O. 3865(E), dated 28 October 2020] to amend the Equalisation Levy Rules, 2016. The key amendments are as under:

1. 'Electronic verification code' has been defined under Rule 2, to mean a code generated for the purpose of electronic verification of the person furnishing the statement of specified services.
2. Rule 4 which deals with 'Payment of Equalisation levy' has been amended to cast the liability of deducting and paying the equalisation levy on an e-commerce operator in addition to the assessee.
3. Rule 5 which dealt with 'Statement of specified services' has been amended to include a statement of e-commerce supply or services by an e-commerce operator as well. Provision to furnish the revised statement has also been provided for.
4. Rule 6 *[Issuance of notice by the Assessing Officer for furnishing of the statement, in case of failure]*, Rule 7 *[Notice of demand]*, Rule 8 *[Appeal before the CIT(A)]* and Rule 9 *[Appeal before the ITAT]* have also been amended to include an e-commerce operator in addition to the assessee.
5. Consequently, Form 1, Form 3 and Form 4 as provided under the Equalisation Levy Rules, 2016, have been substituted.

Ratio Decidendi

Consideration received from cashless exercise of stock option is taxable as capital gains

The assessee was deputed to the US Co. in the year 1995 by its Indian employer. He served in the US Co. from 1995-1998 as an independent consultant, and later, as an employee from 2001-2004. While the assessee was on deputation, he was given a right to purchase shares of the US Co. for a particular exercise price. He was also given an option of cashless exercise of stock options, whereby the underlying shares were not to be allotted to the assessee and he was only entitled to receive the sale proceeds less the exercise price. In AY 2006-07, the assessee exercised his option under the stock option plan by way of cashless exercise and offered the gain as long-term capital gain. The Assessing Officer,

however, split this transaction and brought to tax (a) the difference between the market value of shares on the date of exercise and the exercise price as 'income from salary', and (b) the difference between the sale price and market value of shares on the date of exercise as 'income from capital gains'. The ITAT held that the assessee was to be regarded as employee for the purposes of plan and the benefits arising therefrom were to be treated as income in the nature of salary in the hands of the assessee.

On an appeal to High Court, the Court observed that the assessee was an independent consultant to the US Co. and was not an employee at the relevant time (i.e. 1995-1998). Further, observing that there was no employer-employee relationship between the assessee and the US Co., the Court held that the finding of the ITAT that the income from exercise of stock option must be taxed as income from salaries is incorrect. It also noted that at the time of grant of options to the assessee in 1996, Section 17(2)(iiia) was not there in the statute. Relying on the decision of the Apex Court in *Dhun Dadabhoy Kapadia* and *Hari Brothers (P.) Ltd.,* it was held that the cashless exercise of option was a transfer of capital asset by way of a relinquishment/extinguishment of rights in capital asset in terms of Section 2(47) of the Income Tax Act, 1961. [*Chittharanjan Dasannacharya* v. *CIT* - Order dated 23 October 2020 in ITA No. 153/2014, Karnataka High Court]

Proceeds from sale of audio and TV rights of film covered under 'receipts from exhibition of films' under Rule 9A

The assessee had produced a feature film and had himself exhibited the film on commercial basis. He also sold audio and TV rights of the said film and computed his income from business as per Rule 9A of the Income Tax Rules, which provides for deduction in respect of expenditure on production of films. Production expenditure was set-off against the gross receipts and the balance was carried forward to the next year. The Revenue contended that the receipts with respect to sale of audio and TV rights would not fall under the ambit of receipt from exhibition of films under Rule 9A and disallowed the expenditure to that extent.

On appeal, the ITAT referred to the decision of *Vievesh Films (P) Ltd.*, wherein it was observed that Rule 9A does not prescribe any mode of exhibition and therefore exhibition of films on TV channels would also be covered under the rule. The ITAT observed that Rule 9A(3)(c) cannot be given a literal interpretation and therefore held that the amounts realized by the assessee on sale of audio and TV rights of the film would fall under the category of 'exhibition of films on commercial basis'. The AO was directed to allow the deduction of expenditure incurred on production. [*Vijaykumar Thimmegowda* v. *ITO* - Order dated 2 November 2020 in ITA No. 2928/2017, ITAT Bengaluru]

Transfer of rights in land and/or building not covered under Section 50C for calculation of capital gains – Section to be read strictly

The assessee-company computed and paid the capital gains arisen on sale of a part of its building (lease hold rights). The Assessing Officer observed that the sale consideration was less than the stamp duty valuation of the property and recomputed the capital gains by invoking Section 50C of the Income Tax Act. According to the said provision, where the sale consideration received or accruing as a result of the transfer of a capital asset, being 'land or building or both', is less than the value adopted by the Stamp Valuation Authority for the purposes of payment of stamp duty, then the value adopted by the Authority be deemed to be the full value of the consideration received for computing capital gains.

On an appeal, the assessee submitted that Section 50C being a deeming provision, has to be strictly interpreted. It was contended that since the section covers a capital asset being 'land, building or both', it would not apply in a case where merely leasehold rights in the land and building were being transacted. The Court accepted the contention and observed that the distinction can also be gathered from Section 54D wherein a capital asset has been understood to be land, building or 'any right in land or building'. Therefore, the Court held that the transaction in the instant case does not warrant invoking of Section 50C as the property in question was not of the nature covered by the section. [*Noida Cyber Park Pvt Ltd.* v. *ITO* - Order dated 12 October 2020 in ITA No. 165/2020, ITAT New Delhi]

Mere location of inter-state Tribunal cannot decide jurisdiction of High Court to challenge that Tribunal's order

The question of law that arose before the High Court was with respect to jurisdiction, on the ground as to when a Tribunal exercises jurisdiction over more than one state, which High Court will have the jurisdiction to adjudicate on the Tribunal's order. The Court analysed the following two judgements.

In *Ambica Industries* [(2007) 6 SCC 769], it was held that in terms of Section 100(1) of the CPC, the First Appellate Court's order being a decree, a Second Appeal shall lie before the High Court to which it is subordinate. It was further held that when the Appellate Court exercises jurisdiction over a Tribunal situated in more than one State, the High Court located in the State where the first court is located should be considered to be the appropriate appellate authority. However, in the case of *Sungard Solutions* [2019 SCC Online (Bom.) 456], it was held that '*by referring to Rule 4(i) of the ITAT Rules in the facts of the present case, the Appellate Court to which an appeal would lie from the order of the Tribunal would necessarily be the High Court exercising jurisdiction over the places where the Tribunal which passed the order is situated*'.

The Court after examining both the judgements held that the proposition laid down in *Sungard Solutions* cannot be considered as a precedent as it limits its finding to the facts of that case. The Court also held that the assertion in *Sungard Solutions* comes into play when the Tribunal was not exercising jurisdiction over more than one State which is not the case in the instant facts. Accordingly, the Court, relying on *Ambica Industries,* held that the mere physical location of an inter-state Tribunal cannot be determinative of the High Court's jurisdiction for an aggrieved party to challenge that Tribunal's order. Revenue department's appeal before the Court was held as not maintainable. [*CIT* v. *MD Waddar & Co.* - Order dated 27 October 2020 in Tax Appeal No. 14/2016, Bombay High Court]

Tax on royalty income cannot be levied on aggregate basis – Sub-clauses of Section 115A(1)(b) are mutually exclusive and independent

The assessee was a foreign company incorporated in the US. For the purpose of Section 115A(1)(b), the assessee bifurcated its income based on the date of royalty agreements and applied beneficial DTAA rate [15%] in respect of income arising out of agreements entered into on or prior to 1 June 2005 and tax-rate under Section 115A [10%] on income received pursuant to agreement entered into on or after 1 June 2005. However, the Assessing Officer rejected assessee's tax bifurcation and applied a flat rate of 15% [being the DTAA rate] and completed the assessment.

The High Court observed that the sub-clauses of Section 115A(1)(b) are mutually exclusive and

independent of each other. Thus, a foreign company must compute tax on its income under each of the sub-clauses separately. The Court also noted that the contracts or agreements, being the source of income, were entered into on different dates, and the statute recognizes such differentiation and provides for separate tax rates for each stream. It was therefore held that the assessee was eligible to compute tax at the rate beneficial to it being in accordance with Section 90(2), wherein the expression 'to the extent' makes it evident that the provisions of the Act or Treaty, whichever is beneficial, is applicable to the assessee. [*DIT* v. *IBM World Trade Corporation* - Order dated 1 October 2020 in ITA No. 278/2012, Karnataka High Court]

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