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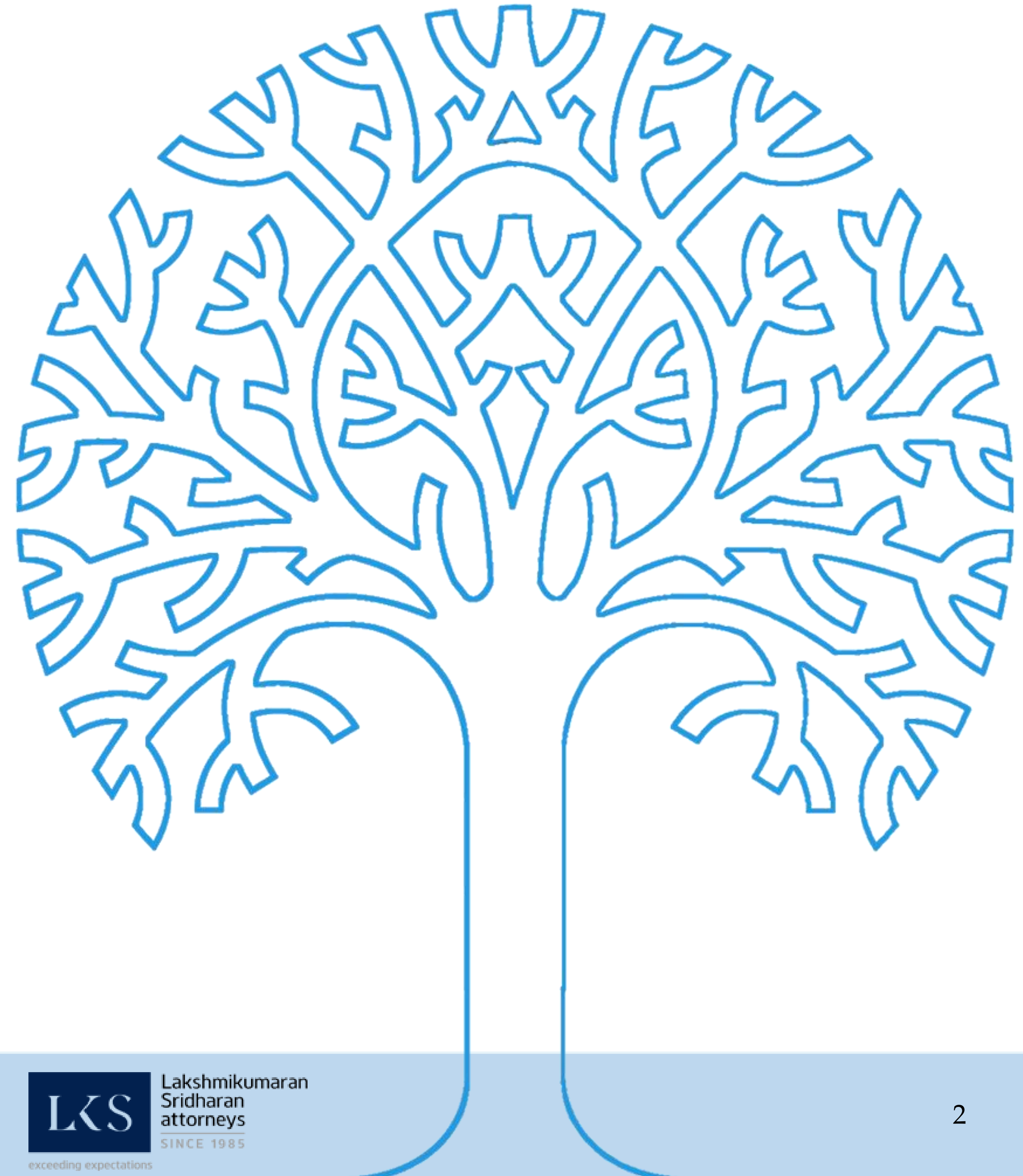

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Article

Timely payments to MSMEs – A beneficial amendment with a delayed clarity in Income Tax provisions

By **Karanjot Singh Khurana, Devashish Jain and Kanika Jain**

The article in this issue of Direct Tax Amicus discusses Section 43B(h) of the Income Tax Act, 1961 which was introduced by Finance Act, 2023. Observing that despite the well-placed intent behind introducing the aforesaid provision, the cross-linkage of the Income Tax Act with the MSME Act may cause certain ambiguities specifically concerning the deduction of the provision of expenses, calculating the time limit under the MSME Act, etc. The article highlights, along with illustrations, a number of these ambiguities and associated practical hardships that a businessman would face going forward. According to the authors, clarity is required in these provisions with respect to, *inter alia*, composite contracts, continuing services, etc. Otherwise, ambiguity surrounding such stringent provisions may make buyers wary of dealing with MSMEs, which is counterproductive to the intention of these provisions..

Timely payments to MSMEs – A beneficial amendment with a delayed clarity in Income Tax provisions

By Karanjot Singh Khurana, Devashish Jain and Kanika Jain.

In line with the Prime Minister's vision of *'extending maximum support to Micro, Small and Medium Enterprises* ('**MSMEs**')', the central government *vide* the Finance Act 2023 introduced Section 43B(h) in the Income-tax Act, 1961 ('**IT Act**'). Introduced as a Socio-Economic Welfare Measure, the provision mainly ensures that timely payments are made to micro and small enterprises.

In essence, the provision provides that payments made to micro and/or small enterprises shall be allowed as a deduction only if the payments are made within the time mandated under Section 15 of the Micro, Small, and Medium Enterprise Development Act, 2006 ('**MSME Act**'). In all other cases, the payments shall be allowed as a deduction only in the financial year when the payment is made to micro and/or small enterprise.

Despite the well-placed intent behind introducing the aforesaid provision, the cross-linkage of the IT Act with the MSME Act may cause certain ambiguities specifically concerning the deduction of the provision of expenses, calculating the time limit under the MSME Act, etc. This article aims to highlight some of these ambiguities and associated practical hardships that a businessman would face going forward.

ICDS v. MSME Act – Interplay with the provision of expense

Income Computation and Disclosure Standards ('**ICDS**') X relating to provisions, contingent liabilities, and contingent assets provide guidance on the computation of income chargeable under the head *'Profits and gains of business or profession'* and *'Income from other sources'*.

Amongst other things, ICDS X[1] defines the term *'provision'* to mean a liability that can be measured using a substantial degree of estimation. Further, the term *'liability'* is defined to mean a present obligation arising from past events, the

[1] Notification No. 87/2016, dated 29 September 2016.

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settlement of which is expected to result in an outflow of resources.

In view of the aforesaid definition, a taxpayer in certain scenarios can recognize a provision of expense and claim a corresponding deduction even in the absence of actual completion of services. However, a challenge would arise in cases where the taxpayer (i.e., service recipient) has booked a provision of expense in relation to services rendered by micro or small enterprises registered under the MSME Act despite actual completion of rendition of service. In such a scenario, a question would arise as to whether the provisions of Section 43B(h) of the IT Act read with Section 15 of the MSME Act will be attracted in the hands of the service recipient.

To appreciate the aforesaid query, it is pertinent to understand the scope and meaning of Section 15 of the MSME Act. Section 15 of the MSME Act provides that a buyer must make payment against receipt of goods or services to the MSME vendor in the following manner:

- ***In cases where there is a written agreement***: The payment shall be made on or before the date agreed upon between the parties. However, the same cannot be more than 45 days from the actual delivery of goods or rendering of services.
- ***In cases where there is no written agreement***: The payment must be made within 15 days of the actual delivery of goods or rendering of services.

In view of the aforesaid provision, one possible view could be that the timeline provided in Section 15 of the MSME Act will be triggered only upon completion of the delivery of goods or the rendering of service and the same has no co-relation with the date of creation of provision of expenses. This statement can further be explained with the help of the following illustration.

Illustration

Let's say Company A has entered into an annual maintenance contract with Company B (i.e., a small enterprise under the MSME Act) for a period of one year (i.e., January 2024 to December 2024). Pursuant to the contract, Company A is required to pay the agreed consideration at the end of the contract period. However, on 31 March 2024, Company A booked a provision for maintenance expense in relation to services received from January 2024 to March 2024 as per ICDS X and claimed the corresponding deduction during FY 2023-24.

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In this regard, the primary question would be whether the deduction of provision of expense would be allowed or the same will be subject to the rigors of Section 43B(h) of the IT Act?

In the aforesaid scenario, Company A (i.e., service recipient) may argue that the provisions of Section 43B(h) of the IT Act may not apply to disallow the expense as the timeline provided in Section 15 of the MSME Act will not stand breached as on 31st March. This is because the timeline provided in Section 15 of the MSME Act will initiate from the completion of services (i.e., 45 days from 31st December 2023). Even at the time of filing return of income, the compliance to timelines provided in section 15 of MSMED Act would not be ascertainable. In such cases, if Company A does not make payment within the prescribed time (i.e. 45 days from December 2024), the tax officer may seek to disallow the provision expense at the time of assessment.

Other practical issues

In addition to the above, taxpayers may have to evaluate the application of Section 43B(h) of the IT Act in the case of composite contracts, continuing services, and services provided by del credere agent. Some of these practical issues are explained with the help of an illustration in the subsequent paragraphs.

Issue 1: Applicability of the provisions of Section 43B(h) in case of composite contract

For instance, let's say that Company A engages Company B (i.e., a small enterprise under the MSME Act) for the purchase and installation of a lift at its office premises on 1st December 2023. As per the contractual arrangement between the parties, Company A is liable to pay a consolidated amount of consideration upon the completion of the project (i.e., on 1st April 2024). Further, the parties understand that the timeline for various activities is as follows:

- *Date of supplying lift by Company B:* 15 December 2023
- *Date of installation of lift by Company B:* 1 April 2024.

In the aforesaid factual background, a question would arise as to whether the time limit prescribed in Section 15 of the MSME Act will initiate from the date of supplying the lift (i.e., the predominant activity) or from the date on which the installation was completed.

In the present scenario, Company A may argue that the time limit of 45 days will begin from the day when the installation services are completed. This is because the activities of supplying lift and installation were part of a single composite contract.

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Consequently, Company A may argue that if it has made a payment on or before the aforesaid timeline, it will be entitled to claim a deduction for the payment on an accrual basis.

Issue 2: Applicability of the provisions of Section 43B(h) involving agent registered as per MSME Act

Ambiguity may also arise in cases where a taxpayer is required to remit a commission fee to a del credere agent (i.e., a small enterprise under the MSME Act) and there is a time lag between the date of sale and the date of collections of sale proceeds. In such a case, a question could arise as to whether the timeline under Section 15 of the MSME Act will initiate from the date of sale or the date of collection.

In the present scenario, taxpayers can take a view that the time limit prescribed under Section 15 of the MSME Act will initiate from the date of collection of sale proceeds. This is because one of the primary responsibilities of the del credere agent is the collection of sales proceeds, and the services of the del credere agent cannot be considered to be completed till the date of collection.

Conclusion

The provisions of Section 15 of the MSME Act and 43B(h) of the IT Act ensure timely payments to MSMEs, with an intent to reduce the credit period and consequent increase in working capital requirements for MSMEs. However, clarity is required in these provisions with respect to, *inter alia*, composite contracts, continuing services, etc. Otherwise, ambiguity surrounding such stringent provisions may make buyers wary of dealing with MSMEs, which is counterproductive to the intention of these provisions.

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Notifications & Circulars

- Digitalization of income-tax forms – Six specified forms to be furnished electronically

Digitalization of income-tax forms – Six specified forms to be furnished electronically

Rule 131 of the Income-tax Rules, 1962 provides for electronic furnishing of Forms, Returns, Statements, Reports, Orders, etc. Sub-rule (1) provides that Director General of Income-tax (Systems) may with the approval of CBDT, specify that any of the Forms, returns, statements, reports, orders, by whatever name called, prescribed in Appendix II, shall be furnished electronically under digital signature, if the return of income is required to be furnished under digital signature or through electronic verification code.

In exercise of the aforesaid powers, the Directorate of Income Tax (Systems) with approval of Central Board of Direct Taxes ('**CBDT**') issued Notification No. 01/2024-25, dated 24 June 2024. *Vide* the Notification, it has been prescribed that the following Forms will be furnished electronically with effect from 27 June 2024:

1. ***Form No. 3CN***: Application for notification of affordable housing project as specified business under Section 35AD.
2. ***Form No. 3CS***: Application for notification of a semiconductor wafer fabrication manufacturing unit as specified business under section 35AD.
3. ***Form No. 3CEC***: Application for a Pre-filing meeting.
4. ***Form No. 3CEFB***: Application for Opting for Safe Harbour in respect of Specified Domestic Transactions.
5. ***Form No. 59***: Application for approval of issue of public companies under Section 80C(2)(xlx).
6. ***Form No. 59A***: Application for approval of Mutual Funds investing in the eligible issue of public companies under Section 80C(2)(xx).

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Ratio Decidendi

- Transfer of capital asset – Deeming provision of Section 50C does not apply to leasehold rights – ITAT New Delhi
- Connectivity charges ancillary to interconnect charges are not to be treated as Fee for Technical Services – ITAT New Delhi
- Belated TDS deposit – Delay in reimbursement by the State Govt is a reasonable cause for quashing prosecution – Andhra Pradesh High Court
- No disallowance under Section 40(a)(i) to be made if the recipient has declared the respective income in their return of income – ITAT Chennai
- Receipt of money on settlement of dispute related to operation of hotel under a licensing arrangement is a 'business receipt' – Calcutta High Court
- Payments made for obtaining administrative services does not constitute 'fees for included services' under the India-USA DTAA – ITAT Bengaluru

Transfer of capital asset – Deeming provision of Section 50C does not apply to leasehold rights

In the instant case, the assessee, a salaried employee, declared an income of INR 5,06,850 in his Income Tax Return ('**ITR**'), which got processed under Section 143(1) of the Income Tax Act, 1961 ('**IT Act**'). Subsequently, the Assessing Officer ('**AO**') reopened the assessment under Section 147 of the IT Act on the ground that the assessee had sold a leasehold property during the relevant financial year ('**FY**') but did not declare any capital gains derived therefrom. Accordingly, the AO completed the reassessment by taxing the entire sale considerations based on the stamp duty value as per Section 50C of the IT Act, resulting in an assessed income of INR 75,94,850.

The matter went on an appeal before the Hon'ble Income Tax Appellate Tribunal ('**ITAT**'), Delhi wherein the ITAT remanded the matter back to CIT(A) to adjudicate on the validity of reopening of assessment. However, in respect of Section 50C, the ITAT after examining various Supreme Court decisions[2] observed that a deeming provision should not extend beyond its intended scope. Further, the ITAT also noted that Section 50C specifically applies to 'land or building or both,' and not to any rights therein. In this regard, the ITAT relied upon the decision of the Bombay High Court[3] and its own decision in a previous case[4] to conclude that Section 50C does not apply to the transfer of leasehold rights. Accordingly, the ITAT held in favor of the assessee, ruling that Section 50C was inapplicable in this case for capital gains computation purposes.

[*Shivdeep Tyagi* v. *ITO* – Order dated 18 June 2024 in ITA No. 484/Del/2024, ITAT Delhi]

Connectivity charges ancillary to interconnect charges are not to be treated as Fee for Technical Services

In the instant case, the assessee, Huawei International Co. Ltd. ('**HICL**'), incorporated under the laws of Hong Kong, engaged in distributing telecommunication products, received reimbursement of connectivity charges from Huawei Telecommunications (India) Company Pvt. Ltd. ('**HTCL**'). During assessment the AO treated the amount under consideration as 'Consultancy' or 'Managerial' services falling within the ambit of Fee for Technical Services ('**FTS**') under

[2] *CIT* v. *Amarchand N. Shroff*, [1963] 48 ITR (SC) 59 & *CIT* v. *Mother India Refrigeration Industries Private Limit*ed, 1985 (4) SCC 1

[3] *CIT* v. *Greenfield Hotels & Estates (P.) Ltd.*, 77 Taxmann.com 308

[4] *Noida Cyber Park (P.) Ltd.* v. *ITO*, 123 Taxmann.com 213

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Section 9(1)(vii) of the IT Act and made additions under Section 143(3) read with Section 144C(13) of the IT Act for the relevant assessment years.

Aggrieved, the assessee appealed to the ITAT, Delhi. The ITAT analyzed the purchase service agreement between HICL and HTCL, which outlined the assessee's responsibilities, including negotiating with manufacturers, suppliers, and vendors, entering into contracts, etc. The ITAT determined that these activities were integral to processing the product and were ancillary to providing interconnect services and did not constitute 'Consultancy' or 'Managerial' services. Consequently, the ITAT held that the amounts received could not be treated as FTS under the IT Act. Notably, the provisions of India- Hong Kong DTAA were held to be not applicable during the assessment years under consideration.

[*Huawei International Co. Limited* v. *ACIT* – Order dated 21 June 2024 in ITA No. 552 and 1815/Del/2022, ITAT Delhi]

Belated TDS deposit – Delay in reimbursement by the State Govt is a reasonable cause for quashing prosecution

In the instant case, the assessee had deducted tax at source ('**TDS**') on certain payments, but the same were not credited into Central Government's account within the stipulated time. Consequently, the assessee had made late payment interest for the same under Section 201(1)(a) of the IT Act. Notwithstanding the above, the Income Tax Department initiated criminal proceedings against the assessee, alleging contravention of Section 276B of the IT Act. Consequently, complaints were filed before the Additional District Judge-cum-Special Economic Offences Court, Vishakhapatnam against the assessee.

Aggrieved by these proceedings, the assessee invoked the jurisdiction of the High Court under Section 482 of the Code of Criminal Procedure, 1973, seeking to quash the criminal complaints. The HC upon examining the matter, and relying on various judicial precedents[5], observed that there cannot be any criminal prosecution by virtue of Section 278AA of the IT Act, if the assessee was able to establish that there was a reasonable

[5] *K.R.M.V Ponnuswamy Nadar Sons* v. *UOI*, [1992] 196 ITR 431 (Mad), *Banwarilal Satyanarain and others* v. *State of Bihar and another*, 1989 SCC Online Pat 137, *Sonali Autos Private Limited* v. *State of Bihar and others*, (2017) 396 ITR 636

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cause for failure to deposit the amount within the stipulated time. The HC further observed that the assessee had delayed in remitting the amount to the Central Government because there was a delay in the receipt of fee reimbursement from the Govt. of Andhra Pradesh relating to students who were admitted under the fee reimbursement scheme. The HC held that the above reason was sufficient to constitute a 'reasonable cause' within the meaning of Section 278AA of the IT Act. Consequently, the High Court held that the initiation of criminal proceedings against the assessee was unwarranted and accordingly quashed the proceedings against the assessee.

[*Aditya Institute of Technology and Management, and Others* v. *The State of Andhra Pradesh and Others* – Order dated 24 June 2024, Criminal Petition Nos. 1207, 1208 and 1212 of 2020, Andhra Pradesh High Court]

No disallowance under Section 40(a)(i) to be made if the recipient has declared the respective income in their return of income

In the instant case, the assessee was engaged in the business of shipping contract services. During the course of remand proceedings, the AO confirmed a disallowance of INR 2.26 crore for non-deduction of TDS on payments made to non-residents under Section 40(a)(i) of the IT Act. The disallowance was sustained by CIT(A). Aggrieved by the CIT(A)'s order, the assessee preferred an appeal before ITAT Chennai.

During the course of hearing, the assessee submitted that no disallowance under Section 40(a)(i) can be made in view of the second proviso of the said provision if the recipient parties have declared the respective income in their return. In this regard, the assessee placed reliance upon the ruling of the Hon'ble Delhi High Court in the case of *CIT* v. *Ansal Land Mark Township (P) Ltd.*[6]

Per contra, the department placed its reliance upon the rulings of the Kerala High Court in *Prudential Logistics and Transports* v. *ITO*[7] and *Thomas George Muthoot* v. *CIT*[8] wherein it has been held that once it is found that there is failure to deduct tax at source, the fact that the recipient has subsequently paid tax, will not absolve the payee from the consequence of disallowance.

The ITAT after considering all submissions observed that in case of contrary rulings of non-jurisdictional High Courts, the ruling which is beneficial to the assessee shall be applied.[9] Accordingly,

[6] [2015] 377 ITR 635 (Del)
[7] 51 taxmann.com 426 (Kerala)
[8] 63 taxmann.com 99 (Kerala)
[9] *CIT* v. *Vegetable Products Ltd.* [1973] 88 ITR 192 (SC)

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given the facts under appeal, the assessee's claim of deduction in respect of the impugned payments was allowed.

[*Ahlers India Pvt. Ltd.* v. *DCIT* – Order dated 27 June 2024 in ITA No. 524 of 2024, ITAT Chennai]

Receipt of money on settlement of dispute related to operation of hotel under a licensing arrangement is a 'business receipt'

The Assessee (licensee) was granted a license by ELEL Hotels & Investment Limited ('ELEL' or 'licensor') to operate the hotel 'Sea Rock' from 1 July 1986 for a period of 25 years, *vide* an Operating License Agreement dated 3 May 1986. Subsequently, on 11 May 2005, the Assessee entered into a settlement agreement, under which the ongoing civil litigations and other disputes were settled on a consideration of INR 43.10 crore. Out of which, a sum of INR 32.42 crore pertained to the settlement of the license arrangement.

During AY 2006-07, the assessee claimed that the sum of INR 32.42 crore was capital receipt and offered long term capital gains on the same in its return of income. During assessment, treated the same as a revenue receipt and proposed corresponding income addition. During initial appeals, both, the CIT(A) and the ITAT held the amount under consideration was rightly offered to long-term capital gain tax.

Aggrieved by the order of the ITAT, the Income-tax Department filed an appeal before the High Court of Calcutta. The Hon'ble High Court while allowing revenue's appeal treated the amount under consideration as 'revenue receipt', *inter alia*, observed as under:

- *Firstly*, the amount of INR 32.42 crore was part of 'award' received by the assessee to adjust and settle all disputes and claim arising out of the operating licence agreement. Thus, the amount received under the 'award' was (1) in the matter of trading contract and not towards transfer of any capital asset, and (2) in the form of compensation for loss of trading operation (i.e., running a hotel) and not a loss of any asset of enduring value[10].
- *Secondly*, the assessee had introduced some circulating capital to run the hotel and did not have any fixed capital investment as per the terms of the operating licence agreement. Accordingly, in view of the classical economist

[10] *CIT* v. *Rai Bahadur Jairam Vaiji & Ors.*, AIR 1959 SC 291

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distinction point of view as well, the receipt under consideration was not for transfer or loss of capital asset.

[*Principal Commissioner* v. *ITC Limited* – Order dated 27 June 2024 in ITA 125 of 2018, Calcutta High Court]

Payments made for obtaining administrative services does not constitute 'fees for included services' under the India-USA DTAA

During the AY 2013-14, the assessee remitted a certain sum upon receipt of administrative service from its parent company without withholding tax. During assessment, income-tax authorities observed that administrative services were performed, as a part of group global policies, to maintain control over staff in India. Accordingly, the same were held to be 'managerial' and 'consultancy' services under the ambit of Section 9(1)(vii) of the IT Act and Article 12 of India-USA DTAA. In appeal, the CIT(A) affirmed the order of the assessment order.

Aggrieved by the same, the assessee preferred an appeal before the ITAT. The issue before the ITAT was whether payment made for obtaining administrative services is taxable as 'fees for technical services' / 'fees for included services' under the IT Act, read with the India-USA DTAA.

The ITAT observed that in order to attract taxability of an income under Article 12(4)(b) of the India-USA DTAA, *inter alia*, the services rendered should satisfy the 'make available' condition. For interpreting the expression 'make available', the ITAT relied upon the Hon'ble Madras High Court's decision[11] which held that *'to fit into the terminology 'making available', the technical knowledge, skills etc. must remain with the person receiving the services even after the particular contract comes to an end.'*. Considering the said condition remained unsatisfied in the present case, the ITAT allowed the appeal and observed that the payments made for administrative services were not in the nature of 'fees for technical services.'

[*Herbalife International Private Limited* v. *DCIT (International Taxation)* – Order dated 18 June 2024 in ITA No. 718/Bang/2024, ITAT Bangalore]

[11] CIT v. De Beers India Minerals Pvt. Ltd. ITA 549 of 2007.

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