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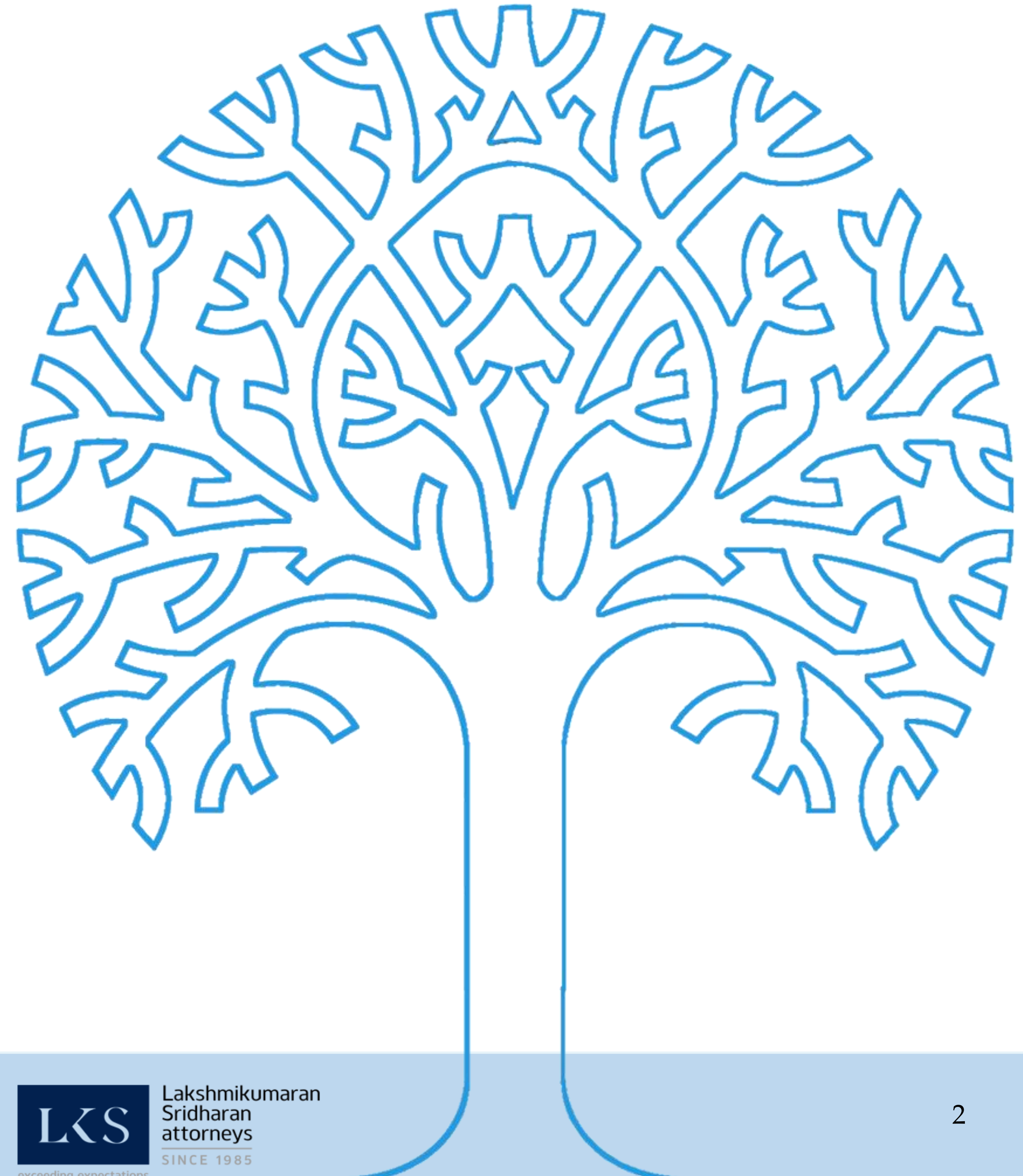

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Article

Impact of Section 281 on transfer of assets: Myriad issues thereunder

By **Shivam Gupta and Tanmay Bhatnagar**

Section 281 of the Income Tax Act, 1961 empowers the Department to declare a transfer of an asset as void where the transferor, during the pendency of any proceedings under the IT Act or completion thereof, but before the service of notice under the Second Schedule by a TRO, creates a charge on, or parts with the possession of any of his 'assets' in favour of another person. Considering the far-reaching consequences of the provision, the article in this issue of the Direct Tax Amicus highlights few practical issues that may be faced by the parties to a transfer. The authors in this regard discuss the questions like whether NOC is required in case of all transfers, establishment of bona fides by transferees, determination of transferor's potential liability, whether charge is created in case of transferable development rights, and slump sale transactions. According to the authors, given the multi-faceted issues surrounding Section 281, the parties may want to tread with caution before taking any legal position in relation to the said provision.

Impact of Section 281 on transfer of assets: Myriad issues thereunder

By Shivam Gupta and Tanmay Bhatnagar

An ever-present concern for purchasers or transferees in any transaction, be it an acquisition of immovable property or a share purchase, is the furnishing of a 'no dues certificate' or No Objection Certificate ('**NOC**') by the seller or transferor under Section 281 of the Income-tax Act, 1961 ('**IT Act**'). The said NOC draws its importance on account of the far-reaching powers granted to the Income-tax Department under Section 281 of the IT Act.

In order to understand the context of the operation of Section 281, reference must first be made of Section 222 of the IT Act which lays down the mechanism for the recovery of taxes. The said provision lays down that where a taxpayer is in default or is deemed to be in default in making the payment of income-tax, the Tax Recovery Officer ('**TRO**') may draw up a 'certificate' for the recovery of the tax dues *inter-alia* by way of the attachment and sale of such defaulting taxpayer' property. The first step after the issuance of such 'certificate' under Section 222 of the IT Act is the issuance of notice under Rule 2 of the Second Schedule to the IT Act. *Vide* this notice issued under Rule 2 of the Second Schedule the defaulter is required to pay the amount specified in the 'certificate' issued by the TRO within fifteen days from the date of service of the notice and is intimated of the steps which would be taken to realise the tax dues.

To ensure that taxpayers are unable to frustrate the aforesaid tax recovery process by simply transferring the property owned by them for little or no consideration, the IT Act also contains Section 281. The said provision empowers the Department to declare a transfer as void where the transferor, during the pendency of any proceedings under the IT Act or completion thereof, but before the service of notice under the Second Schedule by a TRO, creates a charge on, or parts with the possession of any of his 'assets' in favour of another person. Such transfer can be by way of a sale, mortgage, gift, exchange, or any other mode of transfer whatsoever.

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It is important to note that it is a settled law[1] that the Department cannot unilaterally declare the transfer void without first obtaining a decree to this effect from a civil court.

The circumstances in which a transfer cannot be declared void under Section 281, are provided under the proviso to sub-Section (1) of the said provision:

(a) Where the transfer is carried out for adequate consideration **and** without notice of the pendency of such proceeding or without notice of the tax or other sums payable by the transferor under the IT Act; or

(b) Where NOC is issued by the jurisdictional Assessing Officer ('**AO**') of the transferor.

The procedure for obtaining NOC in relation to Section 281 is provided by CBDT in its Circular[2]. The Circular requires the transferor to, *inter alia*, seek stay for disputed demands and also indemnify the remaining outstanding demands. Considering the liabilities fastened in cases involving outstanding demands, while transferee may insist on NOC from AO as a matter of routine, the transferor may want to analyse their actual liability to obtain the certificate.

Given the far-reaching consequences of the provision for the transacting parties, the scope of Section 281 becomes a bone of contention in high stake transactions. In the subsequent paragraphs, we have sought to highlight a few practical issues that may be faced by the parties to a transfer in light of the said provision.

Whether NOC required in case of all transfers?

It is manifest from the plain reading of the provision that NOC is required to be obtained only in cases where there is any pendency of proceedings or where completion of such proceedings has resulted in a demand against the taxpayer.

As a natural corollary, where there are no proceedings or demand under the IT Act, the transferor may not be required to obtain any approval from the income-tax department. Practically, demonstrating this conclusion can be challenging. Given the sensitivity of the financial information, the transferor may not be forthcoming to allow the transferee to access to its income-tax portal. The parties in such cases can consider obtaining certification to capturing the status of proceedings and demands to decide the requirement of obtaining NOC from income-tax department.

[1] *TRO* v. *Gangadhar Vishwanath Ranade*, [1998] 234 ITR 188 (SC)

[2] Circular No. 4 of 2011

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Proviso to Section 281(1) - Bona fides must be established by transferees to avail protection of this provision

As stated above, the proviso to sub-section (1) of Section 281 of the IT Act provides a safeguard to genuine transactions by laying down that a transfer shall not be declared void if the following conditions are cumulatively satisfied:

- It is made for adequate consideration; and
- It is made '*without notice of the pendency of proceedings*' under the IT Act or '*without notice of such tax payable or other sum payable*' by the transferor.

With respect to the first condition, it may be noted that the expression 'adequate consideration' has not been defined. There are certain special provisions in the IT Act which provide fair market value in respect of certain properties for computation of income. As an illustration, reference may be made to the provisions of Section 56(2)(x) of the IT Act which provides a mechanism to compute fair market value for immovable property, shares and securities and certain other properties. It will be interesting to see if the taxman will accept fair market value as provided in similar provisions as 'adequate consideration'.

Regarding the second condition, what must be seen is who is the party to a transaction who must have notice of the pendency of proceedings or of tax liability in order for the said condition to be satisfied. Common sense would dictate that the said condition must be seen *vis-à-vis* the transferee and not the transferor, because the latter would be presumed to be aware of any proceedings or liabilities pending against them under the IT Act.

The said question has been conclusively answered by the High Court of Gujarat in its judgment in *Karsanbhai Gandabhai Patel*[3]. Therein, the High Court held that notice of pendency of proceedings must not only be served on the transferor but must also be served on the transferee. Furthermore, in *Rekhadevi Omprakash Dhariwal*[4], the High Court of Gujarat held that a *bona fide* purchaser for an adequate consideration who has conducted due diligence cannot be made to suffer under Section 281 of the IT Act for tax dues in the name of transferor.

While it may be tempting to conclude on the basis of the said decisions that even in the absence of NOC the Department

[3] *Karsanbhai Gandabhai Patel* v. *TRO*, [2014] 43 taxmann.com 415(Gujarat)

[4] *Rekhadevi Omprakash Dhariwal* v. *TRO*, [2018] 96 taxmann.com 84 (Guj.)

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would be left without a recourse under Section 281 of the IT Act by simply pleading that the transferee did not have knowledge of the proceedings or income-tax liabilities of the transferor, it is advisable that transferees should maintain the proper documentation evidencing that:

(a) The consideration paid by them for the transfer is 'adequate'. This may be done by obtaining valuation reports from experts; and

(b) Proper due diligence was indeed carried out by them to ascertain whether there were any pending proceedings or income-tax liabilities of the transferor.

Section 281(2) - Transferees should operate cautiously for the determination of transferor's potential liability

As per its sub-section (2), Section 281 of the IT Act only applies when *inter-alia* the amount of tax or other sums payable or likely to be payable exceeds INR 5,000. While the threshold provided under Section 281(2) regarding the '*amount of tax or other sum payable or likely to be payable*' is low, a question which still arises is how the potential tax liability may be determined when proceedings are pending against the transferor.

For instance, if proceedings are pending against the transferor, wherein the issues under consideration by the authorities may be covered by judicial precedents in favour of the transferor, the transferor may be of the view that the said proceedings would end up in a favourable outcome. The said view may also be corroborated by legal opinions.

However, even in such circumstances, especially keeping in mind the low threshold of tax liability under Section 281(2) of the IT Act, a transferee may want to insulate itself from the risk under Section 281 by insisting on an NOC issued by the AO.

Creation of charge or transfer of property - Determination of whether charge is created or not in case of transferable development rights

As discussed above, Section 281 is attracted when a taxpayer creates a charge on, or parts with the possession by way of sale, mortgage, gift, exchange or any other mode of transfer whatsoever of any of their assets. Thus, a question which may arise is what happens when possession is handed over or charge is created in an asset which, *per se*, may not result in transfer of title in the asset.

An instance of this may be where a landowner may have transferred developmental rights to a real estate developer

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under an agreement ('**Development Agreement**'). In such a situation, while the land itself may not be transferred in the first instance, the landowner may part with the possession in favour of the developer.

In such instances, where the landowner does not pay its tax dues, the Department may invoke Section 281 to declare the Development Agreement as void under by claiming that the landowner had parted with the possession during the pendency of proceedings under the IT Act. Thus, in addition to other tax considerations, the Development Agreement should also be drafted keeping in mind the implications under Section 281 of the IT Act.

Meaning of 'asset' - Slump sale transactions

Keeping in mind its simplicity from a regulatory perspective, a common mode utilized by parties for a business transfer is a 'slump sale', which is defined in Section 2(42C) of the IT Act to mean '*the transfer of one or more undertaking, by any means, for a lump sum consideration without values being assigned to the individual assets and liabilities in such transfer.*'

The term 'undertaking' is in turn defined in the Explanation to Section 2(19AA) to include '*any part of an undertaking, or a unit or division of an undertaking or a business activity taken as a whole, but does not include individual assets or liabilities or any combination thereof not constituting a business activity.*' As is clear from the above-mentioned definition of 'undertaking' and the numerous judicial precedents regarding 'slump sale', individual assets such as land, building, plant and machinery etc. would not constitute an 'undertaking' for the purposes of the IT Act and rather, all of such assets taken together along with the liabilities, if any, of a business would constitute an 'undertaking'.

However, as per the Explanation to Section 281, the term 'asset' is defined to mean '*land, building, machinery, plant, shares, securities and fixed deposits in banks, to the extent to which any of the assets aforesaid does not form part of the stock-in-trade of the business*' of the taxpayer. Hence, the definition of the term 'asset' under Section 281 of the IT Act is an exhaustive one.

Therefore, a question which arises in the light of the aforesaid definitions is whether Section 281 would apply in the case of a slump sale where an 'undertaking' is transferred as a going concern.

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The scheme of taxation of transfer of an undertaking by way of slump sale was introduced vide Finance Act, 1999 with effect from 1 April 2000. Prior to this amendment, the Courts had understood slump sale as a sale of business as a whole-lock, stock and barrel without values being assigned to individual assets[5]. Even post amendment, the transfer by way of slump sale is understood to be transfer of an undertaking as opposed to transfer of individual assets.

Given the aforesaid, the transferor may want to explore the possibility of arguing that 'undertaking' is not included as a class of asset and ergo there is no requirement to obtain NOC in case of business transfer. Per contra, transferee may want to safeguard its interest and may contest that requirement to obtain NOC is triggered by transfer of specified assets. It may be contested that such transfers may be a result of individual asset transfer or a business transfer. However, the inclusion of such assets in any scheme of transfer may trigger the requirement to obtain NOC.

Conclusion

In light of the aggressive approach adopted by the tax authorities to collect their fair share of taxes, the taxpayers may want to ensure their compliance with the requirement of Section 281 of the IT Act. While there may be various contractual safeguards to protect the interest of acquirers, the powers available under Section 281 may have the effect of unsettling the contractual rights and may have far reaching consequences for the contracting parties. Given the multi-faceted issues surrounding Section 281 of the IT Act, the parties may want to tread with caution before taking any legal position in relation to the said provision.

[The authors are Associate and Principal Associate, respectively, in Direct Tax Team at Lakshmikumaran and Sridharan Attorneys, New Delhi]

[5] *West Coast Chemicals and Industries Ltd.*, [1962] 46 ITR 135, 142 (SC)

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Notifications & Circulars

- One-time relief to taxpayers in relation to transactions with persons with inoperative PAN
- Trusts or institutions – Due date for filing Form 10A/10AB extended to 30 June 2024

One-time relief to taxpayers in relation to transactions with persons with inoperative PAN

The CBDT *vide* Circular No. 3 of 2023 dated 28 March 2023 had clarified that persons who had failed to intimate the Aadhar number in accordance with Section 139AAA of the Income Tax Act, 1961 read with Rule 114AAA of the Income Tax Rules, 1962 shall, with effect from 1 July 2023, face the following consequences as a result of their PAN becoming inoperative:

i. Refund due to such persons shall not be paid to them.

ii. Interest on the aforesaid refund, if any, shall not be payable to such persons.

iii. TDS shall be deducted at a higher rate in case of such persons in accordance with Section 206AA of the IT Act.

iv. TCS shall be collected at a higher rate in case of such persons in accordance with Section 206CC of the IT Act.

Thereafter, several taxpayers received notices intimating that they had committed default of 'short deduction/collection' of TDS/TCS while carrying out the transactions where the PANs of the deductees/collectees were inoperative. As a result of this several grievances were filed by such taxpayers before the CBDT.

In view of the above, the CBDT has issued Circular No. 6 of 2024 dated 23 April 2024, *vide* which it has partially modified the Circular No. 3 of 2023 to provide that there shall be no liability to deduct/collect tax at a higher rate under Section 206AA/206CC of the IT Act for transactions entered up to 31 March 2024. However, such relief would only be available if the PAN of deductee/collectee becomes operative as a result of linkage with Aadhaar on or before 31 May 2024.

Trusts or institutions – Due date for filing Form 10A/10AB extended to 30 June 2024

Trusts or institutions seeking registration/approval under either Section 10(23C) or Section 12A or Section 80G or Section 35 are required to file either Form 10A or Form 10AB depending on the circumstances of their case. In order to alleviate the difficulties faced by taxpayers in filing the said forms, the CBDT, in exercise of its powers under Section 119 of the IT Act, extended the due of filing the said forms numerous times. *Vide* Circular No. 6 of 2023 dated 24 May 2023, the due date was last extended to 30 September 2023.

However, despite such extensions, further representations were received by the CBDT seeking the condonation of delay in the

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filing of Form 10A/10AB from taxpayers who could not file the said forms by 30 September 2023.

Considering the said representations, in order to mitigate the hardship being faced by such taxpayers, the CBDT has issued Circular No. 7 of 2024 dated 25 April 2024 to further extend the due date of filing the aforesaid forms to 30 June 2024. The benefit of Circular No. 7 would also extend in the following cases:

- All applications made in Form 10AB, where the Principal Commissioner or Commissioner has not passed an order before the issuance of the present Circular, would be considered to be valid.
- Where an entity had filed an application in Form 10AB, which was rejected by the Principal Commissioner or Commissioner before the issuance of the present Circular solely due to the application being filed after the due date or being filed under the wrong section code, such entity would have the option to refile Form 10AB on or before 30 June 2024.
- If an entity had failed to file Form 10A for AY 2022-23 till 30 September 2023 and subsequently, applied for provisional registration in Form 10AC, such entity can surrender such Form 10AC and apply for registration for AY 2022-23 as an existing trust, institution or fund in Form 10A till 30 June 2024.

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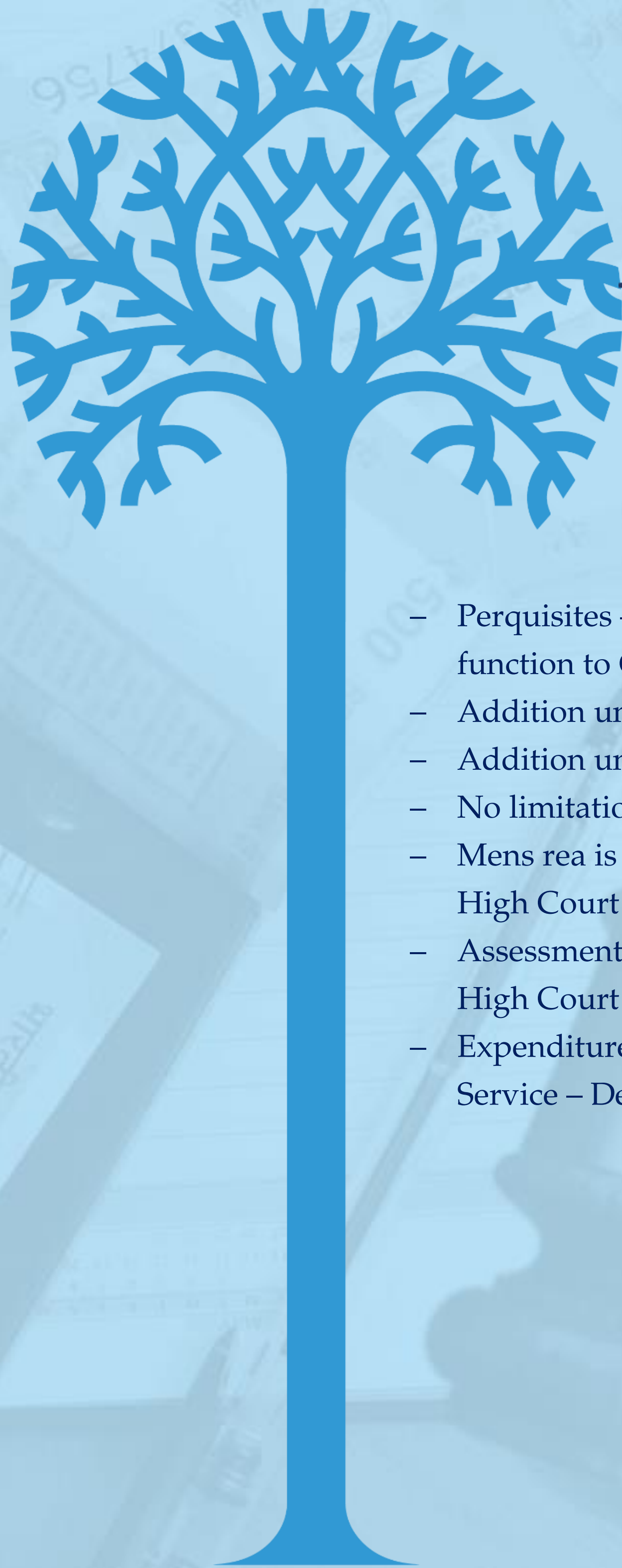

Ratio Decidendi

- Perquisites – Residuary clause under Section 17(2)(viii) does not lead to delegation of essential legislative function to CBDT – Rule 3(7)(1) is also constitutionally valid – Supreme Court
- Addition under Section 69 is not justified on an asset recorded in the books – ITAT Mumbai
- Addition under Section 69B is not justified without any proof of expenditure – ITAT Mumbai
- No limitation period for considering an application for compounding – Delhi High Court
- Mens rea is essential for upholding prosecution under Section 276CC, for delayed filing of return – Rajasthan High Court
- Assessment order sans show cause notice is wrong, as requirement of SCN is not an empty formality – Bombay High Court
- Expenditure incurred for reimbursement to non-resident associated enterprises when not Fee for Technical Service – Delhi High Court

Perquisites – Residuary clause under Section 17(2)(viii) does not lead to delegation of essential legislative function to CBDT – Rule 3(7)(1) is also constitutionally valid

The Supreme Court of India has dismissed the challenge to Section 17(2)(viii) of the Income Tax Act, 1961 and Rule 3(7)(i) of the Income Tax Rules, 1962 by the staff unions and officer association of various banks ('Appellants'). Section 17(2)(viii) was challenged on the ground that the CBDT has been granted excessive and unguided delegation of an 'essential legislative function'. Rule 3(7)(i) was challenged as being violative of Article 14 of the Constitution of India since it treated the prime lending rate ('**PLR**') of State Bank of India ('**SBI**') as the benchmark for determining the value of the perquisite instead of considering the actual interest rate charged by banks for a loan.

Clause (viii) of Section 17(2) of the IT Act provides that the definition of the term 'perquisite' includes '*the value of any other fringe benefit or amenity as may be prescribed*'. Pursuant to the said provision, the CBDT had notified Rule 3(7)(i) which states that interest-free or concessional loan made available to an employee by their employer for any purpose shall be treated as a taxable perquisite, the value of which would be a sum equal to the '*the simple interest computed at the rate charged per annum by the State Bank of India Act, 1955 (23 of 1955), as on the 1st day of the relevant previous year in respect of loans for the same purpose advanced by it on the maximum outstanding monthly balance as reduced by the interest, if any, actually paid by him or any such member of his household.*'

The Supreme Court observed that employer-bank's grant of interest-free loans or loans at a concessional rate will qualify as a 'fringe benefit' and 'perquisite' in the hands of the bank employees.

Further, on the issue of excessive delegation, the Supreme Court relied on the decision of its Constitution Bench in *Municipal Corporation of Delhi* v. *Birla Cotton, Spinning & Weaving Mills*, (1968) SCC OnLine SC 13 and noted that the test to determine excessive delegation was whether the primary legislation had stated the legislative policy with sufficient clarity, and the standards that are binding on subordinate authorities who frame the delegated legislation. Considering the same, the Supreme Court observed that CBDT's authority under Section 17(2)(viii) of the IT Act to prescribe 'any other fringe benefit or amenity' as perquisite was not boundless but was rather demarcated by the

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language of Section 17. It also observed that anything made taxable under Section 17(2)(viii) should be a 'perquisite' in the form of 'fringe benefits or amenity'. Therefore, according to the Court, the provision clearly reflected the legislative policy and gave clear guidance to the CBDT for making rules and consequently, the power granted under Section 17(2)(viii) and the enactment of Rule 3(7)(i) pursuant to such power did not constitute excessive delegation of essential legislative function.

On the issue of Rule 3(7)(i) being arbitrary and violative of Article 14 of the Constitution, the Supreme Court observed that SBI was the largest bank in the country and the interest rates charged by it invariably affect the interest rates charged by other banks. The Supreme Court held that by benchmarking the computation of perquisite against the SBI's PLR, Rule 3(7)(i) ensured consistency in application, provided clarity to stakeholders and prevented unnecessary litigation. Thus, the Supreme Court held that Rule 3(7)(i) could not be considered as arbitrary or irrational.

[*All India Bank Officer's Confederation* v. *The Regional Manager, Central Bank of India and Others* – Order dated 8 May 2024 in Civil Appeal No. 7708 of 2014, Supreme Court of India]

1. Addition under Section 69 is not justified on an asset recorded in the books

2. Addition under Section 69B is not justified without any proof of expenditure

The assessee obtained an immovable property as a part of family settlement which was recorded in its books of accounts. During the assessment proceedings, the Assessing officer contended that the consideration paid by the assessee was less than the market value of the said property and accordingly treated the difference between the stamp duty value and the consideration accounted by the assessee as additions under Section 69 and Section 69B of the Income Tax Act. Aggrieved by the assessment order, the assessee preferred an appeal before the CIT(A), who upheld the assessment order.

In further appeal, the ITAT Mumbai held that additions under Section 69 can only be made towards those investments which are not recorded in the books of accounts. Since in the present case, the assessee had recorded the purchase of the immovable property in its books of accounts, no addition could be made under Section 69. With respect to the applicability of Section 69B, the ITAT observed that the AO has to 'find' that the assessee has 'expended' an amount which is more than the amount recorded

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in the books of accounts. Since in the present case, the AO had not brought on record any evidence to support that the assessee had expended more than what is recorded in the books and has merely made the addition based on the valuation for stamp duty purposes, the ITAT held that the additions under Section 69B were not warranted.

Further, the ITAT held that Section 56(2)(vii)(b) of the IT Act also would not be applicable as it applies only to individuals and HUF and that Section 56(2)(x) of the IT Act would also not apply since the year in which the transaction took place was AY 2013-14.

The ITAT lastly relied upon a ruling of the High Court of Madras in *CIT* v. *Kay ARR Enterprises & Ors*, 299 ITR 348 and held that the transaction under a family settlement does not amount to transfer.

[*Abalabba Developers Pvt. Ltd.* v. *ITO* – Order dated 12 April 2024 in I.T.A. No. 2949/Mum/2023, ITAT Mumbai]

No limitation period for considering an application for compounding

The assessee filed an application for compounding under Section 279(2) of the Income Tax Act, 1961. However, the compounding application was rejected solely on the ground of delay in filing the application by relying upon the CBDT's Compounding Guidelines dated 16 September 2022 ('**Compounding Guidelines**'). The assessee filed a writ petition before the High Court of Delhi challenging the aforementioned rejection.

The High Court relied upon the coordinate bench ruling in *Vikram Singh* v. *Union of India*, 2017 SCC OnLine Del 7826 and held that there is no time limit prescribed for filing a compounding application under Section 279(2) of the IT Act and that the rejection of the compounding application solely on the grounds of delay, as per the CBDT Guidelines was invalid. The High Court held that imposition of time frames for filing applications by way of the Compounding Guidelines went beyond the statutory provisions of the IT Act and that it creates a condition of disability which is not contemplated under Section 279 of the IT Act. Accordingly, the High Court set aside the rejection order and remanded the matter to the Compounding Authority for fresh consideration.

[*Earthcon Constructions Pvt. Ltd & Anr.* v. *UOI & Ors.* – Order dated 10 April 2024 in W.P.(C) 5309/2024, Delhi High Court]

Mens rea is essential for upholding prosecution under Section 276CC, for delayed filing of return

In this case, the Income-tax Department filed a criminal complaint against the assessee under Section 276CC of the

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Income Tax Act, 1961 on the allegation that the assessee had filed his return of income under Section 139(1) of the IT Act for AY 1978-79 with a delay. The trial court, however, acquitted the assessee as the offence under Section 276CC was not proved against him.

The Department preferred an appeal against the order of the trial court before the Rajasthan High Court. The High Court by placing reliance upon the case of *Suresh Kumar Agarwal* v. *Union of India*, (2023) 146 taxmann.com 27(Jharkhand) and *Prem Das* v. *Income Tax Officer*, (1999) 5 SCC 24 held that in order to hold a person guilty of the offence under Section 276CC of the IT Act, the establishment of *mens rea* of the accused is essential for non-payment of tax or attempt to evade the tax.

The High Court observed that the assessee had explained the reasons in detail, about the *bona fide* delay in filing the income tax returns and had also deposited the entire tax amount with penalty subsequently. Therefore, the Department had failed to prove that the assessee had the *mens rea* to evade the payment of tax and also failed to establish the guilt of the assessee beyond all reasonable doubt. Accordingly, the High Court upheld the order passed by the trial court and dismissed the appeal filed by the Department.

[*ITO* v. *Rajendra Prasad Vaish* – Order dated 2 April 2024 in S.B. Criminal Appeal No. 543/1991, Rajasthan High Court, [2024] 161 taxmann.com 711 (Rajasthan)]

Assessment order *sans* show cause notice is wrong, as requirement of SCN is not an empty formality

The assessee was an individual who was a tenant in a building that was being redeveloped pursuant to a development agreement between a developer and owners of the old building. Under the said development agreement, the developer was under an obligation to provide permanent alternate accommodation to the assessee as per the mandate of the Maharashtra Housing and Area Development Authority. Consequently, the assessee received a new flat whose stamp duty value was INR 11.68 crore.

The assessee claimed exemption under Section 54F of the IT Act on the premise that the surrender of his tenancy rights in the old building had fetched a consideration which was thereafter reinvested in the new flat.

The case of the assessee was picked up for scrutiny assessment under Section 143(3) of the IT Act. During the said proceedings, the Department issued a show cause notice proposing to treat the amount of INR 11.68 crore as 'deemed income' under Section

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56(2)(x) of the IT Act and deny the deduction under Section 54F of the IT Act. The appellant-assessee duly made his submissions in response to SCN, but the Department passed the assessment order considering the entire stamp duty value as 'unexplained investment' under Section 69 of the IT Act. However, the assessment order was passed without issuing any show cause notice proposing to consider the entire stamp duty value as 'unexplained investment' under Section 69 of the IT Act.

Aggrieved by the assessment order, the assessee filed a writ petition before the High Court of Bombay. During the proceedings before the High Court, the Department submitted that no SCN was issued regarding the addition under Section 69 of the IT Act since the assessment was getting time barred. However, it was also submitted that all the submissions made by the assessee and other aspects were considered by the Department before passing the assessment order.

The High Court held that the issuance of SCN is not an empty formality, and its purpose is to give reasonable opportunity to the affected persons to effectively deal with the allegations therein. Considering the same, the High Court held that the SCN in the case of the assessee was also defective as it failed to specify the exact provisions under which the Department sought to assess the assessee's income i.e., either under Section 56(2)(x)(a) or Section 56(2)(x)(b). Accordingly, the High Court quashed the impugned order and allowed the Department to issue a supplementary show cause notice if it was possible to issue in accordance with law.

[*Vivek Jaisingh Asher* v. *ITO* – Order dated 16 April 2024 in Writ Petition No. 4370 of 2022, Bombay High Court]

Expenditure incurred for reimbursement to non-resident associated enterprises when not Fee for Technical Service

In this case, the AO had disallowed the expenses incurred on reimbursement of expenses by the assessee to its non-resident associated enterprise ('**AE**') under Section 40(a)(i) of the IT Act on the ground that the same represented fees for technical services ('**FTS**') as per Section 9 and was liable to TDS under Section 195.

In appeal, the CIT(A) disagreed with the view as expressed by the AO and held that while the expenses so incurred would not fall within the ambit of FTS but disallowed the same under Section 37 by holding that the assessee had failed to establish the said expenses.

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Upon appeal by the Department, the ITAT noted that from the evidence available on record, it could be determined that the expenses incurred by the assessee included server maintenance cost, travelling cost, insurance expense etc. Thus, it was held that the expenses reimbursed by the assessee were an integral part of the running of a business and for undertaking day-to day activities. The ITAT observed that the AO and the CIT(A) had neither doubted the genuineness of the expenses nor the nature of the expenses. Therefore, they could not have questioned the commercial expediency of the said expenses. Accordingly, the ITAT held that the reimbursement of expenses did not fall under the ambit of FTS and did not warrant TDS.

Aggrieved, the Department preferred an appeal before the High Court of Delhi. The High Court observed that the Department had failed to establish that the remittances made by the assessee fell within the ambit of any technical, managerial or consultative services. Accordingly, the High Court upheld the ITAT's order.

[*PCIT* v. *JAS Forwarding Pvt. Ltd.* – Order dated 4 April 2024 in ITA 9/2020, Delhi High Court]

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