MPC & CO LLP
CHARTERED ACCOUNTANTS

Corporate Update

Feb. - March | 2019

CONTENTS

INTERNATIONAL TAXATION

- "Make available" condition also applicable to development and transfer of technical plan or design 3-4

TRANSFER PRINCING

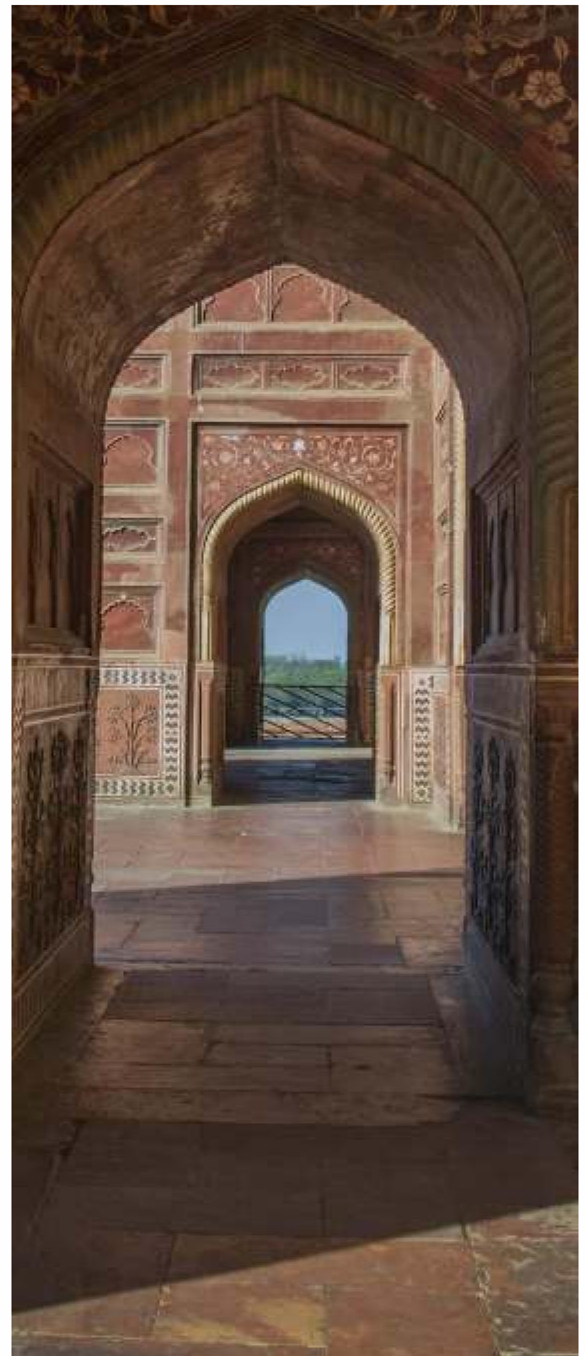
- Bombay HC upholds that excess amount paid over FMV of shares does not attract transfer pricing adjustment 4-5

DOMESTIC TAXATION

- Bombay Stock Exchange recognized as recognized association u/s 43(5) of the Act 5
- Book profit cannot be modified by the Assessee, if the financial statements prepared by the assessee are adopted by the shareholders in AGM 5-6
- Payment of advisory fees to affiliate in Mauritius for raising capital commitments for the overseas funds allowable as deduction u/s 37 6-7
- Non-compete fees paid to ex-employee is a revenue expense 7
- Agricultural land being immovable property, if received at a price less than its stamp duty value, such differential amount is taxable section 56(2)(vii)(b), whether or not it is a capital asset 7-8
- CBDT amends notification on Angel Taxation 8-9

CAPITAL GAINS

- Sale of shares of an entity cannot be equated with Slump Sale for computing capital gains 9



FOREWORD

Dear Reader,

The Government of India has been receiving extensive information from various countries under the 'Exchange of Information' mechanism embedded in many bilateral tax treaties entered into by India. Based on such information, the Indian tax authorities have initiated proceedings against certain corporates as well as expatriates to investigate into tax leakages and improper disclosures of foreign income and foreign assets.

The Indian revenue authorities continue to focus on increasing the taxpayers base and is vigorously issuing tax notices to those having income from Indian sources but not filing tax returns.

Around the close of financial year on March 31, 2019, the Indian revenue authorities made vigorous efforts to collect taxes to meet its budgeted targets. This is the first full year of applicability of GST and the implementation of GST, by and large, was reasonably good. While the GST collection was good, the same fell somewhat short of the target. Furthermore, the direct tax collections during the Financial Year 2018-19 stood close to the budgeted target.

C. S. Mathur
Partner

International Taxation

“Make available” condition is also applicable to development and transfer of technical plan or design

Buro Happold Limited [TS-76-ITAT-2019(Mum)]

Recently, the Mumbai Tax Tribunal in the case of Buro Happold Limited held that receipts towards consulting engineering services cannot be regarded as Fees for Technical Services (FTS) through development and supply of a technical plan or a technical design under India-UK tax treaty since the assessee did not “make available” technical knowledge, experience, skill, knowhow or process to its customer. The Tribunal concluded that such amounts were “business profits” not taxable in absence of permanent establishment (PE) of the assessee in India.

Under India-UK tax treaty, receipts towards technical or consultancy services amount to FTS only if such services make available technical knowledge, experience, skill, knowhow or processes or consist of the development and transfer of a technical plan or a technical design.

On facts, the assessee company, a tax - resident of UK, was engaged in providing engineering design and consultancy services to Indian customers through its Indian affiliate, Buro Happold Engineers India Private Limited (BHEI). As a part of such services, the assessee provided structural and MEP (Mechanical, Electrical and Public Health) engineering for various buildings. During the year under consideration, the assessee had earned income from providing consulting engineering services to BHEI. The assessee declared NIL income in its tax return.

The assessee contended that since it had not made available any technical knowledge or skill to BHEI, amount received from BHEI would not qualify as FTS and was business profit not taxable under the tax treaty in absence of a PE of the assessee in India.

The tax authorities contended that the services provided by the assessee included supply of design/drawing to BHEI and under the tax treaty, receipts for development and transfer of a technical plan or a technical design would be treated as FTS, whether or not it also makes available technical knowledge, experience, skill, knowhow, etc. Furthermore, since the assessee provided consultancy advice as well as technical design to BHEI, enabling it to further apply such technology for rendering services to its customers in India, the condition of “making available” was being satisfied.

On appeal, the Tribunal held that as per the rule of ejusdem generis, the words "or consists of the development and transfer of a technical plan or technical design" in Article 13(4)(c)(FTS) of the tax treaty would take colour from the expression "make available technical knowledge, experience, skill, knowhow or processes". The Tribunal stated that technology is considered to have been made available when the recipient of such technology is competent and authorized to apply the technology contained therein independently as an owner, without recourse to the service provider in the future.

The Tribunal concluded that the technical designs/drawings/plans supplied by the assessee were project-specific and could not be used by BHEI in any other project in the future. Thus, the assessee had not made available any technical knowledge, experience, skill, knowhow or processes while developing and supplying such technical drawings/designs/plans to BHEI.

In this regard, the Tribunal relied on the decision of the Tribunal, Pune Bench in the case of Gera Developments Pvt. Ltd. [72 taxmann.com 238] delivered in the context of the FTS Article under the India-US DTAA, wherein it was held that mere passing of project-specific architectural, drawings and designs with measurements did not amount to making available technical knowledge, experience, skill, knowhow or processes. Unless there was transfer of technical expertise skill or knowledge along with drawings and designs and if the assessee could not independently use the drawings and designs in any manner whatsoever for commercial purpose, the payment received could not be treated as FTS.

In the view of the aforesaid, the Tribunal held that the amount received towards consulting

Contd. on next page...

engineering services was not in the nature of FTS under the tax treaty, since the assessee did not "make available" technical knowledge, experience, skill, knowhow or processes to BHEI, through the development and supply of a technical plan or a technical design. Such amount were to be treated as "business profits" and in the absence of a PE of the assessee in India, it could not be brought to tax in India.

Ritu Theraja

Senior Manager
Tax Advisory
+91 11 47102272
therajaritu@mpco.in

Transfer Pricing

Bombay HC upholds that excess amount paid over FMV of shares does not attract transfer pricing adjustment

PMP Auto Components Pvt. Ltd. [TS-115-HC-2019 (BOM)-TP]

In a recent decision, Bombay High Court ('HC'), upheld the decision of ITAT, deleting the Transfer Pricing ('TP') adjustment made on account of excess money paid to Associate Enterprise ('AE') for acquiring its shares, holding that no income arises from such transactions as it was on capital account.

On the facts of the case, for the Assessment Year ('AY') 2010-11, the Assessee had entered into certain international transactions and its case was referred to Transfer pricing Officer ('TPO'). The TPO in its order held that the Assessee had paid excess money to its AE for acquiring AE's shares and adjustment under TP provisions was made on account of such excess money. Also, such excess money was treated as loan and adjustment of interest on such loan was also made.

Aggrieved, the Assessee filed objections before DRP, who confirmed the addition made on account of excess money, however, deleted the adjustment of interest on such loan. Consequently, the Assessing Officer passed the final assessment order.

Against such final assessment order Assessee filed an appeal before ITAT on adjustment made on account of excess money. The revenue also filed an appeal before ITAT with respect to deletion of adjustment of interest on excess money.

The ITAT allowed the appeal filed by the Assessee by holding that no income arises on account of purchase of shares as it was on capital account, relying on the decision of HC in the case of Vodafone Services Pvt. Ltd. Vs. Union of India [268 ITR page 1] wherein it was held that investment in shares is on capital account and does not give rise to any income to trigger the provisions of Chapter X of the Act. Consequently, the appeal of the revenue on adjustment of interest on excess money was dismissed.

Aggrieved, the revenue filed an appeal before HC against the order of ITAT.

Before HC, the revenue contended that the transaction under consideration is an international transaction on which TP provisions under Chapter X are applicable. Accordingly, the excess money, i.e. amount paid for investment over and above the Fair Market Value ('FMV') of the AE's share should be adjusted under TP provisions. Also, the decision of HC in the case of Vodafone (supra) is not applicable on Assessee as it dealt with inbound investment whereas the present case is in respect of out bound investment. Further, the shares if sold in subsequent years, may give rise to potential loss as the shares have been purchased at a higher price than FMV.

The HC mentioned that the only issue before it is the applicability of TP provisions in case of investments made on capital account. In this regard, the HC took a note of decision in the case of Vodafone (supra) wherein it was observed that TP provisions require determination of Arm's Length Price, however it is necessary that the income must first arise on account of international transaction. The HC mentioned that such view has been accepted by Central Board of Direct Taxes ('CBDT') by issue of instruction No. 2/2015 dated 29th January 2015. The HC held that the

Contd. on next page...

issue stands concluded by the decision of this court in case of Vodafone (supra) and the distinction between outbound investment and inbound investment, as highlighted by revenue, is of no relevance.

Further, with regard to submission of the revenue that in future the Assessee may sell these shares at a loss, leading to reduction of its tax liability in future. The HC held the same to be a hypothetical situation which cannot be the basis of assessment of the year under consideration.

Furthermore, HC noted that with effect from 1st April 2013, in case any consideration received for issue of shares, exceeds the FMV, the excess consideration will be taxable under section 56(2)(viib) of the Act. However, as this provision was made effective only with effect from 1st April 2013, and it is not even the case of revenue, the same has not been examined.

Accordingly, the view taken by the Tribunal was upheld by the HC and the appeal of the revenue was dismissed.

Similar decision has been taken by HC in the case of Tops Group Electronics Systems Ltd. [TS-114-HC-2019(BOM)-TP].

Shweta Kapoor

Senior Manager
Tax Advisory
+91 11 47102253
shwetakapoor@mpco.in

Domestic Taxation

Bombay Stock Exchange recognized as recognized association u/s 43(5) of the Act

(CBDT notification no. 8/2019)

The CBDT has recently issued a notification in terms of which, the transaction in commodity derivative through Bombay Stock Exchange (which are chargeable to Commodity Transaction Tax) shall not be regarded as speculative in nature.

Such notification has been issued under Section 43(5) of the Income Tax Act, 1961 ('the Act') which provides the meaning of the term 'speculative transaction'. Proviso to the same specifies certain transactions which are not deemed to be speculative in nature. Clause (e) of the said proviso states that an eligible transaction carried out in a 'recognized association' which is chargeable to commodity transaction tax with respect to trading in commodity derivative shall not be deemed to be speculative in nature. BSE has now been notified as the recognized association w.e.f. October 1, 2018.

Book profit cannot be modified by the Assessee, if the financial statements prepared by the assessee are adopted by the shareholders in AGM

[Gati Ltd. V. Assistant Commissioner of Income Tax, Circle – 2(2), Hyderabad][102 taxmann.com 40]

In a recent decision, the Hon'ble Tax Tribunal, Hyderabad Bench in the case of Gati Limited ('the Appellant') held that the audited financial statements prepared in accordance with the relevant accounting standards, policies and provisions of Companies Act, which wasadopted by the shareholders in the Annual General Meeting (AGM) cannot be subsequently modified by the Appellant for computation of the book profits.

The Appellant, in the instant case, filed return of income for AY 2013-14 offering the total income at Rs. 1,19,33,700/-. The Assessing Officer during the assessment proceedings, made certain disallowances.

On perusal of the assessment record subsequently, the CIT observed that an amount of Rs. 64 crores was reduced from the total income of the appellant both under the normal provisions of the Income-tax Act, 1961 ('the Act') as well as under the provisions of Section 115JB for determining the book profits in the assessment order. As the book profits determined under section 115JB were higher, the said book profits were deemed to be taxable income.

However, the amount of Rs. 64 crores was loss on sale of investments which was never debited to the P & L account, instead it was

Contd. on next page...

adjusted in the special reserve. AS-13 was not followed on the same, which was also qualified by the Auditors. However, the audited financial statements were ratified by the Company in the AGM.

CIT under the powers vested by section 263 of the Act, after giving show cause notice to the Appellant disallowed the adjustment of loss of Rs. 64 crores as the same was prejudicial to the interest of the revenue.

The Appellant preferred an appeal before the Hon'ble Tax Tribunal.

The Appellant contended that during the assessment proceedings, the AO was provided with all the material and submissions to satisfy that the deduction of Rs. 64 crores was allowable and the same was also accepted by AO and therefore no negative inference existed in the Assessment order for such claim. The Appellant further contended that CIT cannot exercise the power of revision merely because of a difference of change of opinion. The Tribunal held against the Appellant on the issue of jurisdiction of CIT under section 263 to treat the order as prejudicial.

On merits, the Tribunal after referring to the first and second proviso to section 115JB observed that the provisions of said section are very clear that book profits under section 115JB should be the same as laid before AGM. As the profits in the financial statements were adopted by the shareholders overlooking the qualification by the Auditors, the same shall be the final book profit for the purpose of section 115JB. The Appellant cannot subsequently alter the same by claiming that it had not followed certain accounting standards.

The Tribunal accordingly dismissed the claim of the Appellant and held that the Appellant has no right to modify the profit declared as per Companies Act and adopt a different profit for the purpose of MAT provisions.

Payment of advisory fees to affiliate in Mauritius for raising capital commitments for the overseas funds allowable as deduction u/s37

(Pr. Commissioner of Income Tax – 20 V. M/s. Lok Advisory Services Pvt. Ltd) [TS-774-HC-2018 (DEL)]

The Hon'ble High Court of Delhi, dismissing the appeal of revenue, held that the advisory fee paid by an investment advisory entity to its Mauritian affiliate for fund raising assistance which were beneficial to the payer as well to a third party is deductible under section 37(1) of the Income Tax Act.

In the instant case, M/s. Lok Advisory Services Pvt. Ltd. ('the assessee') was engaged in providing managerial, technical, consultancy and investment research services to two overseas funds (namely Lok I and Lok II). The assessee paid an amount of INR 2,88,43,934/- to its affiliate - Lok Foundation, in Mauritius for identifying the potential investors overseas and getting the successful funding. During the assessment proceedings, the Assessee explained that due to the efforts of one of the co-founder of Lok foundation, the fund size of the investments by Lok I and Lok II had increased. Accordingly, the fees paid by the overseas funds had also been increased. The Assessing Officer ('AO') however disallowed the same, on the ground that the payment had no direct nexus with the business of the Assessee. The AO contended that Lok Foundation had not actually rendered services directly to the assessee.The AO alleged that the assessee had made such payments only to shift its profit base to Mauritius, a tax heaven country with a low tax rate of 3%.

Aggrieved, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) ['CIT(A)'].The CIT(A) in its order, allowed the assessee's claim and deleted the addition made. While passing the order the CIT (A), The CIT(A) noted that advisory fee to be received by the assessee company from the overseas fund was to be calculated as a percentage of the committed capital to the funds. As a result, services being received from the Lok Foundation with the motive of increasing capital commitment to the overseas funds were in the business interest of the assessee as higher capital commitment means higher advisory fees for the assessee. This was also evident from the fact that there was increase of approx. 93% in the revenue earned by the assessee.

Tribunal also allowed the claim of the Assessee.

Contd. on next page...

On appeal before the Hon'ble High Court, the High Court noted that the efforts of the Mauritian affiliate benefitted the Assessee in the form of increased investment in India resulting in increase in advisory fee. Therefore, the payment was in relation to the business of the Assessee only and hence allowable. Also, TDS of 10% on gross basis was deducted on the payment to the Mauritian company.

Hence, appeal by the Revenue was dismissed by the Hon'ble High Court.

Non-compete fees paid to ex-employee is a revenue expense

(Commissioner of Income Tax Vs. M/s Max India Limited) [TS-776-HC-2018 (P&H)]

In a recent decision, the Hon'ble Punjab & Haryana High Court dismissing the appeal of the revenue has held that non – compete fees paid to ex-employee of the entity would be treated as a revenue expense.

In the instant case, M/s Max India Limited ('the assessee'), engaged in the business of manufacturing and sale of drugs, etc. paid non – compete fees to its ex-employee in order to restrain him from doing particular business / work / job, etc. for a particular period. The Assessing Officer disallowed the expense claimed holding the same to be capital in nature. However, CIT(A) and Tribunal provided relief to the Assessee relying upon its earlier decision in assessee's own case for the AY 2000-01, wherein, it was held that non-compete fee was allowed as deduction on the ground that the same was incurred to safeguard the business interest of the assessee.

On appeal before the High Court, the Hon'ble High court quoted the relevant findings of the Tribunal, which stated that Assessee had paid the relevant amounts in order to protect its business interest, as the ex-employee who was in a senior position with the company was instrumental in setting up the assessee's business and had such employee been in the competition with another joint venture company, the same would have been detrimental to the interest of the company. Therefore, relying on the decision of the Hon'ble Supreme court in SA builders 2006 (288) ITR 1, such amount was for the purpose of business on account of commercial expediency.

On the issue of revenue vs capital, the High court held that same depends on facts and circumstances of each and every case.

As such, the High Court dismissed the appeal of the revenue and held that non-compete payment to ex-employee for safeguarding interest of the company is revenue in nature.

Ritu Gyamlani

Senior Manager
Tax Advisory
+91 11 47102274
ritu@mpco.in

Agricultural land being immovable property, if received at a price less than its stamp duty value, such differential amount is taxable section 56(2)(vii)(b), whether or not it is a capital asset

In the present case, the assessee purchased three plots of land during the year under consideration. The sale consideration as per the respective sale deeds amounted to Rs.23,00,000 and the stamp duty value of such properties as determined by the Stamp Duty Authority amounted to Rs. 1,74,06,224.

During the assessment proceedings, the Assessing Officer (AO) invoked the provisions of section 56(2)(vii)(b) as per which if the sales consideration is less than the stamp duty value of the property by an amount exceeding fifty thousand rupees, then the difference between stamp duty value and the sales consideration is taxable under the head 'Income from other sources'.

The assessee claimed that these plots of land were agricultural land and did not fall under the definition of capital asset, on which provisions of section 56(2)(vii) read with Explanation thereto are not attracted.

Contd. on next page...

The AO rejected the argument of the assessee and made an addition of Rs. 15,106,224 being the difference between the sale consideration as per the sale deed and the stamp duty value as determined by the Stamp Valuation Authority.

The assessee, being aggrieved by the order of AO, preferred an appeal before Commissioner of Income Tax (Appeals) ['CIT(A)']. The CIT(A) held that the land in question being an agricultural land was not a capital asset as per the provisions of section 2(14) and therefore, section 56(2)(vii)(b) is not applicable on the said transaction.

Further, the CIT(A) also held that the assessee was in the business of sale/purchase of property, hence, the land so purchased was his stock-in-trade. Since, the stock-in-trade is excluded from the definition of capital asset, on this account as well, the provisions of section 56(2)(vii)(b) were not attracted. Accordingly, the CIT(A) deleted the addition of Rs. 15,106,224 in the hands of the assessee. Being aggrieved by the CIT(A) order, revenue filed an appeal before Income-tax Appellate Tribunal. The ITAT held that on reading of the provisions of the sections 56(2)(vii)(b), it refers to any immovable property and the same is not circumscribed or limited to any particular nature of immovable property. It refers to any immovable property which by its grammatical meaning would mean all and any property which is immovable in nature, i.e, attached to or forming part of earth surface. Whether the agricultural land falls in the definition of section 2(14) of capital asset or not whether such agricultural land is stock-in-trade of the assessee, are issues which cannot be read in definition of 'any immovable property' used in context of section 56(2)(vii)(b) and are thus not relevant. In the result, the ITAT upheld the order of the AO and the additions as made.

Shilpa Sharma

Senior Manager
Tax Advisory
+91 11 47103312
shilpasharma@mpco.in

CBDT amends notification on Angel Taxation

(CBDT Notification No. 13/2019/F. No. 370142/5/2018-TPL (Pt.) dated 05th March 2019 and DIPP Notification No. G.S.R. 127(E) [F.NO. 5(4)/2018-SI] Dated 19th February 2019)]

Section 56(2)(viib) of the Act provides for taxation of income in the hands of a closely held company where it issues shares to resident persons in excess of Fair Market Value (FMV) of such shares i.e. share premium charged on issue of shares is excessive.

On March 05, 2019, the CBDT amended its earlier notification relating to exemption to start-ups from applicability of provisions of Section 56(2)(viib) pursuant to the notification issued by the Department for Promotion of Industry and Internal Trade (the DPIIT).

In terms of the amended notification of the CBDT, section 56(2)(viib) shall not be applicable to consideration received by a company from an investor for issue of shares that exceeds the face value of such shares , if such issue of shares is approved by the Central Board of Direct Taxes under notification issued by the DPIIT.

The DPITT notified following amendments expanding the definition of start-ups:

- Tenure for which an entity can retain status as "start-up" has been increased from 7 years to 10 years from the date of incorporation or registration.
- An entity shall be considered as a Startup if turnover has not exceeded Rs. 100 crores in any of the previous financial years.

The new DPITT notification also amended conditions for claiming exemption under section 56(2)(viib) of the Act including the following:

- For claiming exemption u/s 56 (2) (viib) under the Income Tax Act, 1961, the approval from Inter-Ministerial Board is no longer required. Instead, the DPIIT shall send the applications seeking exemptions to the CBDT for its approval.
- The application can be made by a

Contd. on next page...

recognised startup, either for shares already issued or for a proposed investment. However, the notification is not applicable for investments in respect of which the tax officer has already passed an assessment order.

- The requirement of furnishing valuation report has been done away with for recognised startups.
- Ceiling limit of INR 250 million (increased from INR 100 million) has been prescribed on aggregate of paid-up share capital and share premium after issue or proposed issued of shares. Shares issued to non-residents, venture capital company / fund and certain listed companies shall be excluded while computing the said limit.
- Conditions earlier prescribed for investors have been removed.
- Certain restrictions have been prescribed on investments by the start-up.

Ritu Theraja

Senior Manager
Tax Advisory
+91 11 47102272
therajaritu@mpco.in

Capital Gains

Sale of shares of an entity cannot be equated with Slump Sale for computing capital gains

Pr. CIT – 16 v. UTV Software Communication Ltd (ITA No. 1475 of 2016)

Recently, the Bombay High Court held that sale of the shareholding of an entity by a shareholder would not make it 'slump sale' of the 'undertaking' of the company and consequently capital gain in the hands of the shareholder transferring the shares cannot be computed as 'slump sale' of business undertaking under section 50B of the Income – tax Act, 1961 ('the Act').

The tax payer, an Indian entity, held 49% of the shares in another Indian entity and during the financial year relevant to AY 2007-08, such shareholding was transferred to a third party. Incidentally, the balance shares of 51% being held by other shareholders were also transferred by them to such third party.

While filing the tax return, long term capital gain was declared in respect of the transfer of such shareholding. The tax officer, however, rejected the computation and held that the assessee was the owner of 100% shares of the Indian entity and has transferred entire shareholding during the year. Therefore, this will be treated as 'slump sale' of an 'undertaking' and capital gain has to be computed as per the provisions of section 50B of the Act as per which the capital gain on transfer of an undertaking under slump sale is treated as short term capital gain.

The CIT(A) confirmed the action of the tax officer. On subsequent appeal to the Tribunal, the Tribunal accepting the contention of the tax payer, based on the pronouncement of Apex Court in the case of Bacha F. Guzdar v. CIT (27 ITR 1), held that the sale of shares of a company does not tantamount to sale of the assets of the company and as such the transfer of shares by the tax payer cannot be considered to be a slump sale of an undertaking.

The revenue took the matter in the appeal before the High Court of Bombay. The High Court affirming the order of the Tribunal held that in the present facts what has been transferred are mere shares of a company. There has been no transfer of an undertaking and the undertaking continues to be vested with the company whose shares has been transferred. Mere change in the pattern of the shareholding of a company would not make it a slump sale. This position is evident from the statutory definition of slump sale and the term 'undertaking' as defined in the Act.

Accordingly, the appeal of the revenue was dismissed by the High Court.

Purnima Bajaj

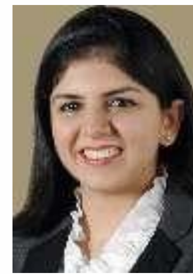
Senior Manager
Tax Advisory
+91 11 47102357
purnima@mpco.in

Particulars	Date
Deposit of TDS for the month of March 2019	30.04.2019
Filing of GSTR I for the month of March 2019	10.04.2019
Filing of GSTR IIIB for the month of March 2019	20.04.2019

For further information, please contact:

C.S. Mathur
Partner
+91 11 47102200
csm@mpco.in

Vikas Vig
Partner
+91 11 47103300
vvig@mpco.in



Surbhi Vig Anand
Partner
+91 11 47102250
surbhivig@mpco.in

Mohinder Puri & Co.
New Delhi
1 A-D, Vandhna
11, Tolstoy Marg
New Delhi-110 001

MPC & Co. LLP
New Delhi
Pune
Vadodara

Associates
Ahmedabad
Bangalore
Chennai
Hyderabad
Mumbai

DISCLAIMER

The contents of this document are for information purposes and general guidance only and do not constitute professional advice. You should not act upon the information contained in this publication without obtaining specific professional advice.

No representation or warranty (express or implied) is given as to the accuracy or completeness of the information contained in this publication and Mohinder Puri & Co. disclaims all responsibility for any loss or damage caused by errors/ omissions whether arising from negligence, accident or any other cause to any person acting or refraining from action as a result of any material in this publication.

© 2019 Mohinder Puri & Co.