MPC & CO LLP
CHARTERED ACCOUNTANTS

Corporate Update

October & November | 2024

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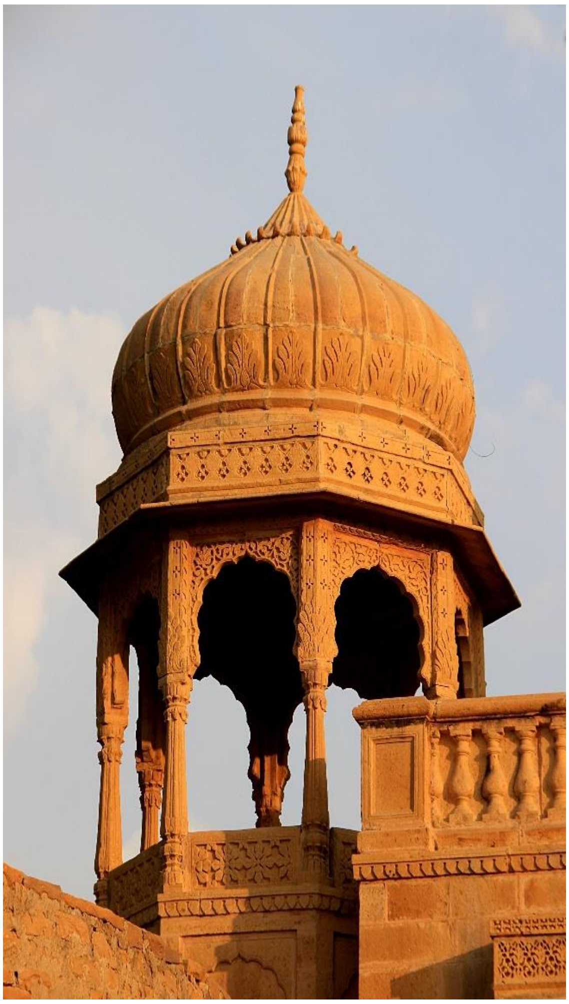

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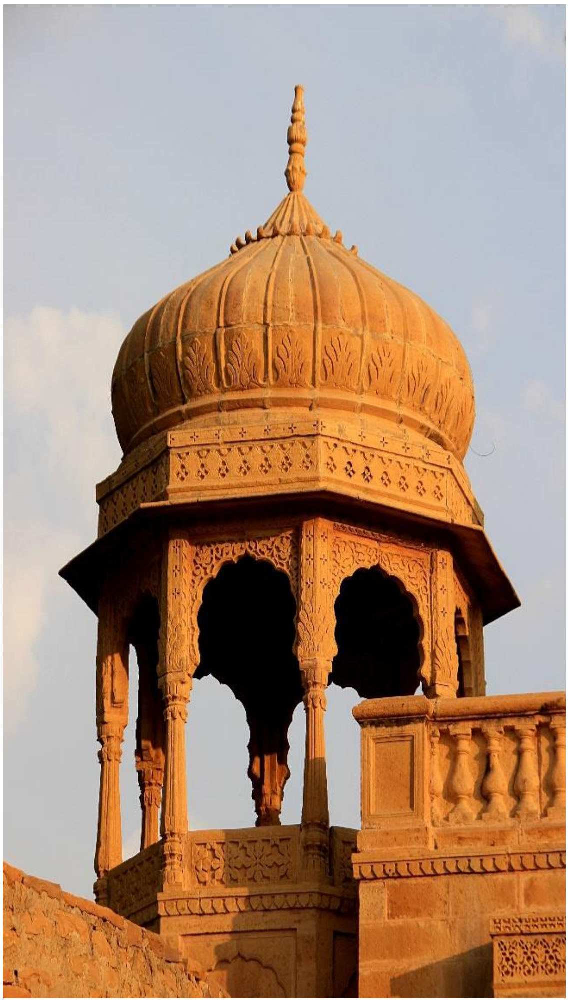

FOREWORD

Dear Reader,

We wish you all a very Happy and Successful New Year 2025.

This Corporate Update covers various important decisions on direct taxes including international taxation, as well as certain regulatory announcements.

The Government of India's Budget for the Financial Year beginning April 1, 2025 will be presented on February 1, 2025 and is expected to cover important changes, policy announcements etc.

The Indian Economy is expected to have a GDP Growth between 6.5% and 7% in the current Financial Year (2024-25) taking into account the last two quarter's developments.

It is expected that in the forthcoming budget the Finance Minister will announce major policy changes to boost the economy.

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DIRECT TAXES

INTERNATIONAL TAXATION

CASE LAWS

Suspension of the application of the most favoured nation clause of the protocol to the Indo-Swiss tax treaty

In a statement published on December 11, 2024, the Swiss competent authority has suspended application of most favoured nation ('MFN') clause of the protocol to the Double Taxation Avoidance Agreement between Switzerland and India ('Indo-Swiss tax treaty').

The tax treaties of India with various countries such as Switzerland, France, Netherlands, Sweden, etc include MFN clause. In terms of the MFN clause as contained in the Indo-Swiss tax treaty, if, after the signing of the amending protocol dated August 30, 2010, India enters into any tax treaty/ protocol with an OECD member State limiting its taxation at source on dividends, interest, royalties or fees for technical services to a rate lower than the rate provided for in the Indo-Swiss tax treaty, the lower rate as provided for in that later tax treaty/ protocol shall also apply to the Indo-Swiss tax treaty. Thereafter, in 2011, India concluded two new tax treaties with Lithuania and Colombia. In these treaties, a lower tax rate of 5% was agreed upon in respect of dividends from qualifying shareholdings. Lithuania and Colombia joined the OECD on July 5, 2018 and April 28, 2020, respectively.

After abolition of Dividend Distribution Tax in India with effect from April 1, 2020, the issue assumed significance when taxability of dividend income shifted from the dividend declaring company to the recipient. When Swiss residents claimed benefit of MFN clause in India basis subsequent tax treaties with Lithuania and Colombia, the tax authorities in India declined the same adopting a position that a separate notification under Section 90 of the Act was necessary to give effect to the MFN clause in India's tax treaties. It was further contended by the tax authorities that the MFN clause would be applicable only if the said countries would have been a member of the OECD at the time of entering into respective tax treaties with India. As this condition was not satisfied in the case of Lithuania and Colombia, the MFN clause could not be pressed into service.

However, the High Court of Delhi in various judgments decided in favour of taxpayers and accepted the arguments on automatic application of MFN clause contained in their respective treaties.

Thereafter, in a statement published on August 13, 2021, the Swiss competent authority indicated that, on the basis of the MFN clause in Indo-Swiss tax treaty, the tax rate in the source State for dividends from qualifying shareholdings shall be reduced from 10% to 5%, considering Lithuania's and Colombia's accession to the OECD. However, in the said statement, it was specified that in case India did not reciprocate the interpretation on the MFN clause, the Swiss competent authority would have the right to reverse the unilateral application of the said clause.

Later in February 2022, the Central Board of Direct Taxes vide its Circular No. 3/2022 clarified its interpretation of MFN clauses in tax treaties which was not in line with the decisions of High Court of Delhi. It was stated in the circular that unilateral decree/bulletin/publication did not represent shared understanding of the treaty partners on applicability of the MFN clause and had no binding force in India.

Subsequently, the position adopted by the Indian tax authorities was upheld by the Hon'ble Supreme Court of India vide decision in the case of Nestle SA dated October 19, 2023 [TS-616-SC-2023]. It was concluded by the Supreme Court that the application of the MFN clause provided for in the Indo-Swiss DTAA was not automatic and the said clause shall not apply in the absence of notification in accordance with Section 90 of the Income Tax Act. It was further held that reference to 'third State which is a member of the OECD' in the protocol had to be interpreted as being limited to the countries which were member of the OECD at the time of entering into respective tax treaties with India.

Thus, in terms of the Supreme Court's verdict, the lower tax rates provided for in the tax treaties with Colombia and Lithuania cannot be imported into Indo-Swiss DTAA under the MFN clause. The review petition filed against the said Supreme Court ruling was also dismissed subsequently and as such, the issue has attained finality in India.

Considering the Indian Supreme Court ruling and in absence of reciprocity from India, the Swiss competent authority issued a statement on December 11, 2024 waiving unilateral application of the MFN clause with effect from January 1, 2025. Accordingly, incomes accruing on or after January 1, 2025 may be taxed in the source State at the rates provided for in the Indo-Swiss DTAA without giving regard to the Protocol. As a result, for dividends due from January 1, 2025 received by an Indian resident from a Swiss company, a tax rate of 10% shall be imposed by Switzerland.

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Supreme Court dismisses taxpayer's petition against characterization of guarantee fee as other income

Johnson Matthey Public Limited [TS-734-SC-2024]

Recently, the Hon'ble Supreme Court dismissed the Special Leave Petition filed by the taxpayer against the order of High Court of Delhi on the issue of taxability of guarantee charges received by the taxpayer from its Indian subsidiaries.

On facts, the taxpayer, a tax resident of UK, is engaged in the manufacture of speciality chemicals and has various subsidiaries worldwide including India. During the year under consideration, the taxpayer provided guarantee to foreign banks for extending loan facility to its Indian subsidiaries. It entered into guarantee agreements with its Indian subsidiaries, pursuant to which, guarantee fee was receivable by it. However, the taxpayer was not a party to the loan agreement between the foreign bank and the Indian subsidiaries. In the tax return filed by the taxpayer, the guarantee fee was characterized as 'Interest' under Article 12 of the India-UK DTAA ('the DTAA') out of abundant caution. In the course of assessment, the tax officer took the position that the guarantee fee falls within the ambit of 'other income' and would be liable to be taxed under Article 23(3) of the DTAA. This position was upheld by the Dispute Resolution Panel and the Tax Tribunal.

When the matter travelled to the High Court of Delhi, the High Court held that the guarantee charges did not fall within the purview of "interest" as the taxpayer receiving the charges was not a party to the loan agreement. It was also observed that since the obligation to pay the charges was incurred in India and the services were utilized in India, the guarantee charges arose in India. However, the court did not decide the issue whether the guarantee charges could constitute business income and fall within Article 7 of the DTAA as the questions formulated before the High Court were only limited to the characterization of guarantee fee as 'interest' under Article 12 of the DTAA.

On further appeal, the SLP filed by the taxpayer has been dismissed by the Supreme Court holding that the order of High Court does not require interference. It is pertinent to mention that during the course of the hearing before the Supreme Court, it was argued that the issue of characterization of guarantee fee as business profits was not dealt by the High Court. Yet, the High Court's verdict was upheld by the Apex Court without any observation on this aspect.

As such, it would be premature to suggest that the aforesaid issue has attained finality. One may expect other litigants to distinguish this decision on the ground of non-consideration of the issue of business profits.

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ITAT held that transaction between foreign enterprise and its PE in India to be considered as an international transaction and be subject to ALP

TBEA Shenyang Transformer Group Company Limited [TS-508-ITAT-2024(Ahd)-TP]

In a recent judgement, Ahmedabad ITAT Special bench (SB) held that transaction between foreign enterprise and its PE in India can be considered as an international transaction and be subject to ALP adjustment.

On the facts of the case, assessee is a Project office (PO) in India of TBEA Shenyang Transformer Group Company Ltd. (Foreign Enterprise/ HO), tax resident in China. HO has entered into a contract with an Indian third-party contractor wherein assessee (PO) has undertaken to provide onshore services on behalf of HO and incurred substantial losses in execution of such services.

The TPO observed that HO in China made/ received certain payments on behalf of PO and regarded it as international transaction between HO and PO. It was held that PO is not adequately compensated for its services and therefore, TP provisions are applicable to transaction between PO and HO in China.

Based on the aforesaid facts, the question before the ITAT, SB was whether or not the transactions between a foreign enterprise outside India and its Indian PE can be considered as an international transaction for the purpose of sec.92B of the Act, and accordingly can be subjected to the 'arm's length price' adjustment. The ITAT held as under:

1. Whether PE is a separate entity

Before ITAT, the assessee contended that transfer pricing provisions are not applicable as transaction with the self or between two branches of same person cannot trigger any income. Further, PE is only a subset of foreign co. and it cannot be assumed a separate person. On the other hand, revenue contended that as per Sec.92F of the act, an enterprise has been defined as a person (including a permanent establishment of such person), thus, PE of a person has also been recognised as a separate enterprise by the Act.

The Hon'ble ITAT, SB observed that PE of a person is an Enterprise and therefore, transaction between PE and HO are transactions between two separate enterprises. Reference was also made to the decision of Aithent Technologies Pvt ltd vs DCIT (2015) 155 ITD 266 (Del) and Fujifilm Corporation India (2018) 193 TTJ 716 (Del). In the first decision ITAT held that where the transaction was between Indian enterprise and its foreign branch, since the global income of the enterprise was taxable in India, therefore, transaction was tax neutral and not an international transaction whereas, in latter case it was held that PE is a separate enterprise where the transaction was between a foreign enterprise and its branch office (PE) in India. In view of the above, ITAT, SB held that PE of a foreign entity in India is a separate enterprise.

2. Income arising from International Transaction

The assessee has contended that there is no income arising out of international transactions in the current case as there is only fund movement between HO and PE and actual transactions are between PE and third parties.

The ITAT, SB stated that the fundamental question that arises in this context is whether in an independent party scenario, an enterprise would permit its receipts and payments to be routed through third party. The HO has complete control over the funds of PE. The revenue of PE are determined by agreement signed by HO. These all aspects have influence on the taxable income that is to be determined in the hands of PE. Further, the word 'transaction' in the context of transfer pricing includes an arrangement, understanding or action in concert.

In the instant case, the arrangement between HO and the PE is giving rise to loss in the hands of PE and thus, ITAT, SB held that such an arrangement is subject matter of transfer pricing.

3. Associated Enterprise

The assessee contended that revenue has considered PO and HO to be 'associate enterprise' merely by evaluating section 92A(1) and 92A(2) have not been considered. On the other hand, revenue submitted that conditions of section 92A(1) and 92A(2) are completely met. On the facts of the case, The Hon'ble ITAT, SB opined that in order to qualify as a AE, provisions of section 92A(1) and (2) are required to be read together and not independently. Also, once condition of any clause of section 92(A)(2) of the Act is satisfied, the AE relationship is triggered. As such, the ITAT referred the case to Division Bench to analyse if any clauses of section 92(A)(2) are satisfied in this case.

4. DTAA vs Act

The assessee submitted that the provisions of the DTAA to the extent it is beneficial to the assessee override the provisions of the Act and as per Article 9 of India-China DTAA the profits derived by the one enterprise would be subject to transfer pricing and determination of ALP, only where one of the two enterprises is a resident of the other contracting state (India). Therefore, since neither the HO nor the PE can be termed as resident and the transactions between them shall not be subject to transfer pricing considering provisions of Article 9 of DTAA.

The Hon'ble ITAT, SB, however, mentioned that in the context of a PE of a foreign enterprise in India, the Article 7(2) provides that profits that will be attributed to PE shall be profits which the PE might be expected to make if it were a distinct and separate enterprise and dealing wholly independently with the enterprise of which it is a PE.

Therefore, determination of profits under the hypothesis of the PE being a distinct and separate enterprise, dealing wholly independently with the enterprise of which it is a PE, is nothing but adherence with the arm's length principles.

Thus, Hon'ble ITAT rejected the contention of the assessee that there is a conflict between Article 9 of the DTAA and TP provisions.

In the light of the aforesaid reasoning, ITAT, SB were of view that the transaction between foreign enterprise and its PE in India can be considered as an international transaction and be subject to ALP adjustment. Therefore, the appeal was decided in favour of the Revenue.

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SC Dismisses the SLP filed by revenue on Advertising, Marketing and Promotional (AMP) expenditure as not an international transaction

Whirlpool of India Ltd [TS-491-SC-2024-TP]

The SC in the case of M/s Whirpool of India Ltd. has dismissed the Special Leave Petition (SLP) filed by the revenue against the decision of Hon'ble High Court of Delhi **[TS-622-HC-2015(DEL)-TP]**. The Hon'ble High Court had earlier observed that in view of the extant transfer pricing provisions there must exist an 'understanding' or an 'arrangement' or 'action in concert' regarding AMP expenditure incurred to establish existence of international transaction. Also, even if an international transaction of AMP expenditure is found to exist there is no machinery provision under the Act to enable the Revenue to determine the fair compensation an Indian entity will be entitled to. Thus, Hon'ble High Court held that AMP expenditure cannot be treated and categorised as international transaction under the provisions of the Act in view of its similar decisions.

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For determination of Centre of Vital Interest u/s A(2) (a) of the DTAA under USA, Personal and Economic relationship must be considered together

Ashok Kumar Pandey [TS-736—ITAT-2024 (MUM)]

Mumbai ITAT holds by its order dated October 3, 2024 that by virtue of Article 4(2)(a) of India-US treaty, the Assessee is deemed to be an Indian Resident as both personal and economic relationship are more in favour of India.

On the facts of the case, Assessee, an Individual filed his tax return for the A.Y 2013-2014 declaring only Indian sourced income and claiming to be a Resident but not ordinarily resident of India for the year. The Tax return was selected for scrutiny and notice was issued to the assessee.

During the assessment proceedings, the AO observed that"

1. His stay in India was more than 183 days and;
2. He was staying with his wife and two children in India;
3. He was also a Managing Director in an Indian company;

During assessment proceedings, the assessee claimed that he is a resident of USA as per tie breaker rule given in Article 4 of the DTAA. His centre of vital interest is in USA as his family holds US passport, he is overseas citizen of India and has larger investment in USA and one daughter is studying in USA.

AO held that assessee's centre of vital Interest is close to India and therefore rejected the claim of the assessee that he is a resident of USA and thus taxed his global income in accordance with the provisions of the Act.

Aggrieved by the AO order, he preferred an appeal before Commissioner of Income Tax (Appeals) "CIT(A)" and submitted a copy of 'Tax Residency Certificate'. However, CIT(A) upheld the order of the AO.

Aggrieved by the first appellate order, Assessee filed an appeal before ITAT.

Before Hon'ble ITAT Mumbai, the Assessee submitted, that he along with his spouse and children holds passport of USA and all are US Nationals. He also referred that he owns a house and has other investments in USA. He further referred to his Indian business which has resulted into loss during the year. He therefore submitted that his social and economic interest are more in USA and not in India and therefore he should be considered as resident of USA.

The Hon'ble Tribunal held that as test of centre of vital interest is required to be applied for the relevant assessment year, this test is highly factual. For the determination of personal relationship, connection with the nucleus family is more important than the extended family. Similarly for determination of economic relationship, more credential is to be given to active involvement in the commercial activities than more investments.

On the above findings ITAT noted that the Assessee is staying in India with his wife, son and daughter and the stay of his extended family is not much relevant to decide his personal relationship with USA.

Regarding his economic interest, ITAT noted that Assessee has an active involvement in running of Indian business, holds operative bank account in India including other investments. Thus, the Hon'ble ITAT held that personal and economic relationship of the assessee tilts more in favour of being close to India than USA.

Accordingly, ITAT held that the Assessee is a resident of India in terms of Article 4(2)(a) of the DTAA and consequently, the income derived in USA is also chargeable to tax in India.

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ITAT deletes various TP adjustments made in connection with CCDS and for acquiring business undertaking

Indorama Ventures Oxides Ankleshwar Private Limited [TS-471-ITAT-2024(Mum)-TP]

In a recent decision Hon'ble ITAT, Mumbai bench deleted the transfer pricing adjustment made on account of (a) alleged sale of call option embedded in Compulsorily Convertible Debentures ('CCDs'), (b) purchase price of business acquired, computed as per DCF method by the TPO, and (c) interest paid on CCDs.

On the facts of the case, the assessee is a company involved in manufacturing of surfactants. During the relevant year the assessee acquired the surfactants business (i.e. business undertaking) of Huntsman International (India) Private Limited ("HIIPL"), an unrelated party under 'slump sale'. Acquisition of this business undertaking was part of a global business acquisition agreement. The acquisition consideration for HIIPL's surfactants business was determined based on the ratio of HIIPL's EBITDA to the total EBITDA of the business acquired globally. To finance such acquisition, assessee issued CCD's to its associate enterprise (AE) and balance amount by way of short term loan from the bank. Interest was paid by the assessee to its AE on such issued CCD's.

In relation to the above transaction, the following TP additions were made which were upheld by the DRP. Before ITAT, the assessee contented as under:

1. **Adjustment on account of alleged sale of call option embedded in CCD subscription -**

   The assessee issued CCD's to its AE which were issued at a price of face value INR 1000 per CCD and were convertible into 50 equity shares of INR 10 at a premium of INR 10 each. CCD could be converted into equity shares at any time at the option of both the CCD holders and the assessee. In case no option is exercised by any of them, then CCDs would be compulsorily converted on expiry of one year from issuance. The above CCDs were issued under the automatic route of Reserve Bank of India ("RBI"). The TPO held that such CCD's embedded sale of call option as international transaction and made adjustment on account of option premium.

   The Ld. AR of the assessee submitted that CCDs cannot be equated with call option. Call option gives right to the holder not the obligation to buy underlying security, which is in contrast with the terms of the CCD's.

   Further, it was submitted that fair market value at which CCD were issued is inclusive of 'premium' on shares. As such, adjustment of alleged option premium over and above FMV is erroneous. The assessee also placed reliance on the decision of the Hon'ble High Court in the case of **Vodafone India Services (P.) Ltd v UOI [(2014) 368 ITR 1** and contended that in the absence of 'income' chargeable to tax under any charging provisions of the Act, transfer pricing provisions cannot be invoked.

The Honble ITAT accepted the above contentions of the assessee and relied on the decision of the Vodafone India Services (P.) Ltd v UOI (supra) and mentioned that the tax department was unable to show any income element in these transactions. Therefore, the ITAT deleted the adjustment made on account of alleged option premium.

2. **Adjustment on account of difference in purchase price based on EBITDA and valuation as per DCF method of business of HIIPL -**

The price for acquisition was determined based on the ratio of HIPL's EBITDA to the total EBITDA of the business acquired globally. The Ld. AO, however, made adjustment to purchase price on the recommendations of the TPO based on value computed as per DCF method, giving reference to the provisions of the section 56(2)(x) of the Act.

The assessee contented that the definition of 'Property' under section 56(2)(x) does not include 'business undertaking' acquired for lumpsum consideration. Therefore, the provisions of said section are not applicable on the facts of the case.

Further, section 92(1) dealing with computation of income from international transactions does not create an independent charge to tax 'income' which is otherwise not chargeable under the Act. And that, if income is not chargeable to tax under normal provisions of the Act, provisions of Chapter X cannot be invoked. In this regard, the assessee placed reliance on judgement of the Hon'ble Mumbai High Court in the case of Vodafone India Services Pvt. Ltd. v UOI (Supra).

The Hon'ble ITAT upheld the aforesaid view of the assessee and deleted the adjustment to purchase price made as per DCF Valuation.

3. **Adjustment on account of interest paid on CCD's**

The interest paid by the assessee on CCD's for the period before CCD's were converted into equity shares was disallowed by the Ld. TPO. The Ld. TPO relied upon the Circular No. 74 dated 8 June 2007 issued by RBI which inter alia provided that CCD's will be treated as equity. The assessee argued against adjustment made by the TPO by stating that Ld. TPO has failed to appreciate the context of the circular, which was to prevent Indian companies from raising debt by means of issuing optionally convertible debentures without complying with the conditions specified under the applicable 'External Commercial Borrowings' ("ECB") regulations.

Further, the assessee submitted that the TPO does not have power to re-characterise a transaction as the jurisdiction of the transfer pricing officer is to determine the ALP of international transaction in accordance with the methods prescribed under the Act. In this regard, the assessee relied on the judgement of the Hon'ble Delhi High Court in the case of **CIT vs. EKL Appliances Ltd. [2012] 345 ITR 241 (Delhi).**

The assessee submitted that until the date of its conversion, CCD's continue to remain 'debenture' in nature of 'debt' and cannot be treated as 'equity'. The assessee placed reliance on the judgements of the Hon'ble Supreme Court in the case of **SaharaIndia Real Estate Corpn. Ltd v SEBI [2012] 25 taxmann.com 18 (SC) and Hon'ble Delhi High Court in the case of Zaheer Mauritius v DIT [2014] 270 CTR 244 (Delhi).** The assessee also submitted that it had suo moto disallowed certain amount of interest under section 94B of the Act for the purpose of this capitalisation and submitted that the interest rate of 9.7% paid to the AE was well within the arm's length range of 8% to 12% p.a. as per the comparables submitted by it

Further, the assessee also submitted that proceeds from issuance of CCDs were utilised for the purpose of business and is allowable under section 36(1)(iii) and under section 37 of the Act. As such, the interest paid for CCD is an allowable expense.

The Hon'ble ITAT accepted the submissions of the assessee and deleted the adjustment of interest on CCD's.

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DOMESTIC TAXATION

CASE LAWS

Amendment to Rule 11UA to provide tolerance limit of 10 per cent of Fair Market Value is curative in nature and applicable with retrospective effect

Go Fashion (India) Ltd v PCIT [167 taxmann.com 645 (Chennai-Trib.)]

In a recent decision in the case of Go Fashion (India) Ltd v PCIT [167 taxmann.com 645 (Chennai-Trib.)], the Chennai Tax Tribunal has held that where the issue price of Compulsorily Convertible Preference Shares ('CCPS') is higher than its Fair Market Value ('FMV'), but is within the tolerance limit of 10 per cent provided in Rule 11UA(4) as inserted with effect from September 25, 2023, no addition can be made to the income due to such variation, under Section 56(2)(viib) of the Income-tax Act, 1961 ('the Act').

Section 56(2)(viib) deems the consideration received on issue of shares as the income of the assessee in so far it exceeds the FMV of the shares. Rule 11UA provides for the valuation methodology for the same.

In the instant case, the Assessee company had issued CCPS at a premium. The CCPS were issued at a price of Rs.416.69 per share as against FMV of Rs.414/-. The Assessing Officer made no additions to the total income of the Assessee on account of excess premium of Rs.2.69 per share, after examining the details submitted by the Assessee in this regard. However, the Principal Commissioner of Income-tax ('PCIT') did not concur with the order of the Assessing Officer and passed the revision order under Section 263 of the Act, setting aside the order of the Assessing Officer, alleging the same as erroneous and prejudicial to the interest of revenue. The PCIT alleged that the Assessing Officer did not make complete verification and inquiry in this case.

Aggrieved by the order of the PCIT, the Assessee filed an appeal before the Chennai Tax Tribunal.

Before the Chennai Tax Tribunal, the Assessee submitted that no additions can be made in the present case as the excess premium charged is within the tolerance limit of 10 per cent, provided under Rule 11UA(4) even though introduced with effect from September 25, 2023. In this regard, the Assessee relied on the decision of Delhi Tax Tribunal in *Sakshi Fincap (P) Ltd vs ITO [2024] 161 taxmann.com 520* wherein the said amendment was held to be retrospective.

The Chennai Tribunal observed that the issue price of the CCPS exceeded by mere 0.65% of the FMV of these shares, which was well within the tolerance limit brought in by way of an amendment to Rule 11UA on September 25, 2023. Furthermore, the Tax Tribunal noted that the Delhi Tax Tribunal, in the case of *Sakshi Fincap (P.). Ltd. v. ITO (supra),* had held that the amendment brought in Rule 11UA was retrospective, observing that the same was introduced to mitigate hardship faced by taxpayers by the unintended invocation of Section 56(2)(viib) of the Act read with Rule 11UA.

Based on the above, the Chennai Tax Tribunal held that the amendment to Rule 11UA is curative in nature and therefore, one of the conditions for invoking the provisions of Section 263 of the Act (i.e. assessment order being prejudicial to the interest of Revenue) is not satisfied in the instant case. In view of the aforesaid, the Chennai Tax Tribunal set aside the order passed by the PCIT.

Note: Section 56 (2)(vii b) stands abolished w.e.f April 1, 2025.

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Interest on short-term deposits of funds sanctioned by the Government for setting up of a project is in the nature of capital receipt if the interest is to be utilized exclusively for such project

HLL BIOTECH Ltd. v. CIT [(2024) 167 taxmann.com 537 (Kerala)]

The Kerala High Court held that where the interest on the funds parked in the 'short-term deposits', made out of the amount sanctioned by the Government of India for setting up of a project, is to be utilized exclusively for such project, the 'interest income' from such short-term deposits would be in the nature of 'capital receipt', not taxable under the provisions of the Income-tax Act, 1961 ('the Act').

In the instant case, the Assessee - HLL Biotech Ltd, was a subsidiary of a wholly owned Government of India enterprise. The Assessee was sanctioned funds for setting up an Integrated Vaccine Complex. As the construction of complex was carried out in a phased manner, the Assessee invested part of the sanctioned funds in short-term deposits. The interest income generated from the short- term deposits were set off against the expenditure incurred for the construction of the complex.

The Assessing Officer treated the interest from such short-term deposits as 'Income from Other Sources' and denied set-off of such interest with construction expenses, relying on the judgment of the Apex Court in *Tuticorin Alkali Chemicals & Fertilizers Ltd. v. CIT [1997] 227 ITR 172 (SC)*.

The appellate authorities concurred with the view of the Assessing officer and did not grant any relief to the Assessee. Therefore, the Assessee filed an appeal before the Kerala High Court.

During the course of hearing, the Kerala High Court noted that the judgment in *Tuticorin Alkali Chemicals & Fertilizers (supra)* was distinguished by the Apex Court in the case of *CIT v. Bokaro Steel Ltd. [1999] 236 ITR 315 (SC)*. It was also noted that the similar issue had already been considered in their earlier decision in the case of *Roads & Bridges Development Corporation of Kerala Ltd. v. ACIT [2018] 96 taxmann.com 330* as well as in the decision of the *Delhi High Court in PCIT v. Facor Power Ltd. [2016] 380 ITR 474*. Based on the above judgements, the Kerala High Court observed that in case invested funds are not surplus funds and such funds as well as interest thereon is inextricably linked with the setting up of the business and are to be used exclusively for the same, then the 'interest income' from such funds would be in the nature of capital receipt only.

In the instant case, the Assessee furnished a communication received from the Government of India, wherein it was mandated that the sanctioned funds and income earned from such funds shall be utilized for the purpose for which they are released i.e. the setting up of Integrated Vaccine complex. As such, the Kerala High Court observed that the portion of the funds kept in short-term deposits could not be termed as 'surplus amounts' which could be utilized as per the wish and will of the Company.

In view of above findings, the Kerala High Court held that the 'interest income' on the short-term deposits of the funds infused by the Government are in the nature of capital receipt and not revenue receipt.

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Foreign Tax Credit can be granted even if Form 67 has been filed subsequent to filing of Income tax return

Neetu Agarwal [TS-860-ITAT-2024(Kol)]

ITAT Kolkata holds that, the assessee is entitled to foreign tax credit even in a case Form 67 has been filed after filing of the tax return but before the completion of processing of tax return u/s 143(1) of the Act.

On the facts of the case, assessee an individual filed her return of Income for the year by the due date discharging her tax liability by way of tax deducted at source, self-assessment tax and Foreign Tax credit (FTC). Subsequent to the filing of the tax return, assessee filed Form 67 for the claim of FTC.

The Tax return was processed and order u/s 143(1) of the Act was passed without granting FTC on account of late filing of Form 67, which was required to be filed with the return of Income as per Income Tax Rules.

Aggrieved by such order, the assessee filed a rectification application against the order u/s 143(1) however rectification order u/s 154 was passed without granting the FTC credit.

Against the order u/s 154 of the Act, the assessee appealed before the Commissioner of Income Tax (Appeals) 'CIT(A)', who dismissed the appeal holding Form 67 is mandatorily required to be filed on or before the due date of filing of the return of Income u/s 139.

The assessee filed an appeal before the Hon'ble ITAT Kolkata, wherein she contended that FTC cannot be denied to the assessee merely because of late filing of Form 67 which is a procedural requirement. She further contended that Article 23 India-Sri Lanka DTAA allows FTC for elimination of double taxation on income.

The revenue contested that since the assessee did not submit Form 67 with her return of Income as prescribed under the law for claiming of FTC, therefore credit of foreign tax should not be granted to the assessee.

On examining of the facts, and considering the matter is covered by the assessee's own case and various other judgments, Hon'ble Tribunal held that Article 23 of the India – Sri Lanka DTAA mandates that reliefs should be provided to avoid double taxation and FTC should be granted when the tax has been paid in both the countries by the assessee. Hon'ble ITAT further noted that denying of FTC credit due to procedural delay in filing of Form 67 goes against the objectives of mitigation of double taxation. But the point that was noted by the Tribunal was that Form 67 was submitted before the order was passed u/s 143(1) of the Act.

Thus, assessee's appeal was allowed.

In another recent judgment on similar issue, in the case of Ramesh Babu Jasti Gandipet [TS-745-ITAT-2024(HYD)] Hon'ble Tribunal held that foreign tax credit should be granted to the assessee for the taxes paid outside India when the global Income is taxed in India as the assessee has filed Form 67 on or before passing of order u/s 143(1) of the Act.

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'Date on which the refund is granted' under section 244A of the Act IS to be interpreted as 'the payment date' and not 'the order date' and accordingly by the interest on refund is to be granted from the payment date

Recently, the High Court of Delhi in the case of **Nokia Solutions and Networks India Pvt Ltd** [TS-750-HC-2024(DEL)] has held that interest on refund under section 244A of the Act is to be granted up to the date of refund and not up to the date of order granting refund.

Section 244A of the Act provides that the assessee would be entitled to receive interest on refund from the first day of April of the assessment year to '*the date on which the refund is granted*', if the return of income has been furnished by the due date under section 139(1) of the Act.

On facts, the taxpayer company, received an Intimation order granting refund on March 30, 2019 and the refund is released to the taxpayer on 18 October 2019. However, the taxpayer receives the interest only up to the date of intimation order. The taxpayer filed a petition before the High Court of Delhi claiming that interest was required to be granted up to the actual date of refund. The Revenue contented that the refund on interest was payable only up to the date of the order granting the refund as per section 244A of the Act and does not cover the period thereafter.

The High Court of Delhi held that the expression "*date on which the refund is granted*" as used in section 244A of the Act would mean "*date of payment of the refund*". The High Court of Delhi gave reasoning that the interest is paid to compensate the payee for time value of money. The High Court of Delhi dismissed the contention of the Revenue stating that Revenue cannot pass an order for the grant of refund and then continue to withhold the refund amount without payment of interest.

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REGULATORY

CBDT prescribes rule to allow TCS to the employee while computing withholding tax liability on the salary income

The Finance Act, 2024 expanded the scope of section 192(2B) of the Income-Tax Act ("the Act") to allow credit of any TDS or TCS under the provisions of Chapter XVII-B or Chapter XVII-BB of the Act, as the case may be, for the purposes of computing TDS on salary income under the provisions of section 192(1). TCS credit was earlier not allowed while computing TDS liability on salary of employees by the employer.

The amended provisions of section 192(2B) of the Act now permit an employee to disclose to the employer:

i) any income chargeable under any other head of income (not being a loss except loss under the head "Income from House Property" and
ii) Loss under the head 'Income from House Property' or
iii) TDS deducted or TCS collected under any other provision.

To enable employees to claim credit of TDS, TCS and to disclose particulars of any other income, the Central Board of Direct Taxes (CBDT) vide Notification No. 112/2024 dated October 15, 2024, has substituted Rule 26B of the Income-tax Rules to provide that the information related to TDS/TCS/loss from house property would be given by employee to the employer in a newly prescribed Form 12BAA for purpose of computing the TDS by the employer under section 192 of the Act.

Consequential amendments have been made in Form 16 (TDS certificate) as well as Form 24Q [TDS return related to salary] to be filed by employer.

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