Legal fiction cannot be extended any further and has to be limited to the area for which it is created. Hon'ble Andhra Pradesh High Court in the case of Addl. CIT v. Durgamma P. (1987) 167 1TR 776 (AP) held that it is not possible to extend the fiction beyond the field legitimately intended by the statute. The Hon'ble court was dealing with the provisions of sec. 171(1) of the I.T .Act in the context of which it was held that joint family shall be deemed to continue for the limited purpose of assessing cases of joint families which have been hitherto assessed as such. It Is not possible to extend that fiction to other cases.

Similar view was taken by the Hon'ble Kerala High Court in the case of CIT v. Kar Valves Ltd. (1987) 168 ITR 416 (Ker.) wherein it is held that legal fiction is limited to the purpose for which they are created and could not be extended beyond that legitimate frame, Hon'ble Kerala High Court was dealing with the case where assessee sought to take advantage of sec.41(2) by submitting that if liabilities are not liquidated and outstanding are not collected, then business could be deemed to continue.

The Hon'ble Allahabad High Court in the case of Controller of estate Duty v. Krishna Kumar Devi (1988) 173 ITR 561 (All) held that in interpreting the legal fiction the court should ascertain the purpose for which it was created 2nd after doing so assume all facts which are logical to give effect to the fiction,

Hon'ble Supreme Court in CIT v. Mother India Refrigeration Pvt. Ltd. (1985) 155 ITGR 711 (SC) held that legal fictions are created only for some definite purpose and they must be limited to that purpose and should not be extended beyond that legitimate field.

In CIT v,

Bharani Pictures (1981) 129 ITR 244 (Mad,) it is held that legal fictions are for a definite purpose and are limited to the purpose for which they are created and should not be extended beyond its legitimate field. The statutory fiction introduced in one enactment cannot be incorporated in another enactment.

The point that legal fiction cannot be extended to a new field was highlighted by Hon'ble Madras High Court in CIT v. Rajam T.S, (19SS) 125 ITR 207(Mad,) wherein it is held that section 41(2) creates a legal fiction under which the balancing charge is treated as business income chargeable to tax but when this amount is distributed to shareholders then it would not become deemed dividend and it would be only a capital receipt and not distribution of accumulated profits. Thus, a legal fiction was invoked in the hands of the assessee company and was not extended in the hands of the shareholder.

It is trite that plain or literal interpretation of a statutory provision is not to be adopted if it produces manifestly unjust results or absurdly unreasonable consequences which could never have been intended. To obviate injustice flowing from mechanical interpretation and to bring about rationality, it is permissible, even in the field of taxation, to prefer such construction as results in equity over such literal meaning as is unjust. In taking this view, we draw strength from law laid down by the Supreme Court, inter alia, in the cases reported as CIT v. JH Gotla (1985) 156 ITR 323 and CWS (India) Ltd. CIT (1994) 208 ITR 649 (SC).

Constitutional Bench of Supreme Court in the case of Pannalal Binjraj v. Union of India [1957] 31 ITR 565 at page 597 :—

"A humane and considerate administration of the relevant provisions of the Income-tax Act would go a long way in allaying the apprehensions of the assessees and if that is done in the true spirit, no assessee will be in a position to charge the Revenue with administering the provisions of the Act with 'an evil eye and unequal hand'."

The Apex Court in the matter of Directorate of Enforcement Vs. Deepak Mahajan reported in 1994(3) SCC 440 observed as under:

"Though the function of the Court is only to expound the law and not legislate, none the less the legislature cannot be asked to sit to resolve the difficulties in the implementation of its intention and the spirit of the law. In such circumstances, it is the duty of the Court to mould or creatively interpret the legislation by liberally interpreting the statue".

Supreme court in last day's order on its earlier order in case of K.P.Varghese revenue's added duty in light of background of a provision : Mass impact on deeming fictions in income tax law (M/S. SATI OIL UDYOG LTD.)

CIVIL APPEAL NOS.9133-9134 OF 2003
IN THE SUPREME COURT OF INDIA
March 24, 2015.

20. *In the present case, the question that arises before us is also as to whether bonafide assessees are caught within the net of Section 143 (1A). We hasten to add that unlike in J.K. Synthetics case, Section 143 (1A) has in fact been challenged on Constitutional grounds before the High Court on the facts of the present case. This being the case, we feel that since the provision has the deterrent effect of preventing tax evasion, it should be made to apply only to tax evaders. In support of this proposition, we refer to the judgment in K.P. Varghese v. ITO, (1982) 1 SCR 629. The Court in that case was concerned with the correct construction of Section 52 (2) of the Income Tax Act:*

> *"without prejudice to the provisions of Sub-section (1), if in the opinion of the Income-tax Officer the fair market value of a capital asset transferred by an assessee as on the date of the transfer exceeds the full value of the consideration declared by the assessee in respect of the transfer of such capital assets by an amount of not less than fifteen per cent of the value declared, the full value of the consideration for such capital asset shall, with the previous approval of the Inspecting Assistant Commissioner, be taken to be its fair market value on the date of its transfer."*

21. *On a strictly literal interpretation of Section 52 (2), the*

moment the fair market value of a capital asset by an assessee exceeds

the full value of the consideration declared by the assessee, in an amount of not less than 15% of the value declared, the full value for the consideration for such capital asset shall be taken to be the fair market value. A strictly literal reading would take into the tax net persons who have entered into bonafide transactions where the full value of the consideration for the transfer is correctly declared by the assessee. In such a situation, this Court held:-

> *"We must therefore eschew literalness in the interpretation of Section 52 Sub-section (2) and try to arrive at an interpretation which avoids this absurdity and mischief and makes the provision rational and sensible, unless of course, our hands are tied and we cannot find any escape from the tyranny of the literal interpretation. It is now a well settled rule of construction that where the plain literal interpretation of a statutory provision produces a manifestly absurd and unjust result which could never have been intended by the legislature, the court may modify the language used by the legislature or even 'do some violence' to it, so as to achieve the obvious intention of the legislature and produce a rational construction, Vide: Luke v. Inland Revenue Commissioner [1963] AC 557. The Court may also in such a case read into the statutory provision a condition which, though not expressed, is implicit as constituting the basic assumption underlying the*

statutory provision. We think that, having regard to this well recognised rule of interpretation, a fair and reasonable construction of Section 52 sub-section (2) would be to read into it a condition that it would apply only where the consideration for the transfer is under-stated or in other words, the assessee has actually received a larger consideration for the transfer than what is declared in the instrument of transfer and it would have no application in case of a bonafide transaction where the full value of the consideration for the transfer is correctly declared by the assessee."

The Court further went on to hold:-

"Thus it is not enough to attract the applicability of Sub-section (2) that the fair market value of the capital asset transferred by the assessee as on the date of the transfer exceeds the full value of the consideration declared in respect of the transfer by not less than 15% of the value so declared, but it is furthermore necessary that the full value of the consideration in respect of the transfer is under-stated or in other words, shown at a lesser figure than that actually received by the assessee. Sub-section (2) has no application in case of an honest and bonafide transaction where the consideration in respect of the transfer has been correctly declared or disclosed by the assessee, even if the condition of 15% difference between the fair market value of the capital

asset as on the date of the transfer and the full value of the consideration declared by the assessee is satisfied. If therefore the Revenue seeks to bring a case within sub-section (2), it must show not only that the fair market value of the capital asset as on the date of the transfer exceeds the full value of the consideration declared by the assessee by not less than 15% of the value so declared, but also that the consideration has been under-stated and the assessee has actually received more than what is declared by him. There are two distinct conditions which have to be satisfied before sub-section (2) can be invoked by the Revenue and the burden of showing that these two conditions are satisfied rests on the Revenue. It is for the Revenue to show that each of these two conditions is satisfied and the Revenue cannot claim to have discharged this burden which lies upon it, by merely establishing that the fair market value of the capital asset as on the date of the transfer exceeds by 15% or more the full value of the consideration declared in respect of the transfer and the first condition is therefore satisfied. The Revenue must go further and prove that the second condition is also satisfied. Merely by showing that the first condition is satisfied, the Revenue cannot ask the Court to presume that the second condition too is fulfilled, because even in a case where the first condition of 15% difference is satisfied, the transaction may be a perfectly honest and bonafide transaction and there may be no under-statement of the consideration. The

fulfilment of the second condition has therefore to be established independently of the first condition and merely because the first condition is satisfied, no inference can necessarily follow that the second condition is also fulfilled. Each condition has got to be viewed and established independently before sub-section (2) can be invoked and the burden of doing so is clearly on the Revenue. It is a well settled rule of law that the onus of establishing that the conditions of taxability are fulfilled is always on the Revenue and the second condition being as much a condition of taxability as the first, the burden lies on the Revenue to show that there is understatement of the consideration and the second condition is fulfilled. Moreover, to throw the burden of showing that there is no understatement of the consideration, on the assessee would be to cast an almost impossible burden upon him to establish the negative, namely, that he did not receive any consideration beyond that declared by him."

Finally, the Court held:

"We must therefore hold that Sub-section (2) of Section 52 can be invoked only where the consideration for the transfer has been understated by the assessee or in other words, the consideration actually received by the assessee is more than what is declared or disclosed by him and the burden of proving such under-statement or concealment is on the Revenue. This

burden may be discharged by the Revenue by establishing facts and circumstances from which a reasonable inference can be drawn that the assessee has not correctly declared or disclosed the consideration received by him and there is understatement of concealment of the consideration in respect of the transfer. Sub-section (2) has no application in case of an honest and bonafide transaction where the consideration received by the assessee has been correctly declared or disclosed by him, and there is no concealment or suppression of the consideration."

22. Taking a cue from the Varghese case, we therefore, hold that Section 143 (1A) can only be invoked where it is found on facts that the lesser amount stated in the return filed by the assessee is a result of an attempt to evade tax lawfully payable by the assessee. The burden of proving that the assessee has so attempted to evade tax is on the revenue which may be discharged by the rev enue by establishing facts and circumstances from which a reasonable inference can be drawn that the assessee has, in fact, attempted to evade tax lawfully payable by it. Subject to the aforesaid construction of Section 143 (1A), we uphold the retrospective clarificatory amendment of the said Section and allow the appeals. The judgments of the Division Bench of the Gauhati High Court are set aside. There will be no order as to costs.

Supreme Court on Interpretation Principles in Commissioner of Income Tax-III v. Calcutta Knitwears, Ludhiana (2014) 362 ITR 673 (SC),

23. Section 158BD of the Act provides for "undisclosed income" of any other person. Before we proceed to explain the said provision, we intend to remind ourselves of the first or the basic principles of interpretation of a fiscal legislation. It is time and again reiterated that the courts, while interpreting the provisions of a fiscal legislation should neither add nor subtract a word from the provisions of instant meaning of the sections. It may be mentioned that the foremost principle of interpretation of fiscal statutes in every system of interpretation is the rule of strict interpretation which provides that where the words of the statute are absolutely clear and unambiguous, recourse cannot be had to the principles of interpretation other than the literal rule (Swedish Match AB v. Securities and Exchange Board, India, AIR 2004 SC 4219, CIT v. Ajax Products Ltd. [1965] 55 ITR 741 (SC)).

37. It is the duty of the court while interpreting the machinery provisions of a taxing statute to give effect to its manifest purpose. Wherever the intention to impose liability is clear, the Courts ought not be hesitant in espousing a commonsense interpretation to the machinery provisions so that the charge does not fail. The machinery provisions must, no doubt, be so construed as would effectuate the object and purpose of the statute and not defeat the same (Whitney v. Commissioners of Inland Revenue 1926 A C 37 , CIT v. Mahaliram Ramjidas (1940) 8 ITR 442, Indian United Mills Ltd. v. Commissioner of Excess Profits Tax, Bombay [1955] 27 ITR 20(SC), and Gursahai Saigal v. CIT, Punjab [1963] 1 ITR 48(SC); Commissioner of Wealth Tax, Meerut v. Sharvan Kumar Swarup & Sons, (1994) 6 SCC 623; CIT v. National Taj Traders, (1980) 1 SCC 370; Associated Cement Company Ltd. v. Commercial Tax Officer, Kota and Ors., (48) STC 466). Francis Bennion in Bennion on Statutory Interpretation, 5th Ed., Lexis Nexis in support of

the aforesaid proposition put forth as an illustration that since charge made by the legislator in procedural provisions is excepted to be for the general benefit of litigants and others, it is presumed that it applies to pending as well as future proceedings.

Deemed Dividend Section 2(22)(e)

On a plain reading of the aforesaid provision, it appears that the following conditions should be satisfied in order to attract the provision contained in Section 22(2)(e) of the Act :

(i) The assessee should be a shareholder of the company ;
(ii) The company should be closely held company in which the public are not substantially interested ;
(iii) There must be payment by way of advance or loan to a shareholder or a payment by the company on behalf, or for the individual benefit of the shareholder ; and
(iv) There must be a sufficient accumulated profit in the hand of the company upto the date of such payment.

Delhi High Court's order in the case of CIT vs. Ankitech P Ltd. (340 ITR 14)

High Court of Delhi in the aforesaid case has held as under:-

"According to section 2(22)(e) of the Income Tax Act, 1961, the following conditions are to be satisfied : (i) the payer company must be a closely held company; (ii) it applies to any sum paid by way of loan or advance during the year to the following persons : (a) a shareholder holding at least 10 of the voting power in the payer company; (b) a company in which such share

holder has at least 20 per cent of the voting power; (c) a concern (other than company) in which such share holder has at least 20 per cent interest; (iii) the payer company has accumulated profits on the date of any such payment and the payment is out of accumulated profits; (iv) the payment of loan or advance is not in the course of
ordinary business activities. By a deeming provision it is the definition of dividend which is enlarged. The legal fiction does not extend to "shareholder". The fiction is not to be extended further for broadening the concept of shareholders.
Circular No. 495, dated September, 22, 1987, issued by the Central Board of Direct Taxes is not binding on the High Court.

During the assessment proceedings, the Assessing Officer noticed that the assessee company had received advances of Rs. 6,32,72,265/- by way of book entry from a company, JGPL and the share holders having substantial interest in the assesee company also had 10 per cent of the voting power in JGPL. The Assessing Officer was of the view that as the two Guptas were members holding substantial interest in JGPL which had provided loans and advances to the assessee company and these very persons had substantial interest in the assessee company, for the purpose of section 2(22)(e) of the Act the amount received by the assessee from JGPL which constituted "advances and loans" would be treated as deemed dividend within the meaning of section 2(22)(e) of the Act and added the amount to the income of the assesssee. The Tribunal deleted the addition. On Appeal to the High Court: **Held, dismissing the appeals, that the Tribunal was correct in law in deleting the addition of Rs. 6,32,72,265/- made by the Assessing Officer in the hands of the assesee company under section 2(22)(e)."**

The decision of the Delhi High Court in the case of CIT vs. MCC Marketeing Pvt. Ltd., reported in **343 ITR 350** wherein it is held that the deemed dividend u/s. 2(22)(e) be assessable only in the hands of the shareholder of the company from whom it had received a loan or advance and where the recipient of the loan or advance is not a shareholder no addition could be made u/sec. 2(22)(e).

We may further gainfully refer to the other judicial pronouncements as under:-

1. Raj Kumar (Del) 318 ITR 462, holding that 'Trade Advances' are not assessable as 'deemed dividend' u/s. 2(22)(e) of the Act.

2. Creative Dying and Printing P. Ltd. (Del) 318 ITR 476, holding that advance to be adjusted against dues for job work to be done by the assessee, is a business transaction and the 'advance' is not assessable as deemed dividend.

3. Ambassador Travels P. Ltd. (Del) 318 ITR 376, holding that financial transactions in normal course of business cannot be treated as 'loans or advances' and hence they would not be taxable as deemed dividend.

4. Sunil Chopra (ITAT, Del) [2010] 002 ITR (Trib) 469, holding that receipts in ordinary course of business cannot be treated as deemed dividend.

5. Pradip Kumar Malhotra v. CIT [ITA No.219 of 2003 decided on 02/08/2011 by Calcutta High Court – for the proposition that when loan or advance was given for consideration which was beneficial to the company, the same would not come within the meaning of deemed dividend in section 2(22)(e).

6) *Delhi bench ITAT order in* S. Joginder Singh :

The facts are that the assessee received an aggregate sum of Rs. 1,43,96,908/- from Gururakha Plastics Pvt. Ltd., in which he has substantial interest and in which public are not substantially interested. The monies were received in pursuance of collaboration agreement dated 01.04.2005, under which the assessee and the company agreed for development of plots of land for construction of commercial buildings The company was to pay a total sum of Rs. 4.00 crore to the assessee in lieu of which the vacant possession of plots of land and construction thereon was to be handed over to the company. This agreement was acted upon. The company passed a resolution to carry on the business of real estate developer, with the result that it became one of the main objects of the company. The question is-whether, the amounts so received are liable to be taxed as dividend under the provision contained in section 2(22)(e)?

5.4 Coming to the facts, the monies were advanced in pursuance of the memorandum of agreement for developing plots of land into commercial buildings, one of the objects of the company. The plots belonged to the assessee which were to be handed over to the company for construction as

per approved plans. It was the business of the company to undertake real estate construction business. In a way, the assessee became a partner with the company to carry on real estate business, during the course of which the advances were received. In such a situation, the advances cannot be deemed to be dividend.

7) ***Delhi bench ITAT order in*** International Land Development (P) Ltd:

15. With regard to payment made to Shri Alimuddin, the assessee submitted before the learned CIT(A) that the payment made to Shri Alimuddin was not in the nature of any loan or advance but was made in the regular course of assessee's business in terms of MoU for the acquisition of land on behalf of the assessee) and, therefore, the payment is not covered by Section 2(22)(e) of the Act. In support of the contention that the money advanced in the regular course of business cannot be treated as deemed dividend, number of decisions were cited by the learned counsel for the assessee before the learned CIT(A).

18. It is not in dispute that the moneys advanced in the regular course of business cannot be treated as deemed dividend as held in the following cases:-

(i) CIT Vs. Ambassador Travels (P) Ltd. – 173 Taxman 407; (Del).(ii) CIT Vs. Raj Kumar – 181 Taxman 155 (Del). (iii) CIT Vs. Nitin Shantilal Parikh – Income Tax Reference No.66 of 1999 (Gujarat). (iv) CIT Vs. Creative Dyeing & Printing (P) Ltd. – 184 Taxman 483 (Del). (v) CIT Vs. Sunil Sethi – ITA 569/2009. (vi) Atul Mittal in ITA No.3863/Del/2002 (ITAT Del). (vii) Nigam Chawala (page 303 of the paper book).

19. In the case of CIT Vs. Sunil Sethi – ITA No.569/2009, the Hon'ble High Court of Delhi has held that since the amount of `30 lakhs which was given to the assessee was in the nature of imprest payment, the same could not be treated as deemed dividend u/s 2(22)(e) of the Act. In this case, a sum of `30 lakhs was given to the assessee for the purpose of making advance in respect of certain land dealings which were proposed to be entered into by the company through the assessee and the Tribunal noted that no material was brought on record to suggest that whatever was explained by the assessee was incorrect. 20. In the case of CIT Vs. Creative Dyeing & Printing (P) Ltd. – 184 Taxman 483, the Hon'ble High Court has held that the amount advanced for business transaction between the parties would not fall within the definition of deemed dividend u/s 2(22)(e) of the Act. In this case, the Hon'ble Delhi High Court has followed its own decision in the case of CIT Vs. Raj Kumar – 181 Taxman 155 (Del). In the course of hearing of this appeal, the learned DR has not been able to controvert the fact that the payment was made by the assessee to Shri Alimuddin under MoU for the acquisition of land on behalf of the assessee nor this fact was disputed by the AO in his remand report.

HELD/CONCLUSION:

The AO stated merely in the remand report that he has made the addition within the ambit of Section 2(22)(e) of the act. It is thus clear that no adverse comments have been given by the AO in respect of the agreements and memorandum of undertaking executed by the parties on which reliance was placed by the assessee. 22. In the light of the

discussions made above, we, therefore, hold that CIT(A) was justified in vacating the demand in respect of payment made to M/s ALM Infotech City (P) Ltd. as well as to Shri Alimuddin.

Hon'ble Calcutta High Court in the case of Pradip Kumar Malhotra v. CIT 338 ITR 538 (Cal) wherein Hon'ble High Court held as under:

"The phrase "by way of advance or loan" appearing in sub-clause (e) of section 2(22) of the Income-tax Act, 1961, must be construed to mean those advances or loans which a shareholder enjoys simply on account of being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten per cent. of the voting power; but if such loan or advance is given to such shareholder as a consequence of any further consideration which is beneficial to the company received from such a shareholder, in such case, such advance or loan cannot be said to be deemed dividend within the meaning of the Act. ***Thus, gratuitous loan or advance given by a company to those classes of shareholders would come within the purview of section 2(22) but not cases where the loan or advance is given in return to an advantage conferred upon the company by such shareholder."***

Select Propositions on Section 50C,43CA, Section 56: Deemed consideration

Principles for interpreting section 50C; Section 43CA; Section 56 etc

i) **Hon'ble Bom HC ruling in the case of ACE Builders 281 ITR 210** wherein their lordships have declined to extend the fiction created under section 50 of the Act deeming gains arising on sale of depreciable assets as Short Term in nature to section 54E (as it stood the relevant time – providing exemption on sale of Long Term Capital Assets) and hence allowed exemption under section 54E of the Act. (**Also Gau HC in Assam Petroleum Industries 262 ITR 587 has concluded so**)

ii) SC rulings in the case of Ishikawajima Harima Heavy Industries **288 ITR 408 (FOLLOWED BY MUM ITAT IN 19 SOT 509)** *wherein their lordships restricted the scope of deeming fiction under section 9(1)(vii) of the Act reading therein "condition of rendition" apart from*

"utilization" and holding that presence of business connection is must in every transaction (i.e no force of attraction in the Act) and reaffirmed the principle that *deeming fictions needs to be construed strictly and* ***in light of other provisions of the Act*** by referring to **Maruti Udyog SC ruling 2 SCC 638.**

Further, reliance in this regard may be placed on following:

a. **Kol SB of ITAT in the case of Venkateshwara Investment 92 TTJ 1129, in context of explanation to section 73 of the Act** interalia held that since the same is deeming provision needs **strict construction**;

b. **SC rulings in the cases of Manilal Dhanji 44 ITR 876, Harinder Singh 83 ITR 416 etc**, in context of deeming provisions of **section 64** of the Act (clubbing of income), has held that same needs **strict construction**;

c. **SC rulings in the cases of Subbulaxmi Mills 249 ITR 795 & Concord Industries 247 ITR 800**, in context of **section 79** of the Act (dealing with restriction on

carry forward of losses in case of closely held companies), while interpreting the same strictly and tightly, has held that same do not cover "**unabsorbed depreciation**";

d. **Full Bench Allahabad High Court** ruling in the case of Nathimal Gaya Lal 89 ITR 190 (at page no 198) (interalia holding ***that fiction needs to be interpreted in such a manner as would not work injustice for a party***, for even when the court steps into the world of legal fantasy, the principle of equity and justice cannot be lost sight)

e. **Madhya Pradesh High Court in the case of Chottelal Kanhaiya Lal 80 ITR 656 (interalia holding *deeming fiction needs strict construction and without importing another fiction therein*)**

f. **SC rulings in the cases of Bengal Immunity 2 SCR 603, Amarchand N Shroff 48 ITR 59, Mother India Refrigeration 155 ITR 711 interalia holding that legal fictions are only for a definite purpose. They are limited to the purpose for which they are created and *should not be extended beyond their legitimate field***

g. **Delhi Bench of ITAT in the case of Aar Dee Finvest 79 ITD 547 while concluding that share application money (pending allotment) cannot be treated as "deemed dividend" under section 2(22)(e) of the Act interalia observing in Para 24 that *"Law dealing with fiction relates to that branch of jurisprudence which should be narrowly watched, jealously regarded and never to be pressed beyond its true limits"***

2014] 49 taxmann.com 249 (SC)

SUPREME COURT OF INDIA

Commissioner of Income-tax (Central)-I, New Delhi

v.

Vatika Township (P.) Ltd.

IT : SC discusses the evils of retrospective law while upholding the principle "that unless a contrary intention appears, a law is presumed to be prospective" but stops short of holding substantive retrospective amendments hurting tax payers as unconstitutional

• Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation.

• The idea behind the rule is that a current law should govern current activities.

• Law passed today cannot apply to the events of the past.

• If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it.

• Our belief in the nature of the law is founded on the bed rock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset.

• This principle of law is known as lex prospicit non respicit : law looks forward not backward.

• As was observed in Phillips v. Eyre [1870] LR 6 QB 1, a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.

• The obvious basis of the principle against retrospectivity is the principle of'fairness‟ , which must be the basis of every legal rule

• There cannot be imposition of any tax without the authority of law. Such a law has to be unambiguous and should prescribe the liability to pay taxes in clear terms.

• If the concerned provision of the taxing statute is ambiguous and vague and is susceptible to two interpretations, the interpretation which favours the subjects, as against there the revenue, has to be preferred. This is a well established principle of statutory interpretation, to help finding out as to whether particular category of assessee are to pay a particular tax or not.

• No doubt, with the application of this principle, Courts make endeavour to find out the intention of the legislature.

• At the same time, this very principle is based on "fairness" doctrine as it lays down that if it is not very clear from the provisions of the Act as to whether the particular tax is to be levied to a particular class of persons or not, the subject should not be fastened with any liability to pay tax

• In the result, the proviso appended to Section 113 of the Income Tax Act imposing a surcharge held to prospective with effect from 01.06.2002

]Court No. - 32 (Section 50C analysed in depth)

Case :- INCOME TAX APPEAL No. - 287 of 2011

Appellant :- The Commissioner Of Income Tax Alld And Anr.
Respondent :- Sh. Chandra Narain Chaudhri
Counsel for Appellant :- A.N. Mahajan,S.C.

8. In order to appreciate the question raised in this appeal, it is necessary to quote the provisions of Section 50-C of the Act.
10. Section 50-C of the Act is a rule of evidence in assessing the valuation of property for calculating the capital gain. The deeming provision under Section 50 C (1) of the Act is rebuttable. It is well known that an immovable property may have various attributes, charges, encumbrances, limitations and conditions. In the present case, it is stated that the property was under the tenancy of father of the purchaser since 1969 and thus the assessee being landlord of the property, offered it for sale to the tenant, which could not have attracted fair market value, as a willing purchaser may have offered for a property in vacant condition. The Stamp Valuation Authority does not take into consideration the attributes of the property for determining the fair market value in the condition the property is a offered for sale and is purchased. He is required to value the property in accordance with the circle rates fixed by the Collector. The object of the valuation by the Stamp Valuation Authority is to secure revenue on such sale and not to determine the true, correct and fair market value on which it may be purchased by a willing purchaser subject to and taking into consideration its situation, condition and other attributes such as it occupation by tenant, any charge or legal encumbrances.
11. The question as to whether the assessee filed any objections before the Stamp Valuation Authority to dispute the valuation, or filed appeal or revision or made reference before any authority, court or the High Court under sub section (2) (b) of Section 50 C of the Act is not of any relevance in this case, as the AO himself observed that the assessee did not dispute the stamp valuation before the Stamp Valuation Authority. There may be several reasons for the purchaser not to file such objection. A purchaser may not go into litigation, and pay stamp duty, as fixed by the Stamp Valuation Authority, which may be over and above the fair market value of

the property, as on the date of transfer, though the amount so determined has not been actually received by owner of the property. Whenever the assessee claims before the Assessing Officer that the value adopted or assessed or assessable by the Stamp Valuation Authority under sub section (1) of Section 50-C exceeds the fair market value of the property as on the date of transfer, the Assessing Officer may refer the valuation of the capital asset to a Departmental Valuation Officer (DVO) and for that purpose, the procedure prescribed under the Wealth Tax Act are to be applied. In case of any such claim, the AO may rely on the report of registered valuer under Section 55-A of the Act and in such case it will not be necessary for him to refer the matter to the DVO. However, in any event, the AO has to record sufficient reasons. He has to record reasons for accepting the report of the approved valuer submitted by the assessee along with his claim/objection under Section 50 -C (2) of the Act. If he does not accept the report, he has to record the reason for referring the matter to the DVO. The reasons in either case must have nexus with the objection/claim made by the assessee and the objection, which may be raised by the department against the valuation determined in the report of the approved valuer.

ITO vs. Onkarmal Kajaria Family Trust (ITAT Kolkata)

It is difficult to accept the proposition that the assessee had accepted that the price fixed by the District Sub Registrar was the fair market value of the property. No such inference can be made as against the assessee because he had nothing to do in the matter. Stamp duty was payable by the purchaser. It was for the purchaser to either accept it or dispute it. The assessee could not, on the basis of the price fixed by the Sub-Registrar, have claimed anything more than the agreed consideration which, according to the assessee, was the highest prevailing market price. It would follow automatically that his case was that the fair market value of the property could not be the value as assessed by the District Sub Registrar. In a case of this nature the assessing officer should, in fairness, have given an option to the assessee to have the valuation made by the departmental valuation officer contemplated under Section 50C. As a matter of course, in all such cases the assessing officer should give an option to the assessee to have the

*valuation made by the departmental valuation officer to avoid miscarriage of justice. The legislature did not intend that the capital gain should be fixed merely on the basis of the valuation to be made by the District Sub Registrar for the purpose of stamp duty. The legislature has taken care to provide adequate machinery to give a fair treatment to the citizen/taxpayer. There is no reason why the machinery provided by the legislature should not be used and the benefit thereof should be refused. Even in a case where no such prayer is made by the assessee, who may not have been properly instructed in law, the assessing officer, discharging a quasi judicial function, has the bounden duty to act fairly and to give a fair treatment by giving him an option to follow the course provided by law (**Sunil Kumar Agarwal vs. CIT** (Cal HC) followed)*

- ***Sunil Kumar Agarwal vs. CIT (Calcutta High Court)***

We have already set out hereinabove the recital appearing in the Deeds of Conveyance upon which the assessee was relying. Presumably, the case of the assessee was that price offered by the buyer was the highest prevailing price in the market. If this is his case then it is difficult to accept the proposition that the assessee had accepted that the price fixed by the District Sub Registrar was the fair market value of the property. No such inference can be made as against the assessee because he had nothing to do in the matter. Stamp duty was payable by the purchaser. It was for the purchaser to either accept it or dispute it. The assessee could not, on the basis of the price fixed by the Sub-Registrar, have claimed anything more than the agreed consideration of a sum of Rs.10 lakhs which, according to the assessee, was the highest prevailing market price. It would follow automatically that his case was that the fair market value of the property could not be Rs.35 lakhs as assessed by the District Sub Registrar. In a case of this nature the assessing officer should, in fairness, have given an option to the assessee to have the valuation made by the departmental valuation officer contemplated under Section 50C. ***As a matter of course, in all such cases the assessing officer should give an option to the assessee to have the valuation made by the departmental valuation officer. For the aforesaid reasons, we are of the opinion that the valuation by the departmental valuation officer, contemplated under Section 50C, is required to avoid miscarriage of justice. The***

legislature did not intend that the capital gain should be fixed merely on the basis of the valuation to be made by the District Sub Registrar for the purpose of stamp duty. The legislature has taken care to provide adequate machinery to give a fair treatment to the citizen/taxpayer. There is no reason why the machinery provided by the legislature should not be used and the benefit thereof should be refused. Even in a case where no such prayer is made by the learned advocate representing the assessee, who may not have been properly instructed in law, the assessing officer, discharging a quasi judicial function, has the bounden duty to act fairly and to give a fair treatment by giving him an option to follow the course provided by law. *For the aforesaid reasons, the order under challenge is set aside. The impugned order including orders passed by the CIT(A) and the assessing officer are all set aside. The matter is remanded to the assessing officer. He shall refer the matter to the departmental valuation officer in accordance with law. After such valuation is made, the assessment shall be made de novo in accordance with law.*

S. 50C: If the stamp duty valuation is higher than the consideration received, the AO must refer the valuation to the DVO even if there is no request by the assessee No inference can be made that the assessee has accepted the price fixed by the District Sub Registrar…

M/S. GUJARAT NRE COKE LIMITED ITAT 193 OF 2013

GA 3485 of 2013IN THE HIGH COURT AT CALCUTTA

SPECIAL JURISDICTION (INCOME TAX)

ORIGINAL SIDEDate : 6th March, 2014

Under Section 48 the income tax chargeable under the head “capital gains” has to be computed taking into consideration the full value either received or accrued. Any other valuation is not permissible under Section 48. When the legislature wanted to make a departure a specific provision was introduced. Reference in this

regard can be made to Section 50C. We are as such of the opinion that the Assessing Officer was wrong in taking the view that the capital gain has to be assessed not on the basis of the consideration actually received but on the basis of the consideration receivable based on market rate. The third question proposed by the revenue for the aforesaid reasons is equally without any merit.

IN THE INCOME TAX APPELLATE TRIBUNAL

LUCKNOW BENCH "B", LUCKNOW ITA Nos.256 & 257/LKW/2011

Assessment years:2007-08 & 2008-09 Shri Dwarikadhish Temple Trust Date of pronouncement 21/08/2014

From the order of CIT(A), we find that the assessee is a charitable and

religious trust registered u/s 12A of the Act. It is also noted by the Assessing Officer that the assessee has sold immovable property for total sale consideration of Rs.2.25 lac and the entire sale consideration was invested in other capital asset i.e. fixed asset with bank. The Assessing Officer invoked the provisions of section 50C of the Act and computed the capital income at Rs.66.38 lac based on the value adopted by stamp duty authorities for stamp duty purposes. We find that the CIT(A) has decided this issue in favour of the

assessee by following the Tribunal decision in the case of Gyanchand Batra vs. Income Tax Officer 115 DTR 45 (JP-Trib).

6.2 We also find that it is specifically mentioned in section 50C(1) of the Act

that the stamp duty value is to be considered as full value of consideration

received or accruing as a result of transfer for the purpose of section 48 of

the Act. It is true that the assessee is a charitable trust and the income of the

assessee has to be computed u/s 11 of the Act. As per sub section (1A) of

section 11 of the Act, if the net consideration for transfer of capital asset of a

charitable trust is utilized for acquiring new capital asset, then the whole of

the capital gain is exempt. Considering all these facts, we do not find any reason to interfere in the order of CIT(A) on this issue.

IN THE HIGH COURT OF DELHI AT NEW DELHI

ITA 64/2014

SHRI KISHAN DASS10.02.2014

The assessee in this case, a lessee of M/s. Uttar Pradesh State Industrial Development Corporation (hereafter referred to as ?the UPSIDCO?) had originally acquired leasehold rights on 26.08.1971 for `12,20,500/-, including the cost of land and building. It subsequently transferred the leasehold rights in respect of the property through an agreement of 27.08.2007 and a final lease dated 29.10.2007 @ `3181/- per square metre for a total consideration of `3,25,00,000/-. The tenure of the lease concededly granted by the UPSIDCO was 90 years effective from 1971. The transfer of conveyance to the lessee/assessee?s vendee was for the balance period of 54 years, i.e. 2007-2061. The Assessing Officer (AO) considered that since the prevalent leasehold rights valued by the UPSIDCO for its fresh leasehold transactions was `4500/- per square metre, on an application of Section 50C, applied that as the circle rate, and the consideration for the purpose of recovering tax in respect of the assessee?s transaction was determined at `4,59,73,395/-.

The Tribunal in this case relied upon the decisions of the Lucknow Bench in Carlton Hotel (P) Ltd. v. ACIT 2010 (35) SOT 26 (Luck); Mumbai Bench in Atul. G. Puranik v. ITO, 12(1)(1) and that of the Calcutta Bench in Dy. CIT v. Tejender Singh 19 Taxman.Com 4 In all these, the various Benches of the Tribunal appear to have strictly construed the letter of Section 50C to say that the conveyance has to be complete in respect of all

entitlements to the property. ***In the present case, the Tribunal has upheld the valuation of the assessee. We notice that apart from the three Benches, decisions of which have been relied on, the Tribunal also considered the distinction made between Section 50C and 54D(1) which specifically provides that capital gains from, ?transfer by way of compulsory acquisition under any law of capital asset being land, building or any right in the land or building.....?.***
Section 50C, on the other hand, talks of, ?transfer by assessee of a capital asset being land or building or both?. The contrast in language, given that Section 50C is a specific provision, which seeks to enact a presumption ? is significant. The valuation of the concerned State agency or the government that the cost of the land is, in the circumstances, higher, is determinative. We notice that in the present case, there has been no such valuation. That apart, the Tribunal adopted an approach which, with respect, appears to be correct, in that it took note of the proportionate transfer of leasehold rights for 54 years. If the Revenue?s contentions were to be conceded, then in the given facts of case, if the leasehold rights for residual period of 3 or 4 years were to be valued at par with the cost of acquisition of the full tenure of the lease of 90 years, absurd and anomalous results would ensue.

4. For the above reasons, we find that no substantial question of law arises. The appeal is accordingly dismissed.

IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'B' BENCH, KOLKATA
Before Shri Pramod Kumar (Accountant Member),
and Shri Mahavir Singh (Judicial Member)
I.T.A. No.: 1459/ Kol. / 2011
Assessment year: 2008-09
Tejinder Singh The monies received by the assessee, under the said agreement, were thus clearly in the nature of receipts for transfer of tenancy rights, and, accordingly, as the learned CIT(A) rightly holds, Section 50 C could not have been invoked on the facts of this case. Revenue's contention that the provisions of Section 50 C also apply to the transfer of leasehold rights is devoid of legally sustainable merits and is not supported by the plain words of the statute. Section 50 C can come

into play only in a situation "**where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both,** *(emphasis supplied by us by underlining)* **is less than the value adopted or assessed or assessable by any authority of a State Government …… for the purpose of payment of stamp duty in respect of such transfer".** Clearly, therefore, it is *sine qua non* for application of Section 50 C that the transfer must be of a "capital asset, being land or building or both", but then a leasehold right in such a capital asset cannot be equated with the capital asset *per se…*

Sh. Pramod Chand Soni, IN THE INCOME TAX APPELLATE TRIBUNAL

JAIPUR BENCH "A" JAIPUR ITA No. 135/JP/2011

Asstt. Year : 2007-08

PAN:AIZPS0784L From the language of section 50C it is also proved that property

should be transferred. In the present case, the date of transfer is 04.10.2006.

The sale agreement was entered on 07.09.2006. The sale consideration is not

less than the DLC rate prevalent at that time, that was Rs.2500 to Rs.3000

per yd. The sale deed was executed on 08.01.2007 on the basis of DLC rates

prevalent at that time, which were modified by the appropriate authority by

letter dated 20.11.2006 much after the sale agreement and possession handed over. Therefore, in our considered view, once the possession was already

given on the basis of sale agreement then provision of section 50C(1) of the

Act, are not applicable as held by various Benches of the Tribunal. Various

cases considered by the Jaipur Bench and Jodhpur Bench of ITAT are

mentioned in para 26 of the written submissions, which are reproduced

somewhere above in this order.

M/S Kan Construction And Colonizers (P) Ltd. Allahabad High Court
The Commissioner of Income-tax (Appeals) and the Tribunal on analysis of the facts of the case have reached to the conclusion that section 50C has no application as it was a case of transfer of plots which was stock in trade. An income earned from such transaction is liable to be taxed as income from business activity. Alternatively, the finding recorded by the Tribunal which is last fact finding court, in this regard is essentially a finding of fact or at the most is a mixed question of fact, but it is not a substantial question of law to warrant the interference under section 260A of the Income Tax Act.The view taken by the Tribunal is on terra-firma There is no merit in the appeal.
The appeal is dismissed by holding that on the facts of the present case, the Tribunal has rightly held that the provisions of section 50C are not applicable with respect of sale of land as sale of land was not capital asset.

Judgement Last Updated on: **13 Aug 2010** LexDoc Id: **398324**

Category - Direct Tax

Issuing Authority/Forum: ITAT (Jaipur)

Gyan Chand Batra vs ITO

Citation 133 TTJ 482

.3 In Explanation to s. 54F(1), it is mentioned that net consideration means the full value of consideration received or accruing as a result of the transfer of the capital asset as reduced by any expenditure incurred wholly and exclusively in connection with such transfer. The meaning of full value of consideration in Explanation to s. 54F(1) will not be governed by meaning of words 'full value of consideration' as mentioned in s. 50C. The value adopted for stamp duty is to be considered as full value of consideration for the purpose of computing the capital gains under s. 48. Sec. 54F(1) says that capital gains is to be dealt with in accordance with the provisions of sub-ss. (a) and (b) of s. 54F(1) of the Act. In the instant case, the cost of new asset is not less than the net consideration thus the whole of the capital gains will not be charged even if the capital gains has been computed by adopting the value adopted by stamp registration authority. It is clearly mentioned in s. 54F(4) also that net consideration which is not appropriated towards the purchase of new asset then the same is to be taxed in case such net consideration not appropriated is not deposited in the capital gain account. It is not necessary that the new asset should be got registered before filing of the return. The requirement of law is that net

consideration is required to be appropriated towards the purchase of the new asset. Thus deduction under s. 54F is clearly applicable.

Irfan Abdul Kader Fazlani vs. ACIT

Month-Year :	Mar - 2013
Author/s :	ITA No. 8831/Mum/11 [BCAJ]
Title :	Irfan Abdul Kader Fazlani vs. ACIT

Details :

Facts

The assessee was holding 306 equity shares of Rs. 100 each in a private company ('the company'). The total share capital of the company was 3,813 equity shares of Rs. 100 each. The company owned two flats in a residential building and was earning rent income from the same. During the year under appeal the assessee sold the shares for Rs. 37.51 lakh and capital gain was offered on that basis. According to the AO the assesse engineered the sale of the shares of all other shareholders of the company and thereby effectively transferred the immovable property belonging to the company. According to him, it was an indirect way of transferring the immovable properties, being the flats in the building. He accordingly 'pierced the corporate veil and invoked the provisions of section 50C and computed the capital gains by adopting the stamp duty value of the flats.

Held

The tribunal noted that the provisions of section 50C applies on fulfillment of two conditions *viz*., (i) when a transfer of "capital asset, being land or building or both" takes place; and (ii) the consideration for a transfer is less than the value "assessed" by any authority of a State Government for stamp duty purposes. It further observed that the term "transfer" as used in the provisions would only cover direct transfer. While in the case of the assesse, the assets transferred were shares in a company and not land and/or building. The flats were owned by the company who continues to remain its owner even after the transfer of the shares by the assesse. Secondly, the consideration for transfer received by the assesse is also not "assessed" by any authority. Thus, the other condition to attract the provisions of section 50C is also not complied with. According to it, since the provisions of section 50C are deeming provisions, the

same have to be interpreted strictly in accordance with the spirit of the provisions. Therefore, the appeal filed by the assesse was allowed and it was held that the AO's decision to invoke the provisions of section 50C to the tax planning adopted by the assessee was not proper and it does not have the sanction of the provisions of the Act.

Bhoruka Engineering Inds. Ltd. vs. DCIT (Karnataka High Court)

June 19th, 2013

S. 10(38): Scheme of sale of land through sale of shares of shell company is valid

The assessee held 98.73% shares in Bhoruka Financial Services Limited (BFSL). In AY 2005-06 BFSL purchased a plot of land from a group sick company called Bhoruka Steels Ltd for Rs.3.75 crores which was accepted to be the prevailing market price u/s 50C. BFSL was a shell company with no assets other than the said land. In AY 2006-07 the assessee sold its shareholding in BFSL to DLF Commercial Developers Ltd for a net consideration of Rs. 20 crore. As the sale of shares was executed through the Magadh Stock Exchange and STT was paid, the assessee claimed that the gain on sale of shares was exempt u/s 10 (38). The AO, CIT(A) and Tribunal rejected the assessee's claim on the basis that the assessee, BFSL and Bhoruka Steels were all controlled by common shareholders and that the scheme to first sell the land to BFSL and then to sell the shares of BFSL was devised with the sole purpose of avoiding tax on the capital gains which would have arisen if the land had been sold directly. It was held that the formalities of the transaction and the legal nature of the corporate bodies had to be ignored by lifting the corporate veil and the transaction had to be taxed as a sale of the land. On appeal by the assessee to the High Court, HELD allowing the appeal:

Though BFSL was a shell company with no asset other than the land and by buying the shares of BFSL, DLF in effect purchased the land, the transaction cannot be said to a sham or an unreal one. In coming to the conclusion that the transaction is a colourable devise, the authorities have been carried away by the fact that the assessee was able to avoid payment of income tax. The assessee did resort to tax planning and took advantage of the law/ loopholes in the law. After seeing how the loophole was exploited within the four corners of the law, it is open to Parliament to amend the law plugging the loophole. However it cannot be done by judicial interpretation. S. 10(38) of the Act is unambiguous. If the share holder chooses to transfer the lands through a transfer of the shares of the company owning the land, it would be a valid legal transaction in law and cannot be said to be a colourable devise or a

sham merely because tax is avoided thereby (**McDowell** 154 ITR 148 (SC), **Azadi Bachao Andolan** 263 ITR 706 (SC) & **Vodafone International** 341 ITR 1 (SC) referred)

IN THE INCOME TAX APPELLATE TRIBUNAL,

MUMBAI BENCH "I", MUMBAI

ITA No. 861/Mum/2013

Assessment Year: 2009-10

Inter Trim Lining Fabrics P.

Ltd.

Date of Pronouncement : 04.06.2014

Having heard both the sides and perused the material on record it is pertinent to mention that the assessee for the purpose of acquiring controlling ITL Industries Ltd by ITL Embellishments i.e., the purchasers entered into the transaction of selling the shares. It is pertinent to mention that section 48 of the Act states that 'income

chargeable under the head capital gains shall be computed by deducting from full value of the consideration received or accruing as a result of the transfer of the capital asset…'. It is pertinent to mention that the full value consideration received in the instant case is at the rate of Rs.21 for

1,00,000/- shares. In is relevant to state that in case where the full value consideration is determinable, there are no provisions under the Income Tax Act available to the AO to determine or adopt the full value consideration at a value different from the actual sales consideration.

Further, as per the provision relating to capital gains i.e., from sections 45 to 55A, only section 50(C) provides for full value of consideration in certain cases confers

power to the AO to replace the stamp duty value to the sale consideration in case the sale consideration is less than the stamp duty valuation. Even in such cases, where the sale consideration is lesser than the stamp duty valuation, the assessee can refer to the valuation officer. This implies that wherever the legislature intends to give authority to AO to replace the value i.e., the sale consideration, specific provision have been provided for. In the absence of specific provision, the AO cannot chose to replace the value. In this connection, it is relevant to state that the

Tribunal in the case of ACIT Vs. B. Arun Kumar & Company in ITA No. 8272/Mum/2011, vide its order dated 24.05.2013, while deciding an issue whether the AO has power to substitute the value of consideration in place of sale

consideration shown by the assessee for the purpose of computing the capital gain, has held that once it is found that shares are sold at a particular price it is not

possible for the AO to disturb the figure without bringing any material facts contradictory to the calculation made by the assessee. Further, the Tribunal in the case of M/s. Morar Jee Textiles Ltd. in ITA No. 2077/Mum/2009, vide its order dated 10.05.2013, has held that the sale price of shares on the basis of book value cannot be taken into consideration for the purpose of determining the value of sale of shares in case of full value consideration is determinable. The Tribunal has further held that the AO does not have power under the Income Tax Act to substitute fair

market value for full value of consideration. Considering the entirety of facts and the position of law as discussed, the Ld. CIT(A) is not justified in confirming the addition

made by the AO. Therefore, we allow the claim of the assessee.

CIT v/s Smt. Nandini Nopany, 230 ITR 679 (Cal.).

Held, that the genuineness of the transaction of sale and purchase of shares between the assessee and V Go. had not been doubted by the Department. This was not a case where

any understatement of value or misstatement of value of the shares sold was made by the assessee. This was a case where the assessee had sold the shares at a value admittedly lower titan the market price. There was no evidence

direct or inferential, nor was there any finding by any income-tax authority that the assessee received the difference between the book value and market value of shares sold. Therefore, the Tribunal was justified in upholding the order of the Commissioner of Income-tax (Appeals) in deleting the addition of Rs.7,57,076 on account of

transfer of shares made by the assessee to V Co.

IN THE INCOME TAX APPELLATE TRIBUNAL

PUNE BENCH "A", PUNE

ITA No.686/PN/2013

(Assessment Year: 2008-09)

Shri Balkawade Sadanand Dhanaji

We have heard the rival contentions and perused the record. The issue arising in the present appeal is in relation to the assessability of the sale proceeds received by the assessee on account of sale of development rights. The issue arising in the present appeal is in relation to the assessability of the gain arising on the sale of said development rights. The first aspect of the issue raised was whether the said gain was assessable under the head 'income from business' or under the head 'income from short term capital gain'. The second aspect of the issue was whether while assessing the income under the head 'income from short term capital gain', the provisions of section 50C of the Act are applicable Under the provisions of section 50C of the Act which is a special provision in relation to the full value of consideration in certain cases, it is provided that where the consideration is received or accruing, as result

of transfer of a capital asset, being land or building or both, is less than the value adopted or assessed by the State government authority, for the purpose of payment of stamp duty, then, the value so adopted or assessed, shall for the purpose of section 48 of the Act, be deemed to be full value of consideration received or accruing, as a result of such transfer. The provisions of section 50C of the Act are attracted where there is a transfer of capital asset being land or building or both. In the facts of the present case before us, the assessee had entered into an agreement for the development of the property. By way of the said agreement, the assessee had some rights in the property and the extinguishment of the said rights give rise to the transfer of the asset in the hands of the assessee and such transfer is assessable as income from capital gain in the hands of the assessee. However, the provisions of section 50C of the Act are not applicable as the same are to be applied only where there is transfer of land or building or both. In the case of the assessee, there were only development rights in the said land available to the assessee and such transfer of development rights does not establish the case of the Revenue that it amounts of transfer of land or building or both. The provisions of section 50C of the Act are attracted in specific cases and are not applicable to the facts of the present case.

Allahabad High Court Case :- INCOME TAX APPEAL No. - 207 of 2009

Petitioner :- Commissioner Of Income Tax

Respondent :- M/S Deewan Tourism Ltd. **5.** We find that the assessee had disclosed long term capital loss of Rs. 21,71,434/-. In the computation of income, the assessee has taken cost of

acquisition of land at Rs.26,10,000/- and shown sale consideration at

Rs.26,10,000/-. Later on, vide his letter dated 26.11.2004, the assessee revised the sale consideration at Rs.53,98,000/- as per Section 50 C of the IT Act and offered the capital gains for taxation. Since the assessee in its original return has not offered this amount for taxation, the AO initiated penalty proceedings u/s 271 (1) (c) of the Act. The assessee did not produce the sale deed. He however, on the enquires made by the AO, submitted the value of the land at Rs.23,60,190/- as per circle rate of the land in the financial year 1993-94. The AO took the cost of acquisition at Rs.23,60,190 and after indexation of cost at Rs.43,23,790/-, the long term capital gain was worked at Rs.10,74,210/-. **7.** We do not find any error in the reasons recorded by the Tribunal in holding that the penalty was not

leviable inasmuch as the assessee himself had disclosed the additional income vide letter dated 26.11.2004, before passing of the assessment order dated 31.03.2006

IN THE INCOME TAX APPELLATE TRIBUNAL

BENCH "D" CHENNAI I.T.A. No.1386/Mds/2012

Asst. Year : 2008-09 Smt. Sujatha Krishnan, Date of Pronouncement : 25th September, 2013

We have heard both parties and perused the case file. The strife between the parties is about an addition of capital gain of `8,71,981/-(supra). There is hardly any dispute on facts that despite specific plea raised by the assessee qua fair market value to be less than the guideline value, neither the Assessing Officer nor the CIT(A) made reference under section 50C(2) of the Act to the valuation officer so as to find out the market value of the property sold. We reiterate the interpretation of section 50C(2) made by the decision of the 'tribunal' (supra) holding that an assessee is entitled to get the matter referred to the departmental valuation officer. Therefore, in principle, the inaction on part of the lower authorities in not making reference cannot be concurred with. At the same time, we deem it appropriate in the larger interest of justice that

instead of remitting the case back to the Assessing Officer to proceed afresh

under section 50C(2) at this belated stage, it would be just and proper in case

the fair market value of the property sold is taken as the average of stamp value

of `1,19,50,522/- and actual sale value of `1,02,00,000/- coming to

`1,10,75,261/-. So, we exercise our jurisdiction under section 254(1) of the Act,

and compute ourselves capital gains as under:- Sale Consideration : 1,10,75,261/-

½ share of the assessee : 55,37,630/-

Index cost : 14,53,280/-

40,84,350/-

Deposited in Capital Gain

Account Scheme : 36,50,000/-

4,34,350/-

In this manner, we uphold impugned addition to the extent of `4,34,350/- only.

8. Accordingly, the appeal is partly allowed

ITAT No.222 of 2011

GA No. 2389 of 2011

IN THE HIGH COURT AT CALCUTTA

Special Jurisdiction (Income Tax)KOLKATA

Versus

SMT. GITA ROY

Being dissatisfied the assessee preferred an appeal before the Commissioner of Income Tax (Appeal) and contended that property was 100 years old building and the same was situated in a narrow lane and fully tenanted with encroachment and sub-tenant and suit for eviction was also pending since 1982 and the notional rent was Rs.12,000/- per annum and that too, was deposited by the tenant in court as against the property tax of Rs.23,296/- per

annum. The Commissioner of Income Tax (Appeal) referred the matter to the D.V.O for ascertaining fair market value of the property by invoking his power in terms of Section 50C of the Act. The assessee submitted `no objection' for adoption of the valuation as determined by the D.V.O vide report dated 18th November, 2009, which was valued at Rs.30,87,675/- and the Commissioner of Income Tax (Appeal) accepted the said valuation and directed the Assessing Officer to treat the assessee's share as the 50% of the

value as adopted by the D.V.O. Being dissatisfied the revenue preferred an appeal before the Tribunal below and as indicated earlier, the Tribunal had dismissed the appeal preferred by the revenue. After hearing Mr. Dhudoria, learned Advocate appearing on behalf the revenue and after going through the provisions contained in Section 50C of the Act, we find that if according to the assessee the valuation adopted by the Registering authority is higher than the fair market value and such assertion is made, the

Assessing Officer should refer the matter to the Valuation Officer for appropriate valuation in terms of Sub-section (2) of Section 50C. In the case before us the Assessing Officer did not exercise such power but the Commissioner of Income Tax (Appeal) being satisfied with the explanation given by the assessee passed direction for valuation and

it appears that the Valuation Officer has accepted the valuation given by the assessee by disregarding the valuation given by the Registering authority. It appears from the order passed by the Commissioner of Income Tax (Appeal) that the Assessing Officer in his remand

report while submitting the D.V.O report had not made any adverse comment and and in such circumstances the Commissioner of Income Tax (Appeal) adopted the value of the property as per report of the D.V.O.

We find that before the Tribunal also valuation given by the D.V.O was not specifically challenged but argument was advanced that the Commissioner of Income Tax (Appeal) should not have referred the matter to the D.V.O.

In such circumstances, we find that the Tribunal below

rightly overruled such point taken by the revenue and accepted the valuation report given by the D.V.O pursuant to the order passed under Section 50C of the Act.

ITO vs. Haresh Chand Agarwal HUF (ITAT Agra)

S. 147: Failure to compute capital gains u/s 50C does not lead to escapement of income

The assessee sold property for Rs.6 lakh and offered capital gains on that basis. The AO accepted the claim without examining the applicability of s. 50C. He later (*within 4 years from the end of the AY*) reopened the assessment on the basis that the stamp duty valuation was Rs. 25 lakhs and the capital gains had to computed on that basis u/s 50C. The assessee challenged the reopening inter alia on the ground that the failure to apply s. 50C did not mean income had escaped assessment. The CIT(A) accepted the plea. On appeal by the department to the Tribunal HELD dismissing the appeal:

S. 50C is not a final determination to prove that it is a case of escapement of income. The report of the approved valuer may give estimated figure on the basis of facts of each case. Therefore, mere applicability of s. 50C would not disclose any escapement of income in the facts and circumstances of the case. The AO at the original assessment stage considered all the documents and material produced before him and has accepted the cost of property as was declared by the assessee. The reassessment is on change of opinion which is not justified

Harish Voovaya Shetty vs. ITO (ITAT Mumbai)

No S. 271(1)(c) penalty for failure to compute capital gains as per s. 50C. Direct judgements on the topic have to be followed

The assessee sold property for a sale consideration of Rs.4.50 lakhs. The said plot of land was valued for Stamp Duty purposes at Rs.15,89,000. The AO applied s. 50C and considered the difference between the sale price and Stamp Duty value for purposes of computation of capital gain. He also levied concealment penalty u/s 271(1)(c) on such difference. The levy of penalty was confirmed by the CIT(A). Before the ITAT, the assessee claimed that the issue was covered in his favour by **Renu Hingorani** (ITAT Mum), **Chimanlal Manilal Patel** (ITAT Ahd) & **Madan Theatres** 260 CTR (Cal) 75 where it was held that as the AO had not questioned the actual consideration received by the assessee and as s. 50C was a deeming provision, it could not be said that the assessee had filed inaccurate particulars of income so as to attract levy of penalty u/s 271(1)(c) of the Act. The department claimed that as the assessee was aware of s. 50C, it ought to have applied it and failure to do so was a deliberate attempt to furnish inaccurate particulars of his income which entailed concealment penalty. Reliance was placed on **Zoom Communications** 327 ITR 510 (Del) & **Escort Finance** 328 ITR 44 (Del). HELD by the Tribunal:

There are direct judgements which hold that where addition is made on account of application of s. 50C and there is no material on record to show that the assessee had received more amount than that shown by it on sale of property then penalty u/s 271(1)(c) cannot be levied. The decisions relied upon by the Dept are not directly on the issue and distinguishable on facts. The context in which the decisions have been rendered is entirely different from the context of the present case. The law in this regard is well settled as held in **Sun Engineering** 198 ITR 297 (SC). When there is a direct decision available on the issue, then it will be appropriate to follow the same particularly when no contrary decision on the same very issue is cited by the opposite side.

1.1 Introduction of new Section 43CA in business head of taxation

The rise in real estate sector and given potential of tax payment there, government has plugged various areas to generate more taxes in real estate transactions. For sake of facility and better understanding the amendments proposed in section 56 and section 43CA are collectively considered in next paragraphs. Under section 43CA it is provided that circle rates (deeming value/ stamp valuation rates) will also apply to computation of income under business head, to a transfer of stock in trade as hitherto only capital assets were subjected to taxation as per circle rates. Henceforth, transfer of stock in trader is provided to be taxed as per applicable circle rates. Further, on receiver side, notional benefit in hands of a buyer is sought to be taxed under section 56(2)(vii)(b) where buyer obtains a immovable property at less than circle rate value. *These two amendments further coupled with requirement of tax deduction at the time of purchase of immovable property (Other than agricultural land) @1%, where value exceeds Rs. 50 lacs, will create lot of issues to be answered.*

To start with, paragraphs from **Memorandum circular explaining provisions of Finance Act,2010** wherein similar provisions were omitted/removed for traders and in case of purchase with consideration vis a vis immovable property are reproduced below **to highlight complete U turn and instability in Govt's tax policy :**

"....The provisions of section 56(2)(vii) were introduced as a counter evasion mechanism to prevent laundering of unaccounted income under the garb of gifts, particularly after abolition of the Gift Tax Act. The provisions were intended to extend the tax net to such transactions in kind. **The intent is not to tax the transactions entered into in the normal course of business or trade, the profits of which are taxable under specific head of income.** It is, therefore, proposed to amend the definition of property so as to provide that section 56(2)(vii) will have application to the 'property' which is in the nature of a capital asset of the recipient and therefore would not apply to stock-in-trade, raw material and consumable stores of any business of such recipient. **C.** In several cases of immovable property transactions, there is a time gap between the booking of a property and the receipt of such property on registration, which results in a **taxable differential**. It is, therefore, proposed to amend clause (vii) of section 56(2) so as to provide that it would apply only if the immovable property is received without any consideration and to remove the stipulation regarding transactions involving cases of inadequate consideration in respect of immovable property. **These amendments are proposed to take effect retrospectively from 1st October, 2009 and will, accordingly, apply in relation to the assessment year 2010-11 and subsequent years..."**

The reintroduction of aforesaid clause in section 56(2)(vii)(b) to tax the purchaser with consideration of immovable property is beyond comprehension and left to guesses. This along with section 43CA will create lot of anomalies, providing for substitution of actual transaction value by Stamp valuation (circle) rates in case of *immovable property held as stock in trade.*

There were precedents like Allahabad high court in case of Kan Constructions, latest Delhi High Court order in Discovery Estates case (18.02.2013 order) which hold that section 50C being limitedly applicable to capital gains assessment cannot apply to assessee holding land/building as trader (stock in trade) and assessed for the same under **business head.** By this new provision, it is apparent that all these decisions will be impliedly overruled from prospective effect **Assessment Year 2014-2015.**

In section 56 of the Act, it is further suggested that in case a buyer purchases the immovable property **for a consideration, below the prescribed/applicable circle rate** (for stamp valuation purposes), then difference if exceeding Rs 50,000, shall be deemed as *income of the buyer on purchase* under the head "other sources" (Section 56). **It is not excluding stock in trade that is purchase purchasing immovable property as his stock in trade. This amendment is further dealt in below paragraphs at further length.** This amendment among other overrules the decision of Delhi High Court in case of Khoobsurant Resorts and P&h High court Chandni Bhuchar where it was held that on basis of deeming rate given under section 50C, purchaser cannot be straightway assessed for differential amount being unexplained/undisclosed income. That is, after amendment in section 56, on basis of circle rate hitherto applicable for assessment of capital gains only, would apply to assessment of purchaser also by way of present amendment.

That is, on one side, for both type of sellers being trader and investor, taxation of gains arising from sales of immovable property is brought at par on basis of *applicable circle rate* and on other side, a buyer irrespective of being trader or investor (no difference in person purchasing immovable

property as stock and investment), is sought to be taxed **on basis of notional gains as deemed income under section 56.**

Similarities and differences in section 50C and new section 43CA are pointed below (*amongst others)*:

a) Both the provisions are **only** applicable to transfer of **asset being "land or building or both"** and cannot as judicially decided include transfer of leasehold rights and transfer of immovable property in a company through transfer of shares being different from "land or building". **(refer Kol bench ITAT in Tejindiner singh & Irfan Abdul Kader Fazlani vs. ACIT (ITAT Mumbai)**)

b) **Both the provisions can apply** to sale of land/building even where no registration takes place and property is transferred on basis of mere agreement to sell.

c) Both the provisions contain **breathing clause** in as much as trader and investor **selling land/building**, can contest application of specified circle rate (stamp valuation rate) and seek a reference to DVO (department valuation officer), which request as judicially explained shall be *binding* on Assessing Officer. In recent past, ITAT in its rulings has suggested that in distress sale like situations, section 50C cannot be automatically applied to tax an assessee on imaginary sale value **which discretion is very much available in said provision.**

d) New provision stipulates that in case there is difference in applicable circle rate on a) date of sale agreement and b) date of registration, and transfer

is made by barter (for other than cash consideration), value as on date of agreement shall apply. It is unclear how in other situation, valuation shall be done where transfer is done normally for cash consideration. In author's opinion, as per Jaipur Bench's ITAT order in Pramod Soni case, said value shall be applicable rate as on date of agreement (where possession handed over) **This kind of provision is missing in section 50C of the Act.**

How P&L account of trader (builder and developer shall be made) in light of section 43CA?

It is unclear how the trading (profit and loss account) of a real estate trader or builder shall be recasted in light of aforesaid new provisions (section 43CA and section 56). It is although different matter that person **selling and purchasing** immovable property as trader cannot be legitimately asked to transact and trade **on basis of *notional value***.

There is potential double taxation of same amount in hands of buyer and seller as seller (trader) is taxed under new section 43CA and buyer is taxed under section 56 of the Act..

Further, when a trader sells his land and building on rate below than circle rate, whether adjustment shall be restricted to sale price only or purchases made earlier below circle rate, shall also be correspondingly adjusted on basis **of matching principle & real income theory**. Further, different types of problems and anomalies, will arise for builder and developers following project and percentage completion method.

Further, anomaly shall arise in hands of assessee who have earlier converted the land into stock in trade u/s 45(2) of the Act, and **sale** after new provision is brought into force, and **given aforesaid substitution of consideration** in computation of business profits at the time of sale, can cause great hardship. **This may be true for other *old* properties purchased before aforesaid new provision and currently reflected/held as stock in trade in assessee's books.**

Interplay between section 44AD, 145 & Section 43CA:

New provision do not indicate how same shall apply where an assessee holding immovable property as stock in trade, opts to be governed by presumptive income provision of section 44AD of the Act, which requires application of minimum flat rate of 8% profits of turnover etc. It seems that new provision should not apply in cases governed by section 44AD for assessment of profits on sale of land/building. Further , where books of a real estate trader are rejected u/s 145 of the Act, being unreliable books, then for application of estimated profit rate, base figure of sales shall be as per section 43CA or natural consideration?. In authors opinion it should be natural consideration.

Whether mere transfer of a *right to purchase a immovable property at a premium,* assessed in business heads, can fall u/s 43CA?

Seems No (apparently)

The above provision should not impact the proposition that a builder/trader holding immovable property as stock in trade (assessable under business head) is taxable in the year in which *registration of property* takes place (Supreme Court in Realest Builders and Dhir Colonizers). Further, the proposition that extra consideration over and above the disclosed value in hands of builder/trader can be taxed in year of completion of sale seems to be unaffected.

IN THE INCOME TAX APPELLATE TRIBUNAL

PUNE BENCH "A" , PUNE

ITA Nos. 2047 to 2052/PN/2012

Assessment Years : 2003-04 to 2008-09

Sujata Farms Pvt. Ltd

We have gone through the allotment letter which copy is placed on record. In our opinion both the authorities below have not at all understood the nature of the said allotment letter. The allotment letter is issued on company letter head. On perusal of the contents of the allotment letter, we find that it is like a booking letter accepting the offer of the buyer. Nowhere there is mentioned in the allotment letter that the possession of the plot is given to the prospective buyers. The assessee has filed the copy of allotment letter dated 26-07-2002 issued to one Mr. Arun Ramdas Pangarkar. As per the allotment letter said Mr. Arun Ramdas Pangarkar has applied for the allotment of the plot and booking

an amount was paid to the assessee company and the assessee agreed to allot him the plot of agricultural land as per the particulars given. It is stated in the allotment letter that the said buyer has inspected the plot and the same is allotted as per his choice. In respect of the private roads there is mentioned in the allotment letter. It appears that even the allotment letters were issued when the project was under developed that there were no proper roads but demarcation was done. It appears that the electricity poles and water facility was under progress. The cost of the plot is mentioned as well as administrative and security expenses are mentioned. There is condition that the said person has to use the plot for an agricultural purpose and for construction of his own farm house as per rules and regulations and prospective buyer has to prove that he is agriculturist. It is in clear terms clarified that the assessee company will execute sale deed of the said plot depending upon the buyers agriculture status and claiming the amount towards cost of plot administrative expenses etc. It is also *mentioned that the buyer has to become member of GIRIVAN project. We do not understand on which basis both the authorities below came to conclusion that the possession was given to the prospective buyers and the assessee should have recognized the revenue or income on the issue of allotment letters. In our understanding the approach of both the authorities below on this particular is totally misplaced.*

The assessee is following consistent method of accounting in respect of the said GIRIVAN project recognizing income on execution of sale deed and save these six assessment years the same has been accepted. ***As argued before us and which also not controverted by the revenue, the assessee is recognizing the income on the final execution of the sale deed. Allotment letter cannot be said to be conferring the possession on the prospective buyers but it is only accepting the offer of the buyer to sale the specific plot. As per the Transfer of Property Act the title is transferred only on the completion of the terms and conditions agreed between the parties. We find that authorities below have referred to Sec. 2(47) of the Act. Sec. 2(47) of the Income-tax Act is a definition of the term "transfer". As rightly argued by the Ld. Counsel the said definition is applicable when the income is computed under the head Capital Gain. Admittedly, in the case of present assessee the income is computed under the head business hence, the said definition is not applicable at all. Moreover, as the letter of allotment does not disclose nor it is meant for conferring the right of the enjoyment or possession on the date of issue. In our opinion the method of accounting regularly employed by the assessee cannot be disturbed.*** *The Assessing Officer did all the exercise merely on the basis of the survey action u/s. 133A which he could have done in normal assessment proceedings u/s. 143(3) by verifying method of accounting adopted by*

the assessee for recognizing income. ***We have also gone through the Compilation filed by the assessee and the assessee has filed the copies of letters from the buyers of the plots and as per the letters given by the buyers of the plots, the possession of the plot is given only on the execution on the sale deed. In our opinion both the authorities below have misunderstood the provisions of law nor they have properly appreciated the letter of allotment issued by the assessee to the prospective buyers. We, therefore, allow the grounds taken by the assessee and set aside the order of the CIT(A) in all these six assessment years and direct the Assessing Officer to accept the method of accounting regularly followed by the assessee and also to accept the return/loss declared.***

THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI *I.T.A. No. 4887/Mum/2013 Assessment Year: 2010-11 Sudhir Menon HUF 12.03.2014*

We may, to begin with, brief the facts, which are simple and undisputed. The assessee, holding 15,000 shares (as on 01.04.2009, the beginning of the relevant previous year) in a company by the name Dorf Ketal Chemicals Pvt. Ltd. ('DKCPL' for short), the entire (or almost the whole) capital in which is held by the family members of the assessee's karta's family, representing 4.98% of the share capital (3,01,316 shares), was

offered 3,13,624 additional shares (which works to about 21 shares for each share held) at the face value rate of Rs.100/- each, on a proportionate basis. It subscribed to and was accordingly allotted 1,94,000 of those shares, on 28.01.2010, i.e., along with the other shareholders, who were allotted - on the same terms, not only the shares similarly offered to them but also that not subscribed to by the other shareholder/s, as 1,19,624 (313624 – 194000) shares by the assessee. The shares, as stated, were received by the assessee on 10.02.2010. As the book value of the shares of DKCPL as on 31.03.2009 was Rs.1,538/- per share, which is to be adopted as a measure of their fair market value (FMV) under the applicable rules (Rule 11U and r. 11UA), the Assessing Officer (A.O.), treating the difference of Rs.1,438/- per share as the extent of the inadequate consideration, i.e., in terms of section 56(2)(vii)(c) read with the relevant rules, toward the acquisition of additional shares, brought the same to tax there-under. The same being confirmed in appeal, the assessee is in second appeal before us.

We may, before we conclude our discussion on this aspect of the matter, dilate on the application of the provision to the transaction of the nature under reference. The provision, firstly, would not apply to bonus shares, and the argument alluding thereto arises only on account of misconception in respect thereof. Though the shares under reference are admittedly not bonus shares, we consider it relevant to dwell thereon, not only to meet the argument in their respect, made emphatically before us, but also to demonstrate the wholesomeness of the provision, which is in fact what was being sought to be impugned. Issue of bonus shares is by definition capitalization of its profit by the issuing-company. There is neither any increase nor decrease in the wealth of the shareholder (or of the issuing company) on account of a bonus issue, and his percentage holding therein remains constant. What in effect transpires is that a share gets split (in

the same proportion for all the shareholders), as for example by a factor of two in case of a 1:1 bonus issue In other words, there is no receipt of any property by the shareholder, and what stands received by him is the split shares out of his own holding. It would be akin to somebody exchanging a one thousand rupee note for two five hundred or ten hundred rupee notes. There is, accordingly, no question of any gift of or accretion to property; the share-holder getting only the value of his existing

shares, which stands reduced to the same extent. The same has the effect of reducing the value per share, increasing its mobility and, thus, liquidity, in the sense that the shares become more accessible for transactions and, thus, trading, i.e., considered from the holders' point of view

As long as, therefore, there is no disproportionate allotment, i.e., shares are allotted pro-rata to the shareholders, based on their existing holdings, there is no scope for any property being received by them on the said allotment of shares; there being only an apportionment of the value of their existing holding over a larger number of shares. There is, accordingly, no question of section 56(2)(vii)(c), though per se applicable to the transaction, i.e., of this genre, getting attracted in such a case

The shares under question being not acquired through transfer, the transactions falls outside the ambit of section 56(2)(vii). We are completely unimpressed. The argument, attractive on its face, fails miserably the moment the nature of the transaction, i.e., the allotment of the shares (through which the relevant shares stand acquired or received), upon which only the shares come into existence and are received by the allottee thereof, is clarified. The same has been subject to dilation and elucidation by the apex court inter alia in Shree Gopal and Company (supra) and Khoday Distilleries Ltd. (supra) relied

upon by the parties themselves before us. As stated explicitly in the former case, a share is a chose

in action. A chose in action implies the existence of some person entitled to the rights, which are rights in action as distinct from rights in possession, and, until the share is issued, no such person exists. A share does not exist prior to its allotment, and in that sense comes into existence only on its allotment. Allotment of a share is only the appropriation of the authorized share capital, being un-appropriated, to a particular person. In nutshell, the difference between the issue of a share to a subscriber and a purchase of a share from an existing shareholder is the difference between the creation and transfer of a chose in action (refer pgs.865, 866)

We have already explained that to the extent the shares subscribed to are

right shares, i.e., allotted pro-rata on the basis of the existing share-holding (as on a cutoff date), the provision, though per se applicable, does not operate adversely. A disproportionate allotment, which cannot, therefore, strictly be regarded as right shares, though could be allotted under a rights issue, would however invite the rigor of the provision, i.e., to that extent. It is to be noted that the fresh shares rank parri passu with the existing holding and, therefore, we see no reason why the provision shall not apply with full force in such cases. In the case of issue of bonus shares (as also on demerger), no property is being

conveyed to the shareholder in-as-much as the property therein is comprised in the existing shareholding of the allottee. There is as such no case of a gift; the shareholder only receiving his own property, albeit in a different form. A 'right' share, on the other hand, is placed differently. To the extent it is allotted to a person not against his existing shareholding or, even so, albeit disproportionately, there is, depending on the terms of

the allotment, which is the mode of acquisition and, thus, it's receipt, scope for value or property being passed on to him, which cannot be said to be in lieu of or as recompense of his existing property. The section would, as afore-stated, therefore, apply, though the extent of income, if any, chargeable there-under would depend on the actual allotment and its terms. Thus, considering the assessee's case from this angle also leads us to the same conclusion.

In view of the foregoing, therefore, the provision of s. 56(2)(vii)(c), in the facts and circumstances of the case, shall not apply and, hence, the amount of Rs.27,89,02,160/- cannot be assessed as income in the hands of the assessee on the ground of inadequate consideration

IN THE INCOME TAX APPELLATE TRIBUNAL

HYDERABAD BENCH 'A', HYDERABAD ITA No.47/Hyd/13 : Assessment year 2006-07

Income Tax Officer Circle 16(2),

Hyderabad.

V/s. Dr. M.Shobha Ravhuveera,

Hyderabad Date of Pronouncement 3.3.2014

In appeal, before the CIT(A), the learned Authorised

Representative submitted that HUF is nothing but a group of relatives working together, one for all and all for one, and therefore, the HUF giving a gift to its members is a relative or a group of relatives giving gifts to another eligible relatives. He further contended that the definition of relative, as per S.56(2)(v) of the Act is very wide and a small set of relatives form the members of the HUF and a small group of eligible relatives and who are members of an HUF can extend the gifts to another eligible relative.. The CIT(A) accordingly allowed the

assessee's appeal, and deleted the addition made by the Assessing Officer, holding that the gift received from the HUF is nothing but a gift received from group of relatives.. The only question arising for

consideration in this appeal is whether a gift received by the assessee from the HUF is eligible for being considered as a gift received from a 'relative' so as to qualify for exemption from tax. We subscribe to the view taken by the CIT(A) that HUF is nothing but a group of relatives. Merely because it is given legal status as a 'HUF' the individuals do not lose their identity as relatives. Such group of relatives who are members of the HUF clearly fall in the definition of the term 'relative' provided in explanation to clause (vi) of S.56 of the Incometax

Act. It is a matter of jurisprudence that a singular can be read as plural

having regard to the situation and circumstance, and in that view of the

matter, the word relative includes 'relatives' and such 'relatives' coming

together as a group and constituting themselves as a legal entity, viz. 'HUF', are not disentitled from their original right of giving gifts to any eligible relative either within or outside the ring of HUF. Apart from the decision of the Rajkot Bench relied upon by the learned counsel for the assessee, this issue is also covered in favour of the assessee by the decision of the Ahmedabad Bench of the Tribunal in the case of Harshabhai Dahyalal Vaidhya(HUF) V/s. ITO (155 TTJ (Ahd) 71), wherein the Tribunal has considered this issue, analyzing the provisions of Section 56(2)(vi) in the following manner, and held that a gift to an eligible relative, by an HUF is exempt…

IN THE INCOME TAX APPELLATE TRIBUNAL

PUNE BENCHE "A", PUNE

ITA No.1801/PN/2012

(Assessment Year : 2007-08)

Asstt. Commissioner of Income Tax,

Vs.

Sureshkumar Kashmirilal Agarwal

Date of pronouncement **:** 28-02-2014

The Assessing Officer has obse3r ved that assessee failed to produced valid confirmations from the said four creditors and therefore he treated the aforesaid sums as income chargeable to tax u/s 56(2)(vi) of the Act on the ground that the said sum was received without consideration. The stand of the assessee was that all the aforesaid loans were repayable and merely because the sum was received free of interest from unrelated persons, it could not be considered as income within the meaning of section 56(2)(vi) of the Act.

We have carefully considered the rival submissions. In the present case, the pertinent point relates to addition made by the Assessing Officer by invoking section 56(2)(vi) of the Act. Assessee was found to have received certain amounts which were claimed as loan liabilities free of interest. The Assessing Officer invoked section 56(2)(vi) of the Act on the ground that the sums were received free of interest. The CIT(A) has deleted the addition to the extent where assessee was able to establish, on the basis of the confirmations, that such credits were loan liabilities, which were repayable. Section 56(2)(vi) of the Act contemplates that receipts without consideration to be taken as 'income', so however it does not contemplate amounts received as loans with liability to repay. Even where a loan has been received free of interest yet it does not fall within the scope of section 56(2)(vi) of the Act because, it is fastened with a liability to repay. The Hon'ble Punjab & Haryana High Court in the case of Saranapal Singh (HUF) (2011) 237 CTR 50 (P&H) (supra) has upheld the proposition that amounts contemplated u/s 56(2)(v) of the Act would not

include interest-free loans, because a loan received carries a liability to repay. To put it in other words, Section 56(2)(vi) of the Act contemplates a receipt of money without consideration which possesses characteristics of 'income' i.e. the money received by an assessee shall be accompanied by an unfettered right to enjoy it; but, if there exists a liability to repay the same, such a transaction cannot be considered as falling within the scope of section 56(2)(vi) of the Act.

Mumbai Bench of ITAT has in the case of Ashok C Pratap v. Addnl. CIT (2012)(23 Taxmann.com 347) (Mum.) held that the amount received by beneficiary from a Trustee on dissolution of a trust cannot be said to be without consideration.

In the case of ACIT v. Meenakshi Khanna (143 ITD 744)(Del ITAT), the Tribunal held the amount received by the assessee from her ex-husband representing accumulated monthly installments of alimony to be consideration for relinquishing all her past and future claims. The Tribunal held that since there was sufficient consideration in getting the said amount, S. 56(2)(vi) was not applicable.

In the case of Purvez A. Poonawalla v ITO (2011-TIOL- 262-ITAT- MUM), the Tribunal has in the context of S. 56(2)(v) held that the amount received by the assessee for abstaining from

contesting the will was for a consideration and therefore was not covered by S. 56(2)(v).

Promise to marry has held by Bombay HC to be valid consideration (I. Chatterji v. CGT (53 Taxman 428)(Bom)

Section 68 related landmark orders

The Hon'ble Supreme Court has held in the case of CIT v K.S. Kannan Kunhi [1973] 87 ITR 395 (SC) that*:*
Where explanation of the assessee was not absurd and it was capable of being examined, I T Authority acted arbitrarily in rejecting the explanation without making proper enquiry. Further, It may be noted that A. O. merely disbelieved but not disproved the facts stated by the appellant in respect of the said creditor. It is not rejected by the A.O. Merely disbelieving the reasonable explanation of the appellant, is not sufficient for addition.
Further, An explanation prima-facie reasonable cannot be rejected on arbitrary grounds, or on mere suspicious or on imaginary or irrelevant ground, as held in Lajwanti Sial v CIT [1956] 30 ITR 228 (Nag).
Hon'ble Apex Court in the case of C.I.T. vs. Orissa Corporation Pvt. Ltd. 159 ITR 78

wherein it has held that "In this case, the respondent had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income tax assessees. Their index numbers were in the file of the Revenue. The Revenue, apart from issuing notices under section 131 at the instance of the respondent, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they were creditworthy. There was no effort made to pursue the so called alleged creditors. In those circumstances, the respondent could not do any thing further. In the premises, if the Tribunal came to the conclusion that the respondent has

discharged the burden that lay on it, then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion was based on some evidence on which a conclusion could be arrived at, no question of law as such arose. The High Court was right in refusing to state a case."

Hon'ble Madras High Court in the case of Hastimal Vs. CIT reported in 49 ITR 273 it was submitted that after lapse of substantial period, if the department could not find out the creditors, addition cannot be made towards unexplained credit.

The Section 68 of Income Tax Act empowers the Assessing Officer to make enquiry regarding cash credit. If he is satisfied that these entries are not genuine, he has every right to add these as income from other sources. But before rejecting the assessee's explanation Assessing Officer must make proper enquiry and in the absence of proper enquiries addition is justified. **(SC in Orissa Corporation 159 ITR Page 78) Also Failure to make requisite enquiry by Ld AO from critical witness: vitiates addition 49 ITR 561 (All High Court)**

Further, as per the provisions of Section 68 of the Act, it is not mandatory that in case the assessee fails to satisfy the assessing officer about the outstanding credits, the same are mandatorily required to be added as income of the assessee. Section 68 gives a discretion to the assessing officer, as can be seen from its provisions, which read as under:-19. This view has also been upheld by the **Hon'ble Supreme Court in the case of 'CIT vs. Smt. P.K. Noorjahan' (1999) 237 ITR 570 (SC).** The assessing officer has to take into account the overall facts. In this case Supreme Court held that a house hold lady never engaged in any business, even if is not able to explain the source of given investment, cannot be treated to have earned handsome undisclosed income in shape of unexplained investment.
A man indulging in double speaking cannot be said by any means a truthful man at any stage and no court can decide on what occasion he was *truthful...Cal HC in 210 ITR 103 (APPLIED in 133 TTJ 394)*

Supreme Court in Maddi Sudarsanam Oil Mills Co. Vs. C.I.T, Hyderabad, reported in 37 ITR 369 wherein the following views were taken.
"Where the income-tax authorities reject the books of account of the assessee and compute the gross profits of his business by applying a flat rate on the total turnover, they cannot rely on the books for the purpose of adding cash credits, which were part of the scheme of balancing accounts, to the profits so ascertained"
P&H High Court in decision of CIT vs Surinder Pal Anand 242 CTR 61:
"Once under the special provision, exemption from maintaining of books of account has been provided and presumptive tax @ 8% of the gross receipt itself is the basis for determining the taxable income, **the assessee was not under obligation to explain individual entry of cash deposit in the bank unless such entry had no nexus with the gross receipts**. The stand of the assessee before Commissioner of Income-tax (Appeal) and the ITAT that the said amount of Rs.14,95,300/- was on account of business receipts had been accepted. Learned

counsel for the appellant with reference to any material on record, could not show that the cash deposits amounting to Rs.14,95,300/- were unexplained or undisclosed income of the assessee."

Allahabad High Court in case of CIT vs Nitin Soni 207 Taxman 332 It is not in dispute that the assessee has got eight trucks. It was also not disputed by the learned standing counsel for the department that the provisions of Section 44AE of the Act are applicable. Emphasis was laid by him that the additions made in the hands of the assessee was justified as the assessee has income more than that which is calculated as per Section 44AE of the Act. It is difficult to accept the aforesaid submission of the learned standing counsel. The very purpose and idea of enactment of such provision like Section 44AE of the Act is to provide hassle free proceedings. Such provisions are made just to complete the assessment without further probing provided the conditions laid down in such enactments are fulfilled. The presumptive income, which may be less or more, is taxable. Such an assessee is not required to maintain any account books. This being so, even if, its actual income in a given case, is more than income calculated as per sub-section (2) of Section 44AE, cannot be taxed

Judgement	Last Updated on: **28 Oct 2005**	LexDoc Id: **289183**
Category - Direct Tax **Issuing Authority/Forum:** ITAT		
Anand Autoride Ltd. vs JCIT		
Citation	99 TTJ 1250	
	99 ITD 227	

Therefore, in our opinion, if the cash is there with the assessee as per the books of account maintained and there is no other evidence that the same has been utilized elsewhere, no addition on that ground can be made in the hands of an assessee. The fact that the assessee could not explain as to why he retained so much cash with it for a long time cannot be a ground for rejecting the contention of the assessee for the availability of cash. There can be many reasons and the assessee had given some reasons that the amount was kept in cash for such a long period because it was contemplating a transaction of land and thinking itself to be in a better position to bargain if the assessee had cash available with it. We, therefore, hold that, in the absence of any material that the cash shown in the cash book has been used by the assessee elsewhere and there was ho possibility of that cash being available with the assessee, no addition can be made to the income of the assessee for some minor and insignificant variation about

carrying the cash in specific denomination or about the timing of the person who carried the money for depositing in the bank. We, accordingly, delete the addition from the assessment of Anand Autoride Ltd. and the protective addition in the hands of Shri Shailesh M. Bhil and allow these two appeals on this ground.

It is an established fact that only cash credits can only be considered u/s 68, but, not trade receipts ***HYDERABAD BENCH "A", HYDERABAD ITA No. 264/Hyd/2011*** *S.B. Steel Industries*

Section 9

GVK Industries Ltd vs. ITO (Supreme Court) 371 ITR 453.

The assessee paid fees to a non-resident (NRC). The obligation of the NRC was to: (i) Develop comprehensive financial model to tie-up the rupee and foreign currency loan requirements of the project.(ii) Assist expert credit agencies world-wide and obtain commercial bank support on the most competitive terms. (iii) Assist the appellant company in loan negotiations and documentation with the lenders. The assessee claimed that as the fees were paid for services rendered outside India, the same were not chargeable to tax in India and that the assessee was under no obligation to deduct TDS u/s 195. However, the AO and CIT rejected the claim of the assessee. The High Court (228 ITR 564) held that the said payment was not assessable u/s 9(1)(i) but that it was assessable u/s 9(1)(vii). The assessee claimed that s. 9(1)(vii) was constitutionally invalid as it taxed extra-territorial transactions. However, this claim was rejected by the Constitution Bench of the Supreme Court in 332 ITR 130. On merits, the matter was remanded to the Division Bench of the Supreme Court. HELD by the Division Bench dismissing the appeal:

(i) **Re S. 9(1)(i)**: The NRC is a Non-Resident Company and it does not have a place of business in India. The revenue has not advanced a case that the income had actually arisen or received by the NRC in India. The High Court has recorded the payment or receipt paid by the appellant to

the NRC as success fee would not be taxable under Section 9(1)(i) of the Act as the transaction/activity did not have any business connection. The conclusion of the High Court in this regard is absolutely defensible in view of the principles stated in **C.I.T. V. Aggarwal and Company** 56 ITR 20, **C.I.T. V. TRC** 166 ITR 1993 and **Birendra Prasad Rai V. ITC** 129 ITR 295;

(ii) **Re S. 9(1)(vii)**: The principal provision is Clause (b) of Section 9(1)(vii) of the Act. The said provision carves out an exception. The exception carved out in the latter part of clause (b) applies to a situation when fee is payable in respect of services utilized for business or profession carried out by an Indian payer outside India or for the purpose of making or earning of income by the Indian assessee i.e. the payer, for the purpose of making or earning any income from a source outside India.

(iii) **Re "Source Rule" in s. 9(1)(vii)**: On a studied scrutiny of the said Clause (b) of Section 9(1)(vii), it becomes clear that it lays down the principle what is basically known as the "source rule", that is, income of the recipient to be charged or chargeable in the country where the source of payment is located, to clarify, where the payer is located. The Clause further mandates and requires that the services should be utilized in India.

(iv) **Re "Source Rule" vs. "Residence Rule"**: The two principles, namely, "Situs of residence" and "Situs of source of income" have witnessed divergence and difference in the field of international taxation. The principle "Residence State Taxation" gives primacy to the country of the residency of the assessee. This principle postulates taxation of world-wide income and world-wide capital in the country of residence of the natural or juridical person. The "Source State Taxation" rule confers primacy to right to tax to a particular income or transaction to the State/nation where the source of the said income is located. The second rule, as is understood, is transaction specific. To elaborate, the source State seeks to tax the transaction or capital within its territory even when the income benefits belongs to a non-residence person, that is, a person resident in another country. The aforesaid principle sometimes is given a different name, that is, the territorial principle. It is apt to state here that the residence based taxation is perceived as benefiting the developed or capital exporting countries whereas the source based taxation protects and is regarded as more beneficial to capital importing countries, that is, developing nations. Here comes the principle of nexus, for the nexus of the right to tax is in the source rule. It is founded on the right of a country to tax the income earned from a source located in the said

State, irrespective of the country of the residence of the recipient. It is well settled that the source based taxation is accepted and applied in international taxation law.

(v) **Re meaning of the expression, managerial, technical or consultancy service in s. 9(1)(vii)**: The expression "managerial, technical or consultancy service" have not been defined in the Act, and, therefore, it is obligatory on our part to examine how the said expressions are used and understood by the persons engaged in business. The general and common usage of the said words has to be understood at common parlance. By technical services, we mean in this context services requiring expertise in technology. By consultancy services, we mean in this context advisory services. The category of technical and consultancy services are to some extent overlapping because a consultancy service could also be technical service. However, the category of consultancy services also includes an advisory service, whether or not expertise in technology is required to perform it. The word "consultancy" has been defined in the Dictionary as "the work or position of a consultant; a department of consultants." "Consultant" itself has been defined, inter alia, as "a person who gives professional advice or services in a specialized field." It is obvious that the word "consultant" is a derivative of the word "consult" which entails deliberations, consideration, conferring with someone, conferring about or upon a matter.

(vi) **Re Facts**: On facts, the NRC had acted as a consultant. It had the skill, acumen and knowledge in the specialized field i.e. preparation of a scheme for required finances and to tie-up required loans. The nature of activities undertaken by the NRC has earlier been referred to by us. The nature of service referred by the NRC, can be said with certainty would come within the ambit and sweep of the term 'consultancy service' and, therefore, it has been rightly held that the tax at source should have been deducted as the amount paid as fee could be taxable under the head 'fee for technical service'. Once the tax is payable paid the grant of 'No Objection Certificate' was not legally permissible. Ergo, the judgment and order passed by the High Court are absolutely impregnable.

IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on: 07.05.2015 Pronounced on: 27.05.2015 + ITA 95/2005

M/S. LUFTHANSA CARGO INDIA

The following two questions of law have to be answered in this appeal, under Section 260A of the Income Tax Act, 1961 (hereafter "the Act"):

1. Whether the Income Tax Appellate Tribunal (ITAT) has rightly interpreted the agreements between the assessee and non-residents and is right in holding that payments made by the assessee to the non-residents are not fee for technical services within the meaning of Section 9(1)(vii) of the Income Tax Act, 1961 so as to oblige the assessee to deduct tax at source under Section 195 of the Act from such payments?

2. Whether the ITAT was right in holding that payments made by the assessee fell within the purview of the exclusionary clause of Section 9(1)(vii)(b) of the Act and were not, therefore, chargeable to tax at source?

Mr. Rohit Madan, learned counsel for the revenue argues that the AO's finding that the assessee used sophisticated technical experience and skills of the personnel of the Technik in the process of repairs and overhaul carried out on the aircraft clearly showed that the services were technical in nature. It was argued that the assessee defaulted in not deducting tax before making payments in accordance with the provisions of Section 195(1) of the Act and therefore, it could not plead that the receipts in the hands of the non-residents is not chargeable to tax under the Act. Counsel also stressed that if the assessee was of the view that no tax was deductible on the payments made to foreign companies it should have made an application with the AO under Section 195(2) of the Act. Stating that Section 195(1) is concerned with "payment to non residents" and not with the taxability of the corresponding "income of the non-resident" it was argued that if the assessee defaulted by not having deducted tax at source at the time of payment, it cannot later argue that the corresponding income of the non-resident was not chargeable to tax.

Learned counsel also relied on the concurrent findings of the CIT (A) that all payments made were in accordance with the Agreements signed by the Assessee with Technik. It was contended that payments for various services were specified in the Agreement on annual basis while other charges are on man hour basis. The charges were for specialized and sophisticated services which fell squarely within the ambit of "fees for technical services" as envisaged under Explanation 2 to Section 9(1)(vii) of the Act. He drew our attention to the various findings recorded in the orders of the CIT (A). 13. Mr. Madan next submitted that to fall under the excepted category in Section 9 (1) (vii) (b), i.e *"except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India"*, there should be clinching evidence to establish that indeed the income is earned wholly out of India. It was argued that the CIT (A) held correctly that in terms of the agreement between the assessee and LCAG the latter only has priority over others in use of the aircraft. Crucially, there was no compulsion restricting the assessee to wet-leasing the aircraft to third parties. The lower authorities found that aircraft were wet-leased to LCAG and also to other parties. Therefore it could not be said that the revenues were earned wholly from a source outside India. The findings of the AO that since the income from leasing of aircrafts is assessed to tax in India, the source of income is situated in India were also highlighted.

14. Learned counsel stated lastly, that the amendment, with retrospective effect, of Section 9 and substitution of Section 9 (2) meant that such payments amounted to income in the hands of the non-resident Indians. The said amendment reads as follows: *"Section 9...(2) For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) and shall be included in the total income of the non-resident, whether or not,- (i) the non-resident has a residence or place of business or business connection in India; or (ii) the non-resident has rendered services in India."* It was submitted that any doubts as to whether the assessee was obliged to deduct tax at source, is set at rest by virtue of Section 9 (2) which clarifies that income of a non-resident is deemed to arise in India and "shall be included in the total income of the non-resident" regardless of whether such entity has a place of business or business connection and the situs of services provided. *Assessee's contentions* 15. Mr. Ajay Vohra, learned senior counsel for the assessee, argued that the findings of the ITAT with

respect to the nature of services, i.e they were not technical services is correct and should not be disturbed. It was submitted that the ITAT took pains to analyze the correspondence, invoices raised by Technik and the relevant clauses of the agreement with it. The service obtained from that entity was in line with Attachment C, which was concerned only with overhaul and repair.
16. It was urged that by reason of Section 5(2) of the Act, a non-resident is liable to tax in India in respect of all income from whatever source derived which – (a) is received or is deemed to be received in India by or on behalf of such person; or (b) accrues or arises or is deemed to accrue or arise to him in India during the year. Section 9 of the Act deems certain income to accrue or arise in India. Counsel submitted that the said provision prescribes that fees for technical services payable, *inter alia*, by a person resident in India is deemed to accrue or arise in India and, therefore, liable to tax in India in the hands of non-resident service provider. He relied on the Supreme Court judgment in *Ishikawajima – Harima Heavy Industries Ltd. v. DIT* 2007 (288) ITR 408 to say that to apply Section 9(1)(vii), services should not only be rendered in India, but also utilized in India. It was argued that to nullify the said decision Parliament enacted Explanation to Section 9(2) by Finance Act, 2007 which was again substituted by Finance Act, 2010 w.e.f. 1.06.1976. The effect of those amendments by enactment of Section 9(2) is to clarify beyond doubt that income by way of, *inter alia*, fees for technical services would be deemed to accrue or arise in India and consequently taxable in India, in the hands of the non-resident recipients, if the payer is a resident, irrespective of the situs of services, i.e. the place where the services are rendered.
17. Mr. Vohra said that Section 9(1)(vii) (b) of the Act provides an exception to the general source rule by providing that where the services rendered by the non-resident service provider (recipient of income) are utilized by the resident payer for purpose of earning income from any source outside India, then, in that situation, such fees would not be deemed to accrue or arise in India. It was highlighted that the Explanation to Section 9(2), added by Finance Act, 2010 w.e.f. 1.06.1976 merely clarifies the source rule, i.e., income is deemed to accrue or arise in India where the payer is an Indian resident and the situs of services, i.e. the place where services are performed is immaterial. The Explanation is not intended to take away the exception provided in clause (b) to Section 9(1)(vii) of the Act. The assessee submits that there is no conflict between the provisions of Explanation to Section 9(2) and clause (b) to Section 9(1)(vii) of the Act; the two provisions operate in different fields. Resultantly, the exception provided in Section 9(1)(vii) (b) of the Act is not

taken away by the retrospective insertion of Explanation to Section 9(2) of the Act.

18. The assessee relied on Supreme Court judgment in *Sundaram Pillai v. Pattabiraman* 1985 (1) SCC 591 to highlight that the object of an Explanation to a statutory provision is to explain the meaning and intendment of the Act itself, where there is any obscurity or vagueness in the main enactment or to clarify the same so as to make it consistent with the dominant object which it seems to sub-serve. It cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming a hindrance in the interpretation of the same. Counsel lastly relied on the recent Supreme Court judgment interpreting Section 9(1)(vii) of the Act in *GVK Industries Ltd. v. ITO* 371 ITR 453. Explaining the interplay between Section 9(1)(vii) and the amendment made by Finance Act, 2007 and Finance Act, 2010 resulting in retrospective insertion of Explanation to Section 9(2) of the Act, the Court clarified that the exception provided in terms of clause (b) to Section 9(1)(vii) was not overridden by insertion of Explanation to Section 9(2) of the Act and that for *"fees for technical services"* to be taxed in India, it is imperative that the payer is resident in India and that the services are utilized in India. As a sequitur, where the resident utilizes the services provided by the non-resident service provider for purpose of earning income from any source outside India, payment for such services is not deemed to accrue or arise in India and hence not taxable in India. The Supreme Court also dealt with the two principles, namely situs of residence and situs of source of income and pointed out that the "Source State Taxation" rule which confers primacy to right to tax a particular income or transaction to the State/nation where the source of the said income is located, is accepted and applied in international taxation law. In the said judgment, it was observed that *"deduction of tax at source when made applicable, it has to be ensured that this principle is not violated."*

Question No.1:

The ITAT, in the impugned order has returned a finding that the services provided by Technik did not fall within the expression "technical service" and that Section 9(1)(vii) did not apply at the threshold. To arrive at this conclusion, the ITAT held that the assessee had no say in the work done by Technik and did not know what kind of repairs were carried out and that none of its employees ever visited Technik‟s facility in connection with such work. The ITAT surmised that since what the assessee asserted is that the overall components are returned duly certified by Technik that it had carried out the prescribed repairs, along with warranty and tax, there was no technical assistance by providing managerial, consultancy or technical services. It concluded that Technik performed the entire work on *"an inanimate body without any involvement or participation of assessee's personnel"*. It also held that managerial or physical exertion by Techengineers on the assessee‟s components did not render such services managerial, technical and consultancy services within the meaning of Section 9(1)(vii)(d). 20. This Court is of the opinion that the ITAT was unduly influenced by all the regulatory compulsions which the assessee had to face. Besides international convention and domestic law that mandated aircraft component overhaul, the manufacturer itself – as a condition for the continued application of its warranty, and in order to escape any liability for lack of safety, required periodic overhaul and maintenance repairs. Unlike normal machinery repair, aircraft maintenance and repairs inherently are such as at no given point of time can be compared with contracts such as cleaning etc. Component overhaul and maintenance by its very nature cannot be undertaken by all and sundry entities. The level of technical expertise and ability required in such cases is not only exacting but specific, in that, aircraft supplied by manufacturer has to be serviced and its components maintained, serviced or overhauled by designated centres. It is this specification which makes the aircraft

safe and airworthy because international and national domestic regulatory authorities mandate that certification of such component safety is a condition precedent for their airworthiness. The exclusive nature of these services cannot but lead to the inference that they are technical services within the meaning of Section 9(1)(vii) of the Act. The ITAT‟s findings on this point are, therefore, erroneous. This question is accordingly answered in favour of the Revenue.

Question No.2.

21. This question relates to the treatment of expenditure incurred by the assessee (i.e. the payments made) towards its activities outside India. Here, the assessee‟s submission was that the payment made fell within the exclusionary part of Section 9(1)(vii)(b) and was not affected by the Explanation to Section 9(2). The assessee stressed upon the fact that no foreign technician was deputed to work in India. The assessee‟s submission is that the source of its income is wet-leasing activity to non-resident companies and consequently the source of income is outside India. It is evident that Parliamentary endeavor – through the later retrospective amendment, was to target income of non-residents. But importantly, the condition spelt out for this purpose was explicit: "*where income is deemed to accrue or arise in India under clauses (v), (vi) and (vii) of sub- section (1), such income shall be included in the total income of the non-resident... whether or not,- (ii) the non-resident has rendered services in India."* The revenue urges that the fiction created by the said amendment is to do away with the requirement of the non-resident having a place of business, or business connection, irrespective of whether *"..the non-resident has rendered services in India."* Did this amendment make any difference to payments made to such companies – even in relation to income accruing abroad? The revenue grounds its arguments in the assumption that the

later, 2010 retrospective amendment, overrides the effect of Section 9 (1) (vii) (b) exclusion. While no doubt, the explanation is deemed to be clarificatory and for a good measure retrospective at that, nevertheless there is nothing in its wording which overrides the exclusion of payments made under Section 9(1)(vii)(b). The Supreme Court clarified this in *G.V.K Industries* (supra): Thus, it is evident that the "source" rule, i.e the purpose of the expenditure incurred, i.e for earning the income from a source in India, is applicable. This was clearly stated by the Supreme Court, when it later held that: *"The exception carved out in the latter part of clause (b) applies to a situation when fee is payable in respect of services utilized for business or profession carried out by an Indian payer outside India or for the purpose of making or earning of income by the Indian assessee i.e. the payer, for the purpose of making or earning any income from a source outside India. On a studied scrutiny of the said Clause, it becomes clear that it lays down the principle what is basically known as the "source rule", that is, income of the recipient to be charged or chargeable in the country where the source of payment is located, to clarify, where the payer is located. The Clause further mandates and requires that the services should be utilized in India."* 25. In the present case, the ITAT held that the overwhelming or predominant nature of the assessee‟s activity was to wet-lease the aircraft to LCAG, a foreign company. The operations were abroad, and the expenses towards maintenance and repairs payments were for the purpose of earning abroad. In these circumstances, the ITAT‟s factual findings cannot be faulted. The question of law is answered in favour of the assessee and against the revenue.

Comments: Following rulings are not considered in above said order:

a) Delhi high court decision in case of Havells's on source concept;

b) ***Delhi high court decision in case of Panalfa Ltd on meaning of words "technical" "managerial" and "consultancy"***

c) ***Impact of DTAA/Treaty and word "make available" and case laws thereon;***

IN THE HIGH COURT OF DELHI AT NEW DELHI
Reserved on: 17.03.2015
Pronounced on: 29.05.2015

ITA 325/2014

M/S. GRUP ISM P. LTD

The following questions of law were framed by this Court at the time of admission of this appeal under Section 260A of the Income Tax Act, 1961 ("the Act"):

(1) Did the ITAT fall into error in holding that the payment incurred by the assessee to the extent of ` 94,31,826 to the UAE concerns was not technical service in terms of Second Explanation to Section 9 (1) (vii) read with Section 194J?

(2) Did the ITAT fall into error in holding that Article 14 of the Double Taxation Avoidance Treaty applied to the UAE concerns in the circumstances of the case?

Question No. 1:
11. At the outset, it would be apt to quote the relevant parts of Section 9(1)(vii), which read as follows:

—9. (1) The following incomes shall be deemed to accrue or arise in India:—
...
(vii) income by way of fees for technical services payable by—
...
(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or Explanation 2.—For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head _Salaries'.//
12. The revenue contends that the remittances in question, made by the assessee (a resident) to the two UAE entities (non-residents), come within the scope of Section 9(1)(vii)(b).It is not in dispute that the two exceptions to the applicability of Section 9(1)(vii)(b), enumerated in the said sub-clause itself, do not apply in this case. The only dispute between the assessee and revenue concerns the interpretation of the phrase „fees for technical services", as defined in Explanation 2 to Section 9(1)(vii).

13. Explanation 2 defines „fees for technical services" to mean managerial, technical or consultancy services. Revenue contends that the services for which the assessee remitted the sums to CGS International and Marble Arts & Crafts classify as „consultancy services". This Court does not accept the revenue"s submissions, and in light of the thorough determination carried out by the CIT(A), upheld by the ITAT, affirms their view.

Nature of services rendered by the UAE Entities
16. This Court, in its recent ruling in *Director of Income Tax v. Panalfa Autoelektrik Ltd.*, (2014) 272 CTR 117 discussed the meaning of the phrase „consultancy services" as employed in Explanation 2 to Section 9(1)(vii). The Court noted as follows:

—20. The moot question and issue is whether the non-resident was providing consultancy services. In other words, what do you mean by the term

"consultancy services"? This Court in Bharti Cellular Limited and Others (supra) had referred to the term "consultancy services" in the following words:-
"14. Similarly, the word "consultancy" has been defined in the said Dictionary as "the work or position of a consultant; a department of consultants." "Consultant" itself has been defined, inter alia, as "a person who gives professional advice or services in a specialized field." It is obvious that the word "consultant" is a derivative of the word "consult" which entails deliberations, consideration, conferring with someone, conferring about or upon a matter. Consult has also been defined in the said Dictionary as "ask advice for, seek counsel or a professional opinion from; refer to (a source of information); seek permission or approval from for a proposed action". It is obvious that the service of consultancy also necessarily entails human intervention. The consultant, who provides the consultancy service, has to be a human being. A machine cannot be regarded as a consultant."
The AAR in the case of In Re: P.No. 28 of 1999, reported as [1999] 242 ITR 208 had observed:- "By technical services, we mean in this context services requiring expertise in technology. By consultancy services, we mean in this context advisory services. The category of technical and consultancy services are to some extent overlapping because a consultancy service could also be technical service. However, the category of consultancy services also includes an advisory service, whether or not expertise in technology is required to perform it."
21. The word 'consultant' refers to a person, who is consulted and who advises or from whom information is sought. In Black's Law Dictionary, Eighth Edition, the word 'consultation' has been defined as an act of asking the advice or opinion of someone (such as a lawyer). It may mean a meeting in which parties consult or confer. For consultation service under Explanation 2, there should be a provision of service by the non-resident, who undertakes to perform it, which the acquirer may use. The service must be rendered in the form of an advice or consultation given by the non-resident to the resident Indian payer.//
(emphasis supplied)
Subsequent to the decision in *Panalfa Autoelektrik (supra)*, the aforesaid definitions were also adverted to by the Supreme Court in *GVK Industries Ltd. v. ITO*, (2015) 371 ITR 453.
17. Gauged from the above excerpts, it is evident that „consultancy services" would mean something akin to advisory services provided by the non-resident, pursuant to deliberation between parties. Ordinarily, it would not involve instances where the non-resident is acting as a link between the resident and another party, facilitating the transaction between them, or

where the non-resident is directly soliciting business for the resident and generating income out of such solicitation. Indeed, as held by this Court in *Panalfa Autoelektrik (supra),* since Section 9 is a deeming provision, the interpretation cannot be overly broad in nature.

It is evident that in the transaction between the assessee and Marble Arts & Crafts, the former (non-resident) acted as an agent of the assessee for the purposes of the latter‟s dealings with the Works Department, Abu Dhabi, which included coordinating with the authorities in the said department and handling invoices for the assessee. As far as CGS International is concerned, it acts as a liaisoning agent for the assessee, and receives its remuneration from each client that it successfully solicits for the assessee. Facially, such services cannot be said to be included within the meaning of „consultancy services‟, as that would amount to unduly expanding the scope of the term „consultancy‟. Therefore, this Court does not accept the revenue‟s contention that the services provided were in the nature of „consultancy services‟. Consequently, the remittances made by the assessee would not come within the scope of the phrase „fees for technical services‟ as employed in Section 9(1)(vii) of the Act. This question is answered against the revenue and in favour of the assessee.

Question No. 2

20. This question involves a determination of whether the services provided by the UAE entities are in the nature of „independent personal services‟ defined in Article 14 of the DTAA. Article 14, to the extent relevant here, reads as follows:

—1. Income derived by a resident of a Contracting State in respect of professional services or other independent activities of a similar character shall be taxable only in that State...
2. The term "professional services" includes independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants.//

21. The two requirements for the applicability of Article 14, as applied in this case, are: a) income must be of a resident of the Contracting State (herein, UAE); and b) income must be in respect of professional services or other independent activities of a similar character. Article 4(1)(b) of

the DTAA defines „resident of a contracting state" in the context of UAE to mean any *person* who under the laws of that State is liable to tax therein. Article 3(e) defines „person" to include a company. Therefore, the CIT(A) rightly rejected the revenue"s contention that Article 14 is inapplicable for the reason that the services in question were provided by companies, as opposed to individuals. As to whether Article 14 applies to the nature of services provided by CGS International and Marble Arts & Crafts, the CIT(A) observed as follows:

—In the DTAA with UAE, there are Article (sic) to consider assessability of income from immovable property (Article 6), business profit (Article 7), shipping (Article 8), associated enterprise (Article 9), dividends (Article 10), interest (Article 11), royalties (Article 12), capital gains (Article 13), Independent personal services (Article 14), dependent personal services (Article 15) etc. There is no clause or Article governing payment for the so called technical services as in other DTAAs i.e. Article 13 of DTAA with UK or Article 12 of DTAA with Singapore. In view of the fact that the non residents do not have any permanent establishment within the meaning of Article 5 of DTAA in India, the remittances to them could only have been considered under Article 14 or Article 22 of DTAA. Under Article 14 of DTAA, the consideration paid to the non-resident is liable to be taxed in the contracting state i.e. UAE. In case remittances are considered as other income under Article 22 of the DTAA, it would also be taxable in the contracting state i.e. UAE.//

22. This Court agrees with the CIT(A)"s approach, quoted above.

Since the income of CGS International and Marble Arts & Crafts can only be classified under Article 14 or Article 22 of the DTAA – both of which provide that the income shall be taxable in the State of residence (UAE)–the issue as to whether the services provided by the two UAE entities fall within the scope of „professional services" under Article 14 is irrelevant to the outcome of this case. Their incomes would necessarily be taxable in UAE, whether by virtue of Article 14 or Article 22. For this reason as well, the assessee was not obligated to deduct tax on the remittances made to CGS International and Marble Arts & Crafts. The second question is answered accordingly.

23. Thus, both questions of law are answered against the revenue and in favour of the assessee. Consequently, the appeal is dismissed. No costs.

Hon'ble Madras High Court in the case of *CIT vs. Faizan Shoes Pvt. Limited* reported as *367 ITR 155 (Mad).;* •

Delhi High court EON case 246 CTR 40 & (329 ITR 9); Allahabad high court Model Exim (2013) 358 ITR 72;

Bombay high court in Terracom and Chriag Mahesh Bhakta (2014 orders)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY ORDINARY ORIGINAL CIVIL JURISDICTION INCOME TAX APPEAL NO. 1073 OF 2012 *The Commissioner of Income Tax21 ... Appellant v/s Shri Chirag M. Bhakta ... Respondent*

The revenue approached the Tribunal against the order of the Commissioner of Income Tax (Appeals) by urging that the said Commissioner has erred in deleting the disallowance made by the Assessing Officer under Section 40(a)(i) of commission payment of Rs.59,94,757/to one Mahendra Singh Jamnadas for not deducting tax at source. The revenue pointed out that the commission payment was made for services rendered in India and hence Section 9 is squarely applicable. The commission payment has been made for services and which fall within the purview of the provision, namely, Explanation 2 under Section 9(1)(vii) of the Act. In dealing with this argument, the Tribunal, after perusal of the entire record including the agreement in question, pointed out that the assessee was paying similar commission in earlier years and there was no such disallowance. The issue of T.D.S. never arises as the said person has no permanent establishment in India. The amount was not taxable as the services were not rendered in India. In para 6 of the order passed by the Tribunal, it has referred to the appointment order and also the entire record. The nature of the services rendered have also been considered. It is in these circumstances that there was no conclusion that the matter does not fall within the purview of the Explanation 2 and as urged before us. These are matters fully covered by the same, that the services rendered are of the nature, namely, looking after sales, creditworthiness of buyers and overseeing the payment to assessee in the business of export of cycle and cycle parts. In such circumstances, the concurrent findings of fact are consistent with the material produced including the agreement. They do not give rise to any substantial question of law, much less, as framed in the present appeal. The appeal is, therefore, devoid of any merits and,

therefore, stands dismissed.

----Taxability in India--Fees for technical services--Resident of Sri Lanka appointed as â€œresident executiveâ€ for Indian branch of U. K. entity for promotion of sales and brand name of employer in Sri Lanka--Job description fitting in with marketing executive not technical service--Payments made by remittance to bank account in Sri Lanka--Services rendered outside India by non-resident--Payments of remuneration and reimbursement of expenses not taxable in India--Income-tax Act, 1961, s. 9(1)(vii)--Double Taxation Avoidance Agreement between India and Sri Lanka, art. 14-- ***Oxford University Press , In re*** **364 ITR. . . 251**

Art. 7 **--Deduction of tax at source--Non-resident--Taxability in India--Non-resident agent of artistes in foreign countries engaged by assessee to bring foreign artistes to perform in India--No participation of agent in event organised by assessee as an artiste--Agentâ€™s commission not taxable in India--** ***Director of Income-tax (International Taxation)*** **v.** ***Wizcraft International Entertainment P. Ltd.*** **(Bom) . . 364 ITR . 227**

I*N THE HIGH COURT OF DELHI AT NEW DELHI + ITA No. 292/2014 Reserved on : 22nd July, 2014 % Date of Decision : 18th September, 2014 DIRECTOR OF INCOME TAX (INTL. TAX.)-II ....Appellant* *Versus* ***PANALFA AUTOELEKTRIK LTD***

"Whether the ITAT was right in holding that the commission paid to M/s. Agenta World Trading and Consulting Establishment for procuring export orders, is not fee for technical services under Section 9(i)(vii) of the Income Tax Act, 1961?i *n view of the aforesaid discussion, the substantial question of law mentioned above has to be answered in favour of the respondent-assessee and against the appellant-Revenue*

ITA.No.276 & 277/Hyd/2010, ITA.452/Hyd/2011,

594 & 595/Hyd/2013 & C.O. 26 & 27/Hyd/2013

M/s. DQ Entertainment (International) Pvt. Ltd. Hyderabad.

Date of pronouncement : 28.03.2014

Factual Background

We have heard the learned D.R. and Ld. Counsel in detail and perused the paper book placed on record and various case law relied upon. Before adverting to consideration of the issues under dispute, it will be relevant to consider assessee's business and the nature of payments being made by assessee to the above foreign companies. ***Assessee company is in the business of production of 2D and 3D animation films for companies like Walt Disney, Columbia, DIC Animation, Stan Lee Media in Holywood, Bardel Animation, Amberwood Entertainment, Nelvana in Canada and Cromosoma, MSL Audio Visuals in Spain, Universal Cartoon Studios LLC, California, Mike Young Productions LLC, California etc. (Overseas Clients). Assessee gets orders from these companies for production of animation films at their requisition of scheduled deliverables. During the financial years 2006-07 & 2007-08, assessee gave some episodes or part of an episode on sub-contract to foreign sub-contractors or rather outsourced a part of the project out of the orders it received from some of the Overseas Clients****. In that process, assessee made payment of Rs.2,10,15,353/- and Rs.55 ,34,940/- to Maxim International (Animation Division),* ***Hong Kong*** *(which was later renamed as Global Exchange (MI/GE)) as per an agreement on 8th May, 2006 named as 'Outsourcing Facilities Agreement'. By this outsourcing agreement, MI/GE has to provide production work/Production material to assessee by availing the necessary production premises, facilities, personnel, materials, services and expertise, the details of which are mentioned in clause-1 of the agreement, dated 08.05.2006. In the case of HGA, the Ld. CIT(A) in ITA.No.296/2008-09 passed similar order incorporating name of the party to whom it is paid as MI/GE but*

considering the amounts of HGA. Later on, he passed an order under section 154 on 18.12.2009 incorporating the errors pointed out by assessee. Not only that, the CIT(A) also decided the two issues which were not adjudicated in the order on the application of DTAA, even though the appeal was allowed in the first instance on other reasons, as discussed in the order dated 31.02.2009. We have considered all the orders together.

Arguments

The learned D.R. referring to the Orders of the A.O. reiterated the contentions of the A.O. that the payments made to the two companies do fall under 'fees for technical services' and referred to elaborate discussion made by the A.O. in the assessment order. He also relied on the order to support the Assessing Officer's contention that payments made are indeed covered by the provisions of the I.T. Act and since assessee has not made TDS before making the payment, demands under section 201 and 201(1A) were raised correctly.

Ld. Counsel in reply, however, submitted that the A.O. raised the demands under section 201(1) read with section 195 as he has considered that the payments made by assessee to HGA and MI/GE are towards 'fees for technical services' whereas assessee's contention was that these payments are made in the course of business activity and as they do not have any business connection or PE in India, the payments are not taxable in India, as it did not arise in India even under the deeming provisions of section 9(1)(vii).

It was submitted that assessee has made the payments to HGA, MI/GE as business payments and have a bonafide reason that the amounts are not taxable in India for the following reasons :

i. *The payments received by it from foreign clients for exactly the similar work executed by it have not been subjected to withholding tax nor was it called upon to file its return by the several countries from the residents of which assessee received payments for services rendered by it.*

ii. *Assessee was permitted by the RBI to make remittances to the payers on the basis of the certificate obtained from the Chartered Accountants opinion and certificate.*

iii. *The foreign concerns namely HGA China and MI/GE, Hongkong are not found to be taxable in India in the relevant assessment years. The belief is later vindicated by the fact that the Department did not initiate any proceedings or issue any notices u/s 142(1) or Sec 148 or Sec 163 of the IT Act to bring to tax their incomes either before or after the orders u/s 201 were passed. The bonafides of the belief is also vindicated by the decision in the case of Titan Industries Ltd Vs ITO (2007) (11 SOT 206, 210, wherein the Hon'ble Bangalore Bench has held*
"Moreover, it was not the case of the revenue that professional fees paid to C of Hongkong was taxable in India and steps had been taken to tax the same. If the receipts are not taxable in the hands of the recipient, their payer is not required to deduct tax at source as per provisions of

Sec 195" (PP 136-141 of PB on Case Law). The decision in the case of Crompton Greaves Ltd Vs DCIT (PP 193-204 of PB on CL) in ITA Nos 2210 to 2212/Mum/2000 dt 24-02-2012 is to the same effect.

iv. *In ACIT Vs Leap International (P) Limited (15 Taxmann.com 251) (Chennai) (PP 38-45 of Case Law - 2), the ITAT followed the decision of the Hon'ble Supreme Court in the case of GE India Technology Centre (P) Ltd Vs CIT 327 ITR 456*
and held that tax is not deductible u/s 195(1) as the recipient rendered services of Clearing and Forwarding at Foreign Ports and the payments made were for those services.

v. *In Ajappa Integrated Projects Management Consultants (P) Limited Vs ACIT (24 Taxmann.com 116 (Chennai) (PP 21-28 of Case Law -2), assessee paid for technical services to persons in Nigeria. Assessee was in the business of consultancy and provision of technical services and getting income therefrom. Assessee had no Branch in Nigeria. On these facts the ITAT held that the provisions of exception in 9(I)(vii)(b) are applicable and that assessee's belief that no tax was deductible was bonafide and the decisions in the cases of Prasad Productions (SB) (Supra) and of GE India Technology Centre (supra) apply.*

vi. *According to Supreme Court decision in the case of Ishikajawa Harima Heavy Industries Vs CIT (288 ITR 408), as the services were not rendered or utilized in India, the income of N-R is not taxable. The Explanations in*

Sec by Finance Act 2007 did not make any change to the Supreme Court decision because the Explanation becomes applicable where income is deemed to accrue or arise in the first instance. While SC held that the income cannot be deemed to accrue or arise unless services were rendered in India and utilized in India. The Explanation could not overcome the SC judgement. In any case, the inclusion of Technical Services under Explanation in Sec 9 was inserted in Sec 195 only by Finance Act 2012. The Demand u/s 201(1) cannot be justified retrospectively. Assessee could not be expected to do the impossible that is to deduct tax when the relevant explanation did not exist in the Act.

Relying on the above decision, it was the submission that since assessee had bonafide belief that for the reasons stated above the amounts are not covered by provisions of TDS and therefore, raising demand does not arise. Further, the Ld. Counsel relying on the principles laid down by the Hon'ble Allahabad High Court in the case of Ramakrishna Vedantakumar 182 ITR 603 submitted that where assessment proceedings are not initiated in the case of PEs, raising demand under section 201(1A) does not arise. Similar proposition was also laid down by the decision of ITAT the case of Dresser Rand India Pvt. Ltd. vs. ADIT 53 SOT 273 (Mum.) (Tribu.), to submit that provisions of section 195 do not come into play on the facts of the case. 12. We have considered the issue and examined the details, orders placed on record along with the detailed submissions and case law relied upon.

Held by ITAT

20. After considering the detailed order passed by Ld. CIT(A) we agree with the findings that :

1. The payments received by it from foreign clients for exactly the similar work executed by it have not been subjected to withholding tax nor was it called upon to file its return by the several countries from the residents of which assessee received payments for services rendered by it.

2. there was no element of any Technical Services in the production of animation films nor in the production of a part or certain episodes of an animation film so to attract the provision of Section 9(1) (vii) read with Section 5(2)(b) of the Act.

3. just because such expertise, knowledge, technology and experience is possessed by the said party and the same has been utilized for rendering the services, it cannot be said that the services so rendered are in the nature of technical and consultancy services without making any technology available to the other party. The payment in question paid by the assessee-company or any part thereof could not be treated as 'fees for included services' within the meaning of 'fees for technical services' defined in section 9(1)(vii) of the Act".

4. it was never the case of the Assessing Officer that there was Permanent Establishment for MI/GE or HGA in India, instead it was his case that though services were rendered by MI/GE, HGA only in Hong Kong/ China, yet the same were utilized by the assessee in its business in India and as such the Assessing

Officer stated that irrespective of the situs of the services, income is deemed to accrue or arise in India in the hands of MI/GE,HGA and consequentially the assessee is liable to deduct taxes u/s 195 of the Act.

5. the assessee's business with its Overseas Clients undoubtedly constitute a business carried on by resident outside India, making the assessee to satisfy the first category of income referred to in the sub-clause (b). However, the Assessing Officer laid emphasis only on the second category of income to say that originating cause of the income of the assessee is located in India and as such he held that the assessee is not making or earning income from the source outside India. The Assessing Officer failed to examine the provisions of Sub-clause (b) of Section 9 (l) (vii) of the Act in a proper perspective in the aforesaid manner;

Based on above findings it is clear that assessing officer's attempt to raise demands u/s 201 is not correct. Even explanation-1 to section 9(1) excludes the income pertaining to operations carried out outside India. The foreign parties have not done any activity in India nor they have any PE in India. As there is no liability to deduct tax on the amounts paid u/s 195, it is not correct on the part of AO to raise demands. The AO it seems had issued notice u/s. 201 (1) in respect of payments by assessee to TV Arts also and on explanation by the assessee that it was the payments resulted in income from business, the proceedings were dropped. The assessee, in its reply in regard to T.V. Arts relied on Article 7 of DTAA between India & Philippines which applies to business income of non-residents i.e T.V.

Arts and submitted that tax was not deducted as it was not taxable. This was accepted. Non-liability to TDS was not because of lack of article for FTS in DTAA, as presumed in the appellate order, but because of application of Article 7. The Grounds of Appeal is therefore clearly untenable. We uphold the order of CIT(A) and dismiss the grounds

The law is by now settled so far as the connotations of '**make available'** clause in the definition of fees for technical services in the contemporary tax treaties are concerned. It is held to be a condition precedent for invoking this clause that the services should enable the person acquiring the services to apply technology contained therein refer:

Hon'ble Delhi High Court in the case of *DIT Vs Guy Carpenter & Co Ltd (346 ITR 504)* and Hon'ble Karnataka High Court in the case of *CIT Vs De Beers India Pvt Ltd (346 ITR 467)*

Delhi high court in EON technologies 246 CTR Page 40 which states as under:
Ay-2007-2008. The commission was paid to non-resident agent for sales abroad. No income to non-resident accrued in India. the commission paid could not be disallowed for want of DTS under s. 195 Payment received in India- Mere book-entery did not mean that payment was received in India. Business connection- The non-resident agent operated abroad. There was no business connection. No income to non-resident accrued in India. Ss.5(2), 9(i)(i), 40(a)(i) and 195 of the Income Tax Act 1961
The term "business connection" has been interpreted by the Supreme Court to mean something more than mere business and is not equivalent to carrying on business, but a relationship between the business carried on by a non-resident, which yields profits and gains and some activities in India, which contributes directly or indirectly to the earning of those profits or gains. It predicates an element of continuity between the business of the non-resident and the activity in India [***CIT Vs. R.D. Aggarwal and Company*** (1965) 56 ITR 20 (SC), ***Carborandum & Co. Vs. CIT*** (1977) 2 SCC 862 and ***Ishikawajma-Harima Heavy Industries ltd. Vs. Director of income Tax, Mumbai*** (2007) 3 SCC 481]

Judgement	Last Updated on: **09 Mar 2012**	LexDoc Id: **427400**
Category - Direct Tax		
Issuing Authority/Forum: ITAT **(Delhi)**		

Hughes Escort Communications Ltd. vs DCIT

Citation	2012 51 SOT 356

Distinguished	Transmission Corporation of A. P. Ltd and Another vs CIT [1999] 105 Taxman 742 Transmission Corporation of A. P. Ltd and Another vs CIT 239 ITR 587 GE India Technology Centre (P) Ltd. vs CIT 193 Taxman 234; 234 CTR 153; 327 ITR 456; LexReported
Followed	**ACIT vs NIIT Ltd.** **[2008] 23 SOT 44 (approved by delhi high court in 318 ITR 289)**

Topic	Royalty vis-à-vis Sharing of fees
Sub Topic	Affiliate agreement
Summary	The assessee entered into an affiliate agreement with 'C' of USA, for:- Promoting and marketing product and providing ancillary services. The 'C' a university of USA provided distance learning courses to students in India. The fees was shared by both. The payment made to 'C' of USA was not royalty. S. 9(1)(vi) of the Income Tax Act, 1961. Art. 12 of the DTAA with USA.

IN THE INCOME TAX APPELLATE TRIBUNAL 'D' BENCH: CHENNAI I.T.A. No. 2136/Mds/2010 *Assessment Year: 2007 M/s. Wheels India Ltd., Padi, Date of Pronouncement: 26-11-2013*

Revenue has assailed the order of CIT (Appeals) primarily on Deleting the dis-allowance made by the Assessing Officer u/s 40(a)(ia) in respect of legal charges paid to M/s. Reed Smith, LLP, USA. With regard to third issue raised in the grounds of appeal in respect of legal charges paid to M/s. Reed Smith, LLP, USA, the ld.DR submitted that the assessee neither approached the department u/s.195(2) before remitting the above payments to non-residents nor filed the prescribed undertaking and the certificate from the Chartered Accountant. As far as payment of legal fee to M/s. Reed Smith, LLP, USA, the ld. Counsel submitted that the legal charges have been paid for the services rendered outside India and the recipients of fees do not have any permanent establishment in India. Therefore, no dis-allowance u/s 40(a)(i) is warranted. In order to support his contentions the ld. Counsel relied on the order of Mumbai Bench of the Tribunal in the case of Maharashtra State Electricity Board Vs. DCIT reported as 90 ITD 793 (Mum) and GE India Technology P. Ltd. Vs. CIT reported as 327 ITR 456 (SC). In the Fourth ground of appeal, the assessee has raised objection in deleting the dis-allowance made by the Assessing Officer u/s 40(a)(ia) in respect of legal charges paid to M/s. Reed Smith, LLP, USA without deduction of tax at source. It is a well settled law that, if the payments are made for professional services rendered abroad and the party does not have any permanent establishment in India, the tax is not to be deducted at sources. Moreover, as per article 15 of DTA agreement between India and USA, the professional services rendered by the lawyers in USA are chargeable only in USA unless they have a fixed base regularly available in India or has stay in India exceeding ninety days in the taxable year. In the present case, the foreign party has confirmed that they do not have any permanent establishment in India nor it is a case where they stay in India is more than ninety days as aforesaid. Accordingly, for the services rendered by the foreign law firm outside India there is no question of deduction of tax on the payments made. Accordingly, this ground of appeal of the Revenue is also dismissed. ***(Also see citations at 154 TTJ 537: 318 ITR 237 Clifford chance)***

Income Tax Appellate Tribunal – Delhi Hero Honda Motors Ltd., New Delhi vs Assessee on 11 June, 2013 156 TTJ 139

53.38. Applying the propositions laid down in these case laws to the facts of the case, we are of the considered view that the claim of the assessee that the payment was purely for advertisement and publicity of the brand name of the assessee and for promotion of its product during the Cricketing events of ICC and not the payment of royalty as defined used in para 3 of Article 12 of DTAA between India and Singapore has much force. The agreement in question includes sponsorship rights like advertising on bill boards, advertisement in official brochure, Web site of ICC etc., which is purely incurred for the

promotions, advertisement and publicity of the assessee's brand name and products. If incidentally, the proprietary trade mark or logo of ICC is put alongside the assesssee's logo it is only incidental to the main services obtained by the assessee. The ratio of the Judgment in the case of Sheraton International Inc .(supra), and the judgment of Sahara India Financial Corporation (supra), in our view squarely apply to the facts of the case. Thus the amount in question paid to Nimbus Sports International and GCC PTE Ltd., Singapore is not royalty as the payment was not for use of any trade mark, brand name. As both these organizations do not have any P/E in India the income is not taxable in India and consequently there is no requirement of deduction of tax at source.

Section 9(1)(i): Income deemed to accrue or arise in India – Business connection – Service rendered abroad – Deduction at source – DTAA-India-UK-Poland-Brazil-Canada-Australia – Business profit – Assessee was not liable to deduct tax at source from said payments and Assessing Officer was not liable to deduct tax at source, hence the assessee cannot be treated as in default under section 201. (Ss.9(1)(vii), 195, 201)

Assessee company was engaged in business of production of films, shooting of which was often done outside India. For shooting films outside India, its production unit used to go abroad and services required in connection with work of shooting abroad were availed from various overseas providers. The assessee made payment to five such overseas service providers for services availed in connection with shooting of different films. It was held that the services rendered by overseas service providers would not fall within ambit of technical services as given in Explanation 2 to section 9(1)(vii) instead they were in nature of commercial services and amount received for such services constituted business profit. (A.Y. 2005-06 & 2006-07) *Yash Raj Films P. Ltd. v. ITO (IT) (2013) 140 ITD 625/23 ITR 125 (Mum.)(Trib.)*

IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCHES : "A" NEW DELHI

ITA nos. 1124 & 1125/Del/2014

Assessment Years : 2004-05 and 2010-11

Aspect Software Inc.

18th May, 2015.

In view of the above, respectfully following the decision of Hon'ble Jurisdictional High Court in the case of Ericsson A.B. (supra) and Infrasoft Ltd. (supra), we hold that the consideration received by the Assessee for supply of product along with license of software to End user is not royalty under Article 12 of the Tax Treaty. Even where the software is separately licensed without supply of hardware to the end users (i.e. eight out of 63 customers), we are of the view that the terms of license agreement is similar to the facts of Infrasoft Ltd (Supra). Accordingly, we hold that there was no transfer of any right in respect of copyright by the assessee and it was a case of mere transfer of a copyrighted article. The payment is for a copyrighted article and represents the purchase price of an article. Hence, the payment for the same is not in the nature of royalty under Article 12 of the Tax Treaty. The receipts would constitute business receipts in the hands of the Assessee and is to be assessed as business income subject to assessee having business connection/ PE in India as per adjudication on Ground No 5.

Supreme Court reimbursement not income

In the case of CIT Vs. Tejaji Farasram Khanwala Ltd (1968) 67 ITR 95 (SC), the Hon'ble Apex Court held that to the extent the receipt represented reimbursement of expenses, the same was not taxable, it is only when there was a surplus, that this surplus should be taxed. This decision of the Hon'ble Apex Court laid down the position of law that reimbursement of expenses does not constitute income in the hands of the payee.

The Hon'ble Apex Court in the case of TISCO Vs Union of India (2001) 2 SCC 41 held that –

(i) in common parlance the word reimbursement would mean and imply to pay back or refund;

(ii) it denotes restoration of something paid in excess
(iii) 'reimbursement' has to mean and imply restoration of an equivalent for something paid or expended and
(iv) 'reimbursement' pre-supposes previous payment.

Thus reimbursement follows the incurrence of expenditure by replacing the quantum of disbursement. It does not have the potential of earning gains for the payee or the potential of generating a surplus. 'Income' on the other hand would, as per the definition under section 2(24)(i), mean profit or gain.

T**he Special Bench of the ITAT, Mumbai in the case of Mahindra & Mahindra Ltd Vs. DCIT (2009) 313 ITR (AT) 263** held "when a particular amount of expenditure is incurred and that sum is reimbursed as such, that cannot be considered as having any part of it in the nature of income.

P&H High Court in decision of CIT vs Surinder Pal Anand 242 CTR 61: "Once under the special provision, exemption from maintaining of books of account has been provided and presumptive tax @ 8% of the gross receipt itself is the basis for determining the taxable income, **the assessee was not under obligation to explain individual entry of cash deposit in the bank unless such entry had no nexus with the gross receipts**. The stand of the assessee before Commissioner of Income-tax (Appeal) and the ITAT that the said amount of Rs.14,95,300/- was on account of business receipts had been accepted. Learned counsel for the appellant with reference to any material on record, could not show that the cash deposits amounting to Rs.14,95,300/- were unexplained or undisclosed income of the assessee."

Allahabad High Court in case of CIT vs Nitin Soni 207 Taxman 332 It is not in dispute that the assessee has got eight trucks. It was also not disputed by the

learned standing counsel for the department that the provisions of Section 44AE of the Act are applicable. Emphasis was laid by him that the additions made in the hands of the assessee was justified as the assessee has income more than that which is calculated as per Section 44AE of the Act. It is difficult to accept the aforesaid submission of the learned standing counsel. The very purpose and idea of enactment of such provision like Section 44AE of the Act is to provide hassle free proceedings. Such provisions are made just to complete the assessment without further probing provided the conditions laid down in such enactments are fulfilled. The presumptive income, which may be less or more, is taxable. Such an assessee is not required to maintain any account books. This being so, even if, its actual income in a given case, is more than income calculated as per sub-section (2) of Section 44AE, cannot be taxed.

CIT vs Abhyudaya Builders (P) Ltd. 340 ITR 310 High Court of Allahabad

It may be mentioned that the basic idea in the Act is that the entire income of an assessee assessable in respect of a particular assessment year should be made the subject of one single assessment made on him for that year. Income which is assessable in one assessment year cannot be brought to tax in another assessment year even where its non-assessment in the year to which it relates was due to a device employed by the assessee which came to light in the subsequent year as per the ratio laid down by the High Court in the case of Ratanchand Lallumal, In re [1936] 4 ITR 189 (All

T& AP high court in THE HONBLE SRI JUSTICE L.NARASIMHA REDDY AND THE HONBLE SRI JUSTICE CHALLA KODANDA RAM

I.T.T.A.No.190 of 2003 21-10-2014

The Commissioner of Income Tax, Vijayawada.appellant.
M/s.Chennupati Tyre & Rubber Products, Vijayawada...Respondent.

The processing of a return submitted by an assessee is a complicated exercise. More the sources of income from an assessee, higher the amount of scrutiny, that is needed. Even after taking the

help of the Chartered Accountant, an assessee may not be correct in his understanding as to the scope of (a) the determination of the total income, and (b) the deductions, which he is otherwise entitled to. The interpretation placed on the respective provisions, itself is not absolute or final. The Courts and the Tribunals are not uniform in their interpretation of the relevant provisions. Obviously, to provide a deterrance to the assessees, the Parliament added Section 271 of the Act, providing for levy of penalty, in case an assessee is found to have suppressed, or concealed income, or posted the incorrect facts. Till it was amended in the year 1964, Section 271(1)(c) of the Act, brought only deliberate concealment, or furnishing of inaccurate particulars as the basis for levy of penalty. Through the Finance Act, 1964, the word deliberately was omitted. Such omission, no doubt, has added new dimensions to the provision. All the same, the revenue has to discharge its burden to prove that there was some intention to conceal or furnish inaccurate particulars on the part of the assessee before penalty is levied. In other words, an inadvertent mistake, or a bona fide belief, as to the classification, or character of an amount, cannot per se provide a ground for levy of penalty. In the ultimate analysis, the sovereign power of the State is only to levy tax, and imposition of penalty is not a principal activity, but a step in the process of collection thereof.

It is, no doubt, true that the Tribunal made a reference to the

judgment of the Supreme Court in Sir Shadilal Sugar and General Mills Ltd. V. Commissioner of Income Tax , which, in turn, was rendered with reference to the provisions as they stood, before Section 271(c) of the Act, was amended. It is not as if the Commissioner and Tribunal proceeded on the assumption that there was no deliberate attempt on the part of the respondent to conceal the two items. The removal of the word deliberate did not give a free hand to the Assessing Officer or exposing the assessee to a defenceless situation. The principle that runs cutting across any systems of law is that before person is visited with punishment or penalty, the wrongful act on his part must be established. If not a deliberate intention, at least, intention, as such, must be proved to be existing. The intention of this nature may not be equated to the concept of mens rea. At the same time, the minimum contrast with an instance of mere omission, or failure must be made. Otherwise, every inadvertent omission, or a bona fide understanding of a particular provision, which is not accepted by the Income Tax Officer may expose the assessee to penalty. If that time is pursued, Act may turn out to be the one of the collection of penalties than the income tax.

Recently, in I.T.T.A.No.180 of 2003, we observed as under:

The levy of penalty cannot be resorted to as a matter of course. By their very nature, the returns are bound to be at variance from what is contemplated under the Act or the estimates of the Assessing Officers. Many a time, the understanding of a given provision in a particular way, itself would lead to a considerable difference as to the income or the corresponding tax. The very fact that quite large number of remedies in the form of appeals at various stages is provided for, discloses that even the understanding of the assessing or adjudicatory authorities; not absolute. The levy of penalty is not going to leave the matter at that. It would expose the assessee to prosecution also by treating him as an economic offender. An assessee can be made to suffer such far reaching consequences, if only facts of the case support, and it emerges that the assessee had a clear intention to suppress the income.

Learned counsel for the appellant placed reliance upon the judgment of the Supreme Court in Mak Data P. Ltd. v. Commissioner of Income Tax . Their Lordships held that once an item of income was found to have been concealed, the mere fact that the assessee has voluntarily disclosed it thereafter, does not absolve

him from being proceeded under Section 271(1)(c) of the Act. We respectfully follow that. However, it is important to understand the purport of very word concealment. That can occur, only when the person is in full knowledge of the state of affairs and even while being under obligation to make it known to others, and in particular the authorities under the Act fails or refuses to do so. It is then, and only then, that he can be said to have concealed and once the factum of concealment is proved, his attempt to voluntarily disclose it does not save him. In the instant case, we do not find any ingredients of concealment.

Madras High Court in the case of CIT v. Gem Granites (Karnataka) (supra), the Hon'ble High Court has observed as under:

"11. In a recent decision of the Hon'ble Supreme Court in Civil Appeal No.9772 of 2013, dated 30.10.2013 (Mak Data P. Ltd., vs. Commissioner of Income Tax-II), the Hon'ble Supreme Court while considering the Explanation to Section 271(1), held that the question would be whether the assessee had offered an explanation for concealment of particulars of income or furnishing inaccurate particulars of income and the Explanation to Section 271(1) raises a presumption of concealment, when a difference is noticed by the Assessing Officer between the reported and assessed income. The burden is then on the assessee to show otherwise, by cogent and

reliable evidence and when the initial onus placed by the explanation, has been discharged by the assessee, the onus shifts on the Revenue to show that the amount in question constituted their income and not otherwise. Factually, we find that the onus cast upon the assessee has been discharged by giving a cogent and reliable explanation. Therefore, if the department did not agree with the explanation, then the onus was on the department to prove that there was concealment of particulars of income or furnishing inaccurate particulars of income. In the instant case, such onus which shifted on the department has not been discharged. In the circumstances, we do not find that there is any ground for this Court to substitute our interfere with the finding of the Tribunal on the aspect of the bonafide of the conduct of the assessee.

12. In the circumstances, following the decision of the Hon'ble Supreme Court, we uphold the order of the Tribunal and the tax Case Appeal stands dismissed. No costs."

IN THE INCOME TAX APPELLATE TRIBUNAL PUNE BENCH "A", PUNE ITA No.2375/PN/2012 (Assessment Year : 2008-09) *Income Tax Officer, Ward 2 (1), Pune. …. Appellant Vs. Smt. Madhuri Satish Misal, Date of pronouncement* ***:*** *25-08-2014*

22. Before parting, we may refer to the judgement of the Hon'ble Supreme

Court in the case of Mak Data Pvt. Ltd. (supra) which has been relied upon by the learned Departmental Representative in order to support the case of the Revenue before us. In the case before the Hon'ble Supreme Court, the issue was whether a voluntarily surrender of income made during the course of assessment proceedings can mitigate the levy of penalty u/s 271(1)(c) of the Act. The proposition which is emerging from the judgement of the Hon'ble Supreme Court is that a mere voluntary disclosure does not mitigate the rigours of section 271(1)(c) of the Act in the absence of any explanation

forthcoming from the assessee to rebut the presumption of concealment

arising due to Explanation to section 271(1)(c) of the Act. ***As per the Hon'ble Supreme Court wherever there is a difference between the reported and the assessed income, there is a presumption of concealment, and the burden is then on the assessee to show otherwise, by cogent and reliable evidence and only when the initial onus placed on the assessee is discharged, the onus shifts to the Revenue to show that the amount in question constituted the income and not otherwise. In the case before the Hon'ble Supreme Court, factually it was emerging that such onus was not discharged by the assessee by giving a cogent and reliable explanation with respect to the difference in the reported and assessed income****. We say so, because of the following discussion in the order of the Hon'ble Supreme Court :-*

"9. We are of the view that the surrender of income in this case

is not voluntary in the sense that the offer of surrender was made in view of

detection made by the AO in the search conducted in the sister concern of

the assessee. In that situation, it cannot be said that the surrender of

income was voluntary. AO during the course of assessment proceedings

has noticed that certain documents comprising of share application forms,

bank statements, memorandum of association of companies, affidavits, copies of Income Tax Returns and assessment orders and blank share transfer deeds duly signed, have been impounded in the course of survey proceedings under Section 133A conducted on 16.12.2003, in the case of a sister concern of the assessee. The survey was conducted more than 10 months before the assessee filed its return of income. Had it been the intention of the assessee to make full and true disclosure of its income, it would have filed the return declaring an income inclusive of the amount which was surrendered later during the course of the assessment proceedings. Consequently, it is clear that the assessee had no intention to

declare its true income. It is the statutory duty of the assessee to record all its transactions in the books of account, to explain the source of payments made by it and to declare its true income in the return of income filed by it from year to year. The AO, in our view, has recorded a categorical finding that he was satisfied that the assessee had concealed true particulars of income and is liable for penalty proceedings under Section 271 read with Section 274 of the Income Tax Act, 1961."

23. However, in the case before us, factually we have concluded that the CIT(A) made no mistake in concluding that the explanation rendered by the assessee is cogent and reliable as well as bona-fide. Therefore, even after applying the proposition laid down by the Hon'ble Supreme Court in the case of Mak Data Pvt. Ltd. (supra) in the

present case, factually speaking, penalty u/s 271(1)(c) of the Act is not attracted. Therefore, in our considered opinion, the judgement of the Hon'ble Supreme Court in the case of Mak Data Pvt. Ltd. (supra) does not help the Revenue in the present case. Moreover as pointed out by the learned counsel for the respondent-assessee, by relying on the judgement of the Hon'ble Madras High Court in the case of CIT vs. M/s Gem Granites (Karnataka) vide Tax Case (Appeal) No.504 of 2009 dated 12.11.2013, that the proposition laid down by the Hon'ble Supreme Court in the case of Mak Data Pvt. Ltd. (supra) has *to be examined in the context of facts and circumstances of each case.*

Whatever was the fate in the quantum proceedings but as far as the question of levy of 271(1) (C) penalty is concerned, we have noted that in the case of *CIT vs. Jalaram Oil Mills, 253 ITR 192 (Guj.),& National Textiles 249 ITR 125 (Guj.)* it was held that merely

because addition had been made u/s.68, penalty u/s.271(1)(C) would not follow as a natural corollary.(The deeming provisions of section 68 are enabling provisions for making an addition but these deeming provision itself are not good enough for levying the penalty u/s 271(1)(c). To levy penalty u/s 271(1)(c) against such loans, he AO should disprove the fact that loans were not received by the assessee.)

Hon'ble Gujarat High Court in the case of CIT vs L G Chaudhary, reported in 215 Taxman 95**.**

(section 40(a)(ia). The provision has been grafted in the statute, so that the payee must pay the taxes, and because of this reason, to avoid any misconduct or malicious attempts by the payee, the responsibility has been cast on the payer, so that the exchequer is not at a loss. This automatically

means that the actual expense incurred by the assessee is bona fide Since the expense is bona fide, the question of attraction and levy of penalty does not arise.)