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CHARTERED ACCOUNTANTS

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Foreword

Dear Readers,

In this edition, we have come up with an article on recent judgement of the Hon'ble NCLAT New Delhi, wherein the matter as to whether a "Inter Corporate Deposit" by a party to another as part of the Joint Venture Agreement , constitutes a "Financial Debt". This is a important judgement, reaffirming the settled position in law, and will have a lot of bearing on the rights of the parties who enter in to Joint Venture Agreements.

The next article is on the receipt of information from under the exchange of information agreements and consequences under the Indian Evidence Act, 1872. The article deals with requirements under the Indian Evidence Act, 1872 to allow the information from the foreign jurisdictions in respect of various taxpayers in India for the purpose of collection and recovery of taxes.

We have also collated certain important judgments under direct tax and provided our comments wherever necessary.

I hope that you will have good time reading this edition and please do share your feedback.
Thanking You,

Suresh Babu S
Founder & Chairman

Articles of the Month

Corporate Laws

IS GRANT OF "INTER-CORPORATE DEPOSIT" IN A JOINT VENTURE CONSTRUED AS 'FINANCIAL DEBT' UNDER IBC

As the Insolvency and Bankruptcy Code, 2016 (IB Code) is evolving, there emanate many scenarios, which require the necessity to re-visit the already settled provisions, and in this regard, a question as to whether an Inter-Corporate Deposit ('ICD') given by one party to another as part of the Joint Venture Agreement to develop a real estate project jointly, be considered as a 'Financial Debt' in accordance with the Code, was decided by the Hon'ble Appellate Authority. In this Article an attempt is made to understand the reasoning of the Hon'ble Appellate Authority.

-Contributed by CS D.V.K. Phanindra
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Introduction:

An Appeal under Section 61 of the IB Code, was preferred before the Hon'ble National Company Law Appellate Tribunal (NCLAT), New Delhi Bench, arising out of the Order Dt: 28.02.2023, of the Hon'ble National Company Law Tribunal, New Delhi Bench (Principal Bench), by M/s. Ansal Housing Limited, Financial Creditor, as the Adjudicating Authority had dismissed the Section 7 application filed by Ansal Housing Limited, seeking initiation of Corporate Insolvency Resolution Process ("CIRP") against M/s. Samyak Projects Private Limited, the Corporate Debtor, in connection with the financial assistance in the form of Inter Corporate Deposit ("ICD") given by M/s. Ansal Housing Limited to M/s. Samyak Projects Private Limited, pursuant to a Joint Venture Agreement, between them, for developing a real estate project.

Facts of the case:

Before the NCLT:

Both the parties were jointly developing four real estate projects for which separate Joint Venture Agreements ("JVAs") were executed between them. In terms of the collaboration envisaged under the JVA, the M/s. Ansal Housing Limited (herein after referred to as "Financial Creditor/Applicant/Appellant"), was to be the Developer of the real estate project while M/s. Samyak Projects Private Limited (herein after referred to as "Corporate Debtor/Respondent"), was to provide the land for the project, with sharing ratio of 67.5% and 32.5% respectively from the sales receivable.

In connection with purchase of land for one of these real estate projects (Ansal Hub 83-II), the Corporate Debtor, had sought financial assistance of Rs.25 Crores from the Applicant/Appellant. The Applicant/Appellant extended an inter-corporate

loan of Rs.25 Crores, and Dt: 27.03.2014, the parties had entered in to a Inter-Corporate Deposit Agreement ("ICD"). As per the ICD Agreement, the loan facility carried an interest of 24 % pa, compounded monthly and returnable within 24 months. The ICD also provided that the Applicant/Appellant, would have the right to recover the ICD of Rs.25 crore from the sales receivable of the Corporate Debtor, in case of the latter's failure to return the debt.

The Corporate Debtor defaulted the payment on 15.05.2015, and as on 31.07.2018, an amount of Rs. 35,64,03,784/- became due and payable by the Corporate Debtor. On the failure of the Respondent, to repay the ICD amount, The Applicant/Appellant, filed a IBC, Section 7 application against the Corporate Debtor. The said application, was dismissed by the Adjudicating Authority, on the ground that the Appellant was not a Financial Creditor and that the liability of the Respondent qua the ICD was not a "Financial Debt".

Aggrieved by the dismissal of the Section 7 application, the Applicant/Appellant, preferred an appeal to the Hon'ble National Company Law Appellate Tribunal ("Appellate Authority").

Before the NCLAT:

In the Appeal, it was argued on behalf of the Appellants, that the loan disbursed was used by the Respondent, to discharge their obligation, to procure land for the real estate project. It was further submitted, since loan was with interest @ 24 % compounded monthly, the money was disbursed against the consideration for time value of money. Accordingly, the borrowing of Rs.25 crore by the Respondent, was clearly in the nature of financial debt but the Adjudicating Authority erroneously held it to be a "Business Arrangement". In support of their case, the Appellants, relied on the judgments of the Hon'ble Supreme Court in Swiss Ribbons Pvt. Ltd. v. Union of India and Pioneer Urban Land & Infrastructure Ltd. v. Union of India . (both these judgements, relate to the position of financial creditors under the Code)

It was the case of the Appellant that the Adjudicating Authority failed to examine/appreciate that the ICD has all the ingredients Financial Debt, as below:

a) The Respondent had defaulted in the repayment of the loan;

b) The Respondent had given 15 post-dated cheques to the Appellant of which 7 were realized. Besides this, some RTGS transfers were also made.

c) There is no dispute that the Respondent had paid Rs.14.5 crore to the Appellant in discharge of its liability qua the ICD but they did not liquidate the entire debt.

d) The Respondent made payments to third parties were in the nature of repayment of the ICD loan was also contested by the Appellant by stating that these repayment transactions were not reflected in the

ledger statement signed by the Respondent. Accordingly, the defence of such illusionary payments does not stand to reason.

e) The Respondent had acknowledged the debt in its balance sheet under the head "Interest on borrowings". Accounting entries of receipts and payments in respect of the ICD; copies of TDS certificates issued by the Respondent for the FY 2014-15 and 2015-16, certified copies of Bank statement, audited Accounts of Corporate Debtor for the FY 2016-17 proved the existence of debt.

The Appellant argued that it was the sole and exclusive obligation of the Respondent to procure the land for which it was the sole responsibility of the Respondent to mobilize resources for this purpose. It was wrong on the part of the Adjudicating Authority to look at the ICD and the JVA as being integral to each other rather than view the two being independent of each other, which led to the erroneous conclusion by the Adjudicating Authority that the ICD given by the Appellant was a "Commercial Business Transaction" and "not a financial debt". The adjustment against the future receivables of the Respondent under the JVA was just a security under the ICD with an optional right with the Appellant to adjust the same against the ICD agreement.

It was further argued that the Adjudicating Authority ought not to have substituted its own views and assumptions with the actual intention of the parties, and in this regard, the Appellants relied on the judgment of the Hon'ble Supreme Court in Anuj Jain v. Axis Bank Ltd to contend that the Adjudicating Authority was barred from gauging the intention of the parties beyond the intent of the ICD governing the transaction.

On behalf of the Respondents, it was argued that ICD and JVA were not independent agreements, but inter-dependent agreements. JVAs were entered on 18.04.2011, 24.05.2013, 12.04.2013 and 24.06.2013, for the development of four residential/commercial projects between the Appellant and the Respondent. While the JVAs were already in existence, the ICD was signed subsequently on 27.04.2014 between the parties, on the basis of which the Appellant had provided Rs.25 crore to the Respondent to make payments towards purchase of land for one of these projects.

The Respondent also contended that the financial assistance of Rs.25 crore by the Respondent to the Appellant, was in the nature of making an investment for profit and therefore not a financial debt. Pointing out that the ICD stipulated the repayment of the Rs.25 crore to be secured from the receivables of the four projects for which the two parties had entered into JVA shows the inter-dependence between the JVAs and the ICD. It was also contended that the Respondent had completely repaid the amounts, and also pointed out that, had the debt been in existence, then why the Appellant did not encash these 8 un-encashed cheques. Furthermore, as part of the term of the

ICD, the Respondent had unconditionally assigned its share of receivables from the four projects in favour of the Appellant and hence it remains unexplained as to why this right went unexercised by the Appellant, if the debt was not repaid by the Respondent.

It was the contention of the Respondent that the amount that was jointly invested in land cannot be termed as financial debt. Reliance was placed on the following judgements of the Appellate Authority:

Mukesh N Desai v. Piyush Patel & Ors[1]	*It was held* that any amount invested in the purchase of land cannot be said to be a financial debt under Section 5(8) of the IBC.
Samyak Projects Pvt. Ltd. v. Ansal Housing Ltd.[2]	It has been clearly held that the Joint Development Agreement between the two parties shows that it was a case of sharing revenue profit by both the parties and hence initiation of CIRP proceedings under Section 9 by a JV partner was not maintainable
Jagbasera Infratech Pvt. Ltd. v. Rawal Variety Construction Ltd.[3]	It has been held that an amount invested in the joint venture project by any party in their capacity as a promoter/investor does not fall within the ambit of definition of Section 5(8) of the Code.
Vipul Ltd. v. Solitaire Buildmart Pvt. Ltd.[4]	It was held that a Joint Development Agreement is a contract of reciprocal rights and obligations and for any breach of terms of contract, Section 7 is not maintainable as the amount cannot be construed as financial debt.

The issue to be addressed by the Appellate Authority, in the case, is "Whether the financial assistance of Rs.25 crore in the form of ICD, by the Appellant to the Respondent, to purchase land for the project jointly developed under a JVA, be construed as a 'financial debt' in terms of IBC".

The Appellate Authority looked in to the terms 'Financial Debt' and 'Financial Creditor', as defined under the Code, and also the perused the important terms/conditions of the JVA and ICD between the parties, to assess the nature of relationship among the Appellant and the Respondent visa-vis the JVA and the ICD. The submission and contentions raised by both the Appellant and Respondent was also taken into account by the Appellate Authority.

The Appellate Authority referred to the following decisions of the Hon'ble Supreme Court, wherein the law as to what constitutes "Financial Debt" is well settled.

[1] CA (AT) (Ins.) No.789 of 2020, NCLAT, Principal Bench, New Delhi
[2] CA(AT) (Ins.) No.384 of 2022, NCLAT, Principal Bench, New Delhi
[3] CA(AT) (Ins.) No.150 of 2019, NCLAT, Principal Bench, New Delhi
[4] 2020 SCC OnLine NCLAT 620, NCLAT, Principal Bench, New Delhi

Pioneer Urban Land and Infrastructure Ltd. v. Union of India[5]	*It was held* that for any debt to be treated as financial debt, there must happen disbursal of money to the borrower for utilization by the borrower and that the disbursal must be against consideration for time value of money.
Anuj Jain, Interim Resolution Professional for Jaypee Infratech Ltd. v. Axis Bank Limited & Ors[6]	It has been held that the essential condition of financial debt is disbursement against the consideration for time value of money.
Orator Marketing (P) Ltd. v. Samtex Desinz (P) Ltd.[7]	it has been clearly held that financial debt also includes an interest free loan.

In view of the settled position of law as detailed above, the Appellate Authority proceeded to examine the approach of the Adjudicating Authority in the Impugned Order, in viewing both the JVA and the ICD in deciding whether the Appellant falls within the purview of the definition of "Financial Creditor" and whether the loan extended by the Appellant falls within the ambit of "Financial Debt" as defined respectively under Sections 5(7) and 5(8) of the IBC.

The Appellate Authority, before examining, whether the mutual arrangement entered between the Appellant and the Respondent on mutually agreeable conditions, falls under the ambit of 'Financial Debt' under the IBC, noted that the Adjudicating Authority, in its Impugned Order has referred to the salient terms and conditions of the JVA and the ICD and also dwelled upon them at length.

The Appellate Authority also noted the observations of the Adjudicating Authority that the ICD read with JVAs entered upon were in the nature of commercial business transactions and that the loan advanced to the present Respondent was towards payment of money to the owners of land being mutually developed by them.

The Appellate Authority observed that both the JVAs and ICD are linked together for the development of four real estate projects, and there are similar clauses of receivables of a particular percentage of sale realisations from sale of areas to be developed/constructed which both parties have mutually agreed to. Accordingly, the parties being involved in the joint development of projects for which purpose they have entered into collaborative agreements, the financial arrangements outlined in the ICD cannot be a loan agreement simpliciter and hence cannot be treated as a financial debt.

The Appellate Authority also noted that there are unmistakable signs of reciprocal rights and obligations contained in both the agreements (JVAs

[5] [2019] 108 taxmann.com 147 (SC)
[6] [2020] 114 taxmann.com 656 (SC)
[7] (2023) 3 SCC 753

and ICD), besides evidence of common participation as well as sharing of profits and losses in the real estate projects. This spirit of being collaborators and profit-sharing partners is clearly evident in both the JVA and the ICD and therefore the Appellate Authority opined that the Adjudicating Authority has committed no error in holding that the JVA and the ICD are interdependent and inter-related and not independent of each other.

The Appellate Authority further noted that both parties being partners in developing the project together, the purchase and availability of land for the project was an essential ingredient thereof and hence any assistance by the Appellant to the Respondent tantamount to financing the operations of the joint venture. When shared liability for profit is so clearly manifested in the JVA and the ICD and responsibilities well demarcated in the execution of the real estate projects, it cannot be overlooked that both parties are development partners and co-sharers in the real estate projects. The Appellate Authority further noted that the JVA and ICD laid the foundations of a legal and binding relationship with mutual financial obligations towards each other. Thereby, the present transaction is in the nature of investment for profit and not disbursement for time value of money and hence does not fall within the canvas of financial debt as defined under Section 5(8) of the IBC.

The Appellate Authority further pointed out that the primary intent and object of the IBC is the resolution of the Corporate Debtor and not recovery of a debt of the creditor. It needs no emphasis that the Hon'ble Apex Court in a catena of judgments have observed that the provisions of IBC cannot be utilised by a creditor for recovery of its debt, and so has been the observation of the Appellate Authority, time and again that the primary focus of IBC, as a beneficial legislation, is to ensure revival and continuation of the Corporate Debtor and that the provisions of IBC cannot be misused for staging recovery of debt and for treating the Adjudicating Authority as a debt recovery forum.

The Appellate Authority upheld the order of the Adjudicating Authority and concurred with the findings of the Adjudicating Authority that both the parties being joint venture partners, there was no financial debt in terms of Section 5(8) of IBC and hence the application under Section 7 of the IBC could not be entertained

Accordingly, the Appellate Authority held that the Appellant herein was not a "Financial Creditor" in terms of Section 5(7) of IBC and the application under Section 7 by the Appellant was not maintainable, and dismissed the Appeal, giving the liberty to exhaust other remedies available in law before any other appropriate forum and raise all pleas as permissible in law to protect their interests.

Income Tax – International Taxation

Information received from foreign jurisdictions vis-à-vis the Indian Evidence Act, 1872

Government of India has entered into various agreements for exchange of information under which, respective countries share information with the Government of India in respect of income, assets and other financial information. The information received from respective jurisdictions would be used by the revenue for collection and recovery of taxes. However, it is pertinent to note that information received from foreign jurisdiction must satisfy the conditions prescribed under the Indian Evidence Act, 1872 in order to use the same against the taxpayer.

-Contributed by CA Narendra
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Before understanding the legal consequences of information received, let us proceed to understand certain terms under the Income Tax Act,1961 and the Indian Evidence Act, 1872.

Section 279B of the Income Tax Act,1961	Section 279B of the Income Tax Act states that: *"Entries in the records or other documents in the custody of an income-tax authority shall be admitted in evidence in any proceedings for the prosecution of any person for an offence under this Chapter, and all such entries may be proved either by the production of the records or other documents in the custody of the income-tax authority containing such entries, or by the production of a copy of the entries certified by the income-tax authority having custody of the records or other documents under its signature and stating that it is a true copy of the original entries and that such original entries are contained in the records or other documents in its custody."*
Section 62 of the Indian Evidence Act, 1872	Section 62 defines the term 'primary evidence' to mean document itself produced for the inspection of the Court.
Section 63 of the Indian	Secondary evidence ***means and includes —*** (1) certified copies given under the provisions hereinafter contained;

Evidence Act, 1872	(2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies; (3) ***copies made from or compared with the original***; (4) counterparts of documents as against the parties who did not execute them; (5) oral accounts of the contents of a document given by some person who has himself seen it. **In the case of J. Yashoda vs K. Shobha Rani[8], it was held that the definition given under section 63 of the secondary evidence is exhaustive in nature and therefore includes all the elements of secondary pieces of evidence and can be considered as fully comprehensive. This is reflected in the term ' means and includes' given under the said section**
Section 64 of the Indian Evidence Act, 1872	A document must be proved by primary evidence except in the cases referred in section 65.
Section 65 of the Indian Evidence Act, 1872	Section 65 provides for the circumstances in which secondary evidence may be given without filing primary evidence. In other words, the party should show the bonafide cause for filing the secondary evidence and it is the discretion of the Court to admit the same. Secondary evidence may be given of the existence, condition, or con- tents of a document in the following cases:— a) *when the original is shown or appears to be in the possession or power—* *of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it*; b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

[8] 4 MANU/SC/7314/2007.

	c) *when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;* d) when the original is of such a nature as not to be easily movable; e) when the original is a public document within the meaning of section 74; f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India, to be given in evidence; g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection. In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible. In case (b), the written admission is admissible. In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible. In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.
Section 78 of the Indian Evidence Act, 1872	Section 78 states that the certain official document may be proved in certain manner which inter alia includes ***public documents of any other class in a foreign country, by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a Notary Public, or of an Indian Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.***

Section 279B of the Income Tax Act,1961 states that in order to produce any document as evidence which is in the custody of the income tax authority, such document shall be produced either in original or certified copy of the original document by the income tax authority having custody of the record/document. Further, the provisions of Indian Evidence Act, 1872 states that primary evidence is required to produced in order to prove any document subject to certain exception cases.

When the Government of India receives certain information viz. financial or tax information from the foreign jurisdiction, revenue may try to impose tax if there is any tax evade by the taxpayer. However, such information may, in certain circumstances, not be sufficient to impose tax. This is because, the information received by the revenue may not be in sufficient to sustain the proceedings under the Indian Evidence Act, 1872. In certain cases, the judicial fora have held that the revenue cannot utilize the information received from foreign jurisdiction as such information does not satisfies the conditions under the Indian Evidence Act, 1872.

The Hon'ble Delhi High Court in the case of Principal Director of Income Tax (Inv.)-1, Delhi v. Ratna Kumar[9] has held as follows:

- Article 5(3) of Tax Information Exchange Agreement ('TIEA') between India and British Virgin Islands states that if the competent authorities of requesting party specifically requests, the competent authorities of requested party shall provide the information ***in the form of depositions of witnesses and authenticated copies of original records.***

- In the present case, though the revenue produced certified copies of the original information, as the revenue could not prove the fact that the request has been made by the competent authorities of India to competent authorities of BVI, certified copies cannot be accepted.

- Further, no authority of BVI had communicated to the Government of India that Petagaye Daley-Savage (***the person who has certified the documents***) or any other person/company/legal entity is the registered agent of the Company.

- Further, no copy of the register showing name of registered agent of Ridgeway Consulting Limited is placed on record. If, Petagaye Daley-Savage is the Director of some company which is the registered agent of Ridgeway Consulting Limited then the name of that company ought to have been disclosed. It is pertinent to note that Petagaye Daley-Savage holds a Jamaican passport whereas he is certifying the documents supplied by British Virgin Islands.

- Accordingly, these documents certainly cannot be treated as compliance of Section 78(6) of The Indian Evidence Act, 1872. Accordingly, even these certified documents are inadmissible and are of no aid to the complainant whatsoever.

Further, the Hon'ble Delhi High Court in the case of PDIT vs. Ratna Kumar (supra) has held that the revenue has produced other documents received

[9] CC No: 515961/2016

from the Govt. of Singapore which are photocopies of letters, account opening form of the company and photocopy of passport of the taxpayer and account closing letter. None of these documents are certified copies. Further, though these documents have been certified, the same cannot be accepted as the person who certified these documents does not have original with her, but bank has the original copies with them. Accordingly, the Hon'ble High Court has rejected the arguments of the revenue and provided relief to the taxpayer.

Same view has been held by Hon'ble Delhi High Court in the case of ITO vs. Ashok Kumar Singh[10]

However, section 65 of the Indian Evidence Act states that secondary evidence may be submitted if conditions prescribed under section 65 are satisfied. Section 65 of the Evidence Act makes it further clear that each clause mentioned therein i.e. clauses (a) to (g), refers to a different situation and, barring certain cases, each clause is separate and exclusive in the sense that each clause enumerates a distinct type of case in which secondary evidence may be given.

Further, section 63 deals with the secondary evidence and states that photocopy of the original may be considered as secondary evidence and certification not necessary for every situation. Further, section 65 accepts normal photocopies as secondary evidence when the situation is covered under clause (a), (c) and (d).

Production of photocopies as secondary evidence has been accepted by the Hon'ble Rajasthan High Court in the case of Smt. Urmila Devi vs Smt. Bhanwari Devi & Anr[11]. The High Court has held that :

> *"6. So far as admitting the document in question is concerned, the document in question produced by the plaintiff is the, (5 of 17) [CW-9610/2016] photostat copy of the Patta. That has been obtained by mechanical process. The issues have not been decided by the trial Court about the fact whether there was any original document or not so as to prove existence of copy of the document. Without holding any enquiry, the trial Court rejected the application of the plaintiff. In that situation, it will be trial within trial if no preliminary enquiry is held for finding out, whether there was original document or not, whether it is lost or not, whether it is lost in the manner in, which it is stated and whether the copy produced is the true and correct copy of the original and these issues can be examined by the Court during trial as the document can be admitted in evidence subject to just objections which includes all above questions. The admission of a document in this situation, cannot deprive the other party to raise objection about the very foundation for coming into existence of original document. Therefore, it will be appropriate that the document be*

[10] CC No. 531639/2016

[11] S.B. Civil Writ Petition No. 9610 / 2016

admitted in evidence subject to all rights of the defendant including the right to allege that the original document was never issued or came in existence so as to give birth to its photostat copy. The defendant's right for taking objection about the document for creating title in favour of the plaintiff, will also be available. In short, all the defences which can be taken in preliminary enquiry, will be available to the defendant during trial of the suit."

However, in the case of PDIT vs. Ratna Kumar (supra), the Hon'ble High Delhi High Court has rejected the production of secondary evidence without providing opportunity to verify the original document. However, there are other judgments wherein the High Courts have rejected the admission of secondary evidence. The Delhi High Court in the case of M/S Ram Kumar Shree Kishan vs M/S Modern Decorators[12] has held that:

"12)Secondary Evidence of documents is permissible only under the circumstances as enumerated in Section 65 of Evidence Act. That is, a party can lead secondary evidence only if and if it satisfies the court that the case is covered under any of the seven clauses of section 65 of the Evidence Act. In the present case, the plaintiff has nowhere shown that it is entitled to lead secondary evidence under any of the clauses of section 65 of the Evidence Act. Therefore, even if it be accepted for the sake of arguments that the carbon copy is a secondary evidence as defined under section 63 of Evidence Act; yet the same cannot be admissible as a secondary evidence because of the bar of section 65 of the Evidence Act. In other words, in spite of the fact that certain evidence is covered within the ambit of definition of secondary evidence as defined in section 63 of Evidence Act; yet the the party adducing that secondary evidence must satisfy that its case is covered within the sweep of any of the seven clauses of section 65 of Evidence Act and it is entitled to lead that secondary evidence. To put it differently, party adducing secondary evidence must satisfy the requirements of section 63 as well as section 65 of the Evidence Act. In paragraph 10 (supra), I have already discussed as to how Ex. PW1/1 (carbon copy of 'Form A') cannot be admissible as primary evidence. I therefore hold that Ex. PW1/1 which is a carbon copy of 'Form A' issued from the office of Registrar of Firms has not been duly proved either as primary evidence or as secondary evidence."

[12] Suit No. : 150/06

Given the above, it is imperative to understand that primary responsibility is on the person producing the secondary evidence that the conditions prescribed under section 65 of the Indian Evidence Act, 1872 are duly satisfied and photocopy shall be admitted as evidence.

Summary of Income Tax Decisions

Delhi High Court in the case of Hyatt International-Southwest Asia Ltd[13] - Upholds the constitution of PE in support of disposal test. With respect to allocation of profits to the PE on account of losses at global level, referred to the larger bench.

1. The facts of the case are that the assessee, an UAE based entity, entered into a Strategic Operative Services Agreement ('SOSA') with Asian Hotels Limited ('service recipient') for formulating strategic and management decisions for Hyatt Regency ('the Hotel'). The assessee operates its activities from the Hotel premises, deploys its employees on a temporary basis for conducting its agreed activities. The primary questions put before the court were:

   Whether the services provided by the assessee be treated as royalty?

   If the services were to be treated as business income, does the assessee has a Permanent Establishment (PE) in India?

   If the assessee has a PE in India, can profits be attributed to the assessee if the assessee has suffered losses at its global level?

2. The court observed that as per the terms of the agreement, the assessee is required to provide various set of services including formulating strategic decisions, recruiting people for execution and administration functions, providing the employees training, knowledge, skills, experience for the benefit of the hotel. Accordingly, the court has concluded that there is no use of right by the hotel and thus the services provided by the assessee does not amount to Royalty but are in the nature of consultancy services. Further, consultancy services could be categorized as Fees for Technical Services, however in absence of FTS clause in Indo-UAE DTAA, the said services could be taxed only as business income under Article 7 if the assessee is proved to have PE in India.

3. That brings to the second ground, wherein the court analysed the terms of SOSA to determine the level of rights and responsibilities granted to the assessee in delivering its business services, to identify the constitution of PE. The primary requisites for a PE to be established are 1) having a fixed place of business (POB); 2) engaging the POB for conducting business activities; 3) thirdly, establishing PE by various tests, which inter alia is, having the POB at the disposal of the assessee.

4. In the current case, the assessee, by virtue of the SOSA, has a fixed POB i.e., hotel premises and it is used for delivering its business activities. Further, the court have highlighted the following findings to make the disposal test:

5. The service recipient has to obtain any loan for

[13] [TS-812-HC-2023(DEL)]

business only as per the terms acceptable to the assessee.

6. Assessee has the discretion to employ his staff on an occasional basis for executing its business activities pertaining to the hotel.

7. Assessee has discretionary power to recruit any non-local employees for the Hotel including the position of General Manager.

   And, most importantly, the SOSA explicitly doesn't restrict the assessee on providing its services to any other hotels using the current hotel premises, which is the main criteria for satisfying the disposal test.

8. Accordingly, the court has concluded that the assessee has a fixed PE in India and held that the services provided by the assessee are taxable as business income under Article 7 of Indo-UAE DTAA.

9. Further, the assessee has raised its last ground by relying on the ruling produced by this co-ordinate bench in Nokia Solutions and Networks OY wherein it was held that if the entity has incurred losses at global level, then no profits could be attributed to that entity in regard to the PE constituted in India. However, this court has few reservations on the said ruling and has referred this ground to the larger bench.

Our comments:

10. The determination of a service whether it is a royalty or technical service has always been different upon a case-to-case basis. A detailed scrutiny of the nature and terms of the services involved in substance had to be made to arrive at a conclusion. If only there is involvement of any use of right or use of any intangible property as defined under royalty term, it can be termed as royalty. Further, determining the existence of PE in India has also been complex. If the person has control of the POB in spite of any absence of physical presence, then it can be treated as the POB being at his disposal.

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Delhi Tribunal in the case of AKA AUSFUHRRKREDITGESELLSCHAFT MBH[14] - Management fees paid on ECB is held as Interest and held exempt as per Article 11 of Indo-German DTAA.

1. The facts of the case were that the assessee is a banking company resident of Republic of Germany. The assessee had advanced ECB to Indian company and charged interest expenses along with certain non-refundable management fees, non-refundable documentation fees and commitment fees. Since, interest amount is exempt in India as per Article 11(3)(b) of India-Germany DTAA, the assessee had not filed any return of income for the year by considering the entire charges as interest income. However, the AO had contended that management fee is not interest expense and should be held taxable in India under Article 12 of the DTAA – 'Fees for Technical Services'.

[14] [TS-43-ITAT-2024(DEL)]

2. The Tribunal had observed that the definition of interest as per the treaty does not define any other charges to be categorized as interest but only lists the various types of interest income covered by the treaty. Therefore, the Tribunal interpreted interest as per section 2(28A) of IT Act that any service fee or other charge in respect of the money borrowed can be categorized as interest. In the current case, the documentation fee and commitment fee were treated equivalent to the interest but as per section 2(28A) of the Act, management fees can also be treated as interest since it is closely linked with the loan granted, hence cannot be distinguished from documentation fee and commitment fee. Accordingly, the Tribunal held that the management fee would partake the character of interest and is exempt from taxation in India in terms of Article 11(3)(b) of the treaty.

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