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CONTENTS

EDITORIAL....1

GST....2

TAXATION OF SERVICES – JOINT VENTURES JOINT OPERATION AGREEMENTS REVENUE SHARING ARRANGEMENTS 2

DIRECT TAX....12

TAXATION OF GIFT OF BRAND 'ESSAR' - MUMBAI TRIBUNAL IN BALAJI TRUST 12

BLACK MONEY ACT....17

PENALITIES UNDER BLACK MONEY ACT - A 'MUST OR 'MAY' 17

Dear Readers,

Greetings for the season!

In this 93rdedition of ours, we bring you an important ruling of Mumbai ITAT in the matter of Balaji Trust which dealt with taxation of brand 'Essar' received as gift. The Tribunal opined that the receipt of brand 'Essar' is on a capital account and cannot be included in 'income' as per Section 2(24) to bring the same to tax under Section 56(1) of Income Tax Act. The Tribunal also ruled out the possibility of taxing such receipt under old Section 56(2)(vii), stating that brand 'Essar' is not an artwork. Though there are other important aspects in the Tribunal judgment, our attention was given only to the taxation part. I urge everyone to read the entire judgment along with our article.

The next article is on another important ruling in the context of penalties under Black Money Act. The Assessing Officer tried to levy penalty under Section 43 of Black Money Act on assessee, since she has failed to disclose that she was a second signatory to a foreign bank account. The assesse pleaded on bonafides and requested to set aside the penalty. The Tribunal stated that the stringent provisions of Black Money Act cannot be attributed unless there is a malafide and no penalties should be slapped for genuine bonafide issues.

The final article is on the taxation of revenue sharing arrangements under Indirect Tax laws. One of the grey areas in indirect taxation is to how the revenue sharing arrangements would be taxable. The demands were being proposed only based on Circulars issued by CBIC without going into the facts whether there exists a service provider – service receiver relationship. The said task is left to the courts and tribunals, which have come to rescue of the assessees and stated that all such transactions are on principal to principal and does not attract tax. The said aspects would catch more fire in the GST era and the CBIC has to step in to provide a detailed guidance to avoid unnecessary litigation.

I hope that you will have good time reading this edition and please do share your feedback. I will also urge clients to mail us topics or issues on which you want us to deliberate in our future editions, so that we can contribute to the same.

Thanking You,

Suresh Babu S
Founder & Chairman

GST

TAXATION OF SERVICES – JOINT VENTURES JOINT OPERATION AGREEMENTS REVENUE SHARING ARRANGEMENTS

Contributed by CA Sri Harsha

The taxation of services provided in situations where two or more people come together to do a business is always a tricky one, both for the tax authorities and the assessee. The revenue intends that there was a provision of service by constituent member to the joint venture and there would be tax on the said transaction. The assessee on the other hand would argue that the relation with the other co-venturer is on principal to principal basis and cannot be said to be of contractor-contractee to bring into the ambit of service tax law. Before getting into the crux of the article, an important trip to the ancient wisdom on the subject issue is mandatory and accordingly we picked up certain important judgments of Supreme Court in the matter of association of persons and joint ventures.

The Supreme Court in the matter of G Murugesan and Brothers[1] has held that for forming an 'association of persons', the members of association must join together for the purpose of producing income. An 'association of persons' can be formed only when two or more individuals voluntarily combine together for a certain purpose. Hence, the Court held that volition on the part of the member of the association is an essential ingredient. The mere fact that the members jointly own one or more assets and share the income does not show that they acted as an 'association of persons'.

The Supreme Court in another occasion in the matter of New Horizons Limited[2] stated that the expression 'joint venture' connotes a legal entity in the nature of partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of subject matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses.

The Supreme Court in the matter of Faqir Chand Gulati[3] dealing with the nature of relationship between the land owner and developer in the context of development agreement, while interpreting the question, whether a land owner can be called as recipient of service under Consumer Protection Act, stated that where the contract is a true joint venture, the land owner is a true partner or co-adventurer in the venture where the land owner has a say or control in the construction and participates in the business and management of the joint venture, and has a share in the profits/loss of the venture. In such a case, the land owner is not a consumer and is the co-adventurer in the venture, a service provider, where land owner himself is responsible for the construction as a co-adventurer in the venture. The Supreme Court stated that such true joint ventures are comparatively rare.

[1](1973) 4 Supreme Court Cases 211
[2]1995 SCC (1) 478
[3]2008 (7) TMI 159 – Supreme Court

From the above judgments, it is evident that a volition is required to form an association of persons and not just sharing the assets and profits. On the other hand, once the entities come together with volition to achieve a profit out of a business enterprise, the said entity would be different from the constituent entities. The only question that was unanswered is whether there can be any inference of provision of service between the constituent entities and the joint venture, be it, incorporated or unincorporated. The tax authorities were often confused with this particular transaction because there is a flow of consideration. Seeing such flow of consideration, the tax authorities try to put the constituent entities on tax liability stating that they have provided services to unincorporated entity. On the other hand, the constituent entity tried to defend that they were contributing for the enterprise on a principal to principal basis and there cannot be any inference of provision of service. In this article, we shall explore the judgments which are dealing with the above issues. Before dealing with the judgments, it is important to understand the legislative backup, which is only in form of Circulars.

<u>Circular 109:</u>

The issue first arose in the context of the movie industry. CBIC[4] (then CBEC) has issued a Circular 109/03/2009 (for brevity 'Circular 109') dated 23.02.09 detailing the taxation on movie theatres. Circular 109 detailed different models as to how a distributor exploits the copyrights in the film received from producer by entering agreements with the theatre owners. The Circular stated that as long as the distributor leases the theatre and theatre owners gets a fixed amount for exhibition of the film, the said service provided by theatre owner to the distributor would be taxable under the 'renting of immovable property service'. Circular 109 further ruled out classifying the service as 'business support services' especially in a situation where the theatre owner screens the movie for a fixed number of days under a contract and receives a fixed sum, stating that exhibition is not a support or assistance activity but an activity on own accord. The Circular further stated that if the distributor and theatre owner enters into revenue sharing arrangement, as to the where the theatre owner gets a specified percentage of ticket sales, then there would not be any tax implications, since the theatre owner and distributor were acting on principal to principal basis.

<u>Circular 148:</u>

Then there was another Circular in 148/17/2011 (for brevity 'Circular 148') dated 13.12.11 dealing with the same issue. Circular 148 quoting that there were significant changes in service tax law after issuing of Circular 109, it is necessary to understand the tax implications qua the theatre owners and distributors. The Circular stated that if there is a temporary transfer of rights in the movie to a distributor and from distributor to another sub-distributor, then such transaction was subjected to tax in light of the changes brought to the taxation of copyrights under the service tax law[5]. Circular stated that if the rights are not transferred to the theatre owners, then there would not be any taxability under the copyright services but it is necessary to examine the possibility of taxation under the other heads. Dealing with the subject matter of the article, the Circular stated that it was being represented in certain situation the distributor and the theatre owner conduct business together and hence no service tax is leviable. Circular 148 stated

[4]Central Board of Indirect Taxes and Customs, earlier known as Central Board of Excise and Customs

[5]The temporary transfer of rights were brought into tax net and the same continued even after introduction of negative list.

that arrangement amongst two or more entities can either be on principal to principal basis or on partnership/joint/collaboration basis and in the former, the constituent members are independent of each other and do not share risk/revenue/profit/loss/liability of the other, while in the latter the constituent members join hands for mutuality of interest and share common risk/profit together.

Circular 148 further stated that unincorporated joint venture, not operating on principal to principal basis, will exist only if the agreement entered into between the two independent persons is also recognized as a 'person'. Taking support from General Clauses Act, the Circular stated that 'person' includes association or body of individuals, whether incorporated or not and accordingly concluded that unincorporated association is also a person. The Circular further relied on the judgment of Supreme Court in the matter of New Horizons 1995 SCC (1) 478, wherein it was held that 'joint venture' connotes a legal entity in nature of partnership engaged in joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. Further, the Circular relied on Gammon India Limited, wherein the Supreme Court upheld the denial if exemption to joint venture as the goods were directly imported by constituent member, thereby recognising the joint venture as a separate legal entity from its constituent members. Circular concluded that if the distributor and theatre owner enters into an agreement with an understanding to share revenue/profits and not provide service on principal to principal basis, a new entity emerges, distinct from its constituent. As the new entity acquires the character of 'person', the transaction between it and other independent entities namely the distributor and the exhibitor will be a taxable service and whereas, in cases the character of a 'person' is not acquired in the business transition and the transaction is as on principal to principal basis, the tax is leviable on either of the constituent members.

Circular 179:

There was on another Circular in 179/5/2014 – ST dated 24.09.14 (for brevity 'Circular 179') which dealt with service tax on joint venture transactions. The Circular stated that as per Explanation 3(a) of the definition of 'service', an unincorporated association or body of persons, as the case may be, and a member thereof shall be treated as distinct persons and accordingly the members of Joint Venture (for brevity 'JV') and JV are treated as distinct person and therefore, services provided for consideration, by the JV to its members or vice versa and between the members of JV are taxable. The Circular concluded that JV being an unincorporated temporary association constituted for the limited purpose of carrying out a specified project within a time frame, a comprehensive examination of the various JV agreements holds the key to understanding the taxation of transactions involving taxable services between the JV and its members or inter-se between the members of JV. The Circular has outlined the taxation of transactions and left it there to the filed officers to determine the taxation on case to case basis.

The above are only few guidelines issued by CBIC to deal with the taxation of services qua unincorporated association of persons. Now, we shall deal with the judgments delivered in this context to further understand the subject concept.

In the matter of Mormugao Port Trust [6] – Mumbai Tribunal:

The facts of the case are that Mormugao Port Trust (for brevity 'MPT') is engaged in rendering port services and duly registered with the service tax authorities. MPT has entered an agreement with South West Port Limited (for brevity 'SWPL') under which it had leased out pieces or parcel of land which were situated in the operational are of harbour to SWPL on which the latter had constructed jetty which was used for loading and unloading of cargo from ocean going vessels, in lieu of which it received license fee and royalty from SWPL. Since MPT has paid service tax on license fee and has not discharged service tax on royalty, a notice was issued to MPT asking them to pay service tax on the said royalty under renting of immovable property service.

MPT contended that there was no service provided by them to SWPL, since the royalty earned by it was in fact its share of revenue from services which jointly rendered by MPT and SWPL. Since there was no principal-client relationship which is the basic tenet for applicability of service tax, there cannot be any demand of service tax. The Commissioner has not agreed with the submissions made by MPT and accordingly confirmed the demand. The order was appealed before Tribunal. The Tribunal after hearing both the parties made certain important observations.

The Tribunal stated that the core issue that needs determination is whether the amounts received by MPT from SWPL as royalty are taxable under the provisions of service tax law or not. The Tribunal stated that the MPT's contention that there was no principal – client relationship between it and SWPL and the royalty earned by MPT from SWPL that is 18% of revenue earned towards cargo handling charges was an earning from a revenue sharing agreement has been rejected by Commissioner only on the ground that MPT had done nothing but to lease out the land and the water front area to SWPL and hence the royalty collected cannot be called as received in terms of revenue sharing arrangement. The Tribunal after perusal of the agreement between two parties has stated that the Commissioner was wrong in holding that there was nothing done on part of MPT except leasing out of land. The Tribunal held that MPT apart from leasing out the land has also granted permission to SWPL to conduct port operations at Mormugao. The permission was necessary for SWPL to obtain as right to exploit the water front by operating a port at Mormugao was by law vesting only with the MPT and for which MPT has charged license fee and paid service tax on the same. The royalty is the reward that MPT earns as its share of revenue from joint port business enterprise run by the two parties (MPT and SWPL) in lieu of various facilities, rights and resources contributed by the MPT for the joint business. The Tribunal held that MPT has relinquished the exclusive right in favour of the joint venture that it had with SWPL.

The Tribunal stated that the agreement between MPT and SWPL is in the nature of joint venture where two parties have got together to carry out a specific economic venture on a revenue sharing model. These are the arrangements in the nature of partnership with each co-venturer contributing in some resource for the furtherance of joint business activity. The Tribunal then referred to decision of Supreme Court in the matter of Faqir Chand Gulati vs. Uppal Agencies Private Limited [7], to drive home the meaning of expression 'joint venture' and stated that from the decision it would be evident that the obvious feature of joint venture would be that parties participate in such a venture not as independent contractors but as entrepreneurs desirous to earn profits, the extent whereof may be contingent upon the success of the venture, rather than any fixed fees or consideration for any specific services.

[6] 2016 (11) TMI 520

[7] 2008 (12) STR 401 SC

The Tribunal stated that in the facts of the instant case, there is joint control over the operations as it is clear from the agreement that the strategic financial and operating decisions such as those relating to the basic design, capability functionality, etc of the bulk cargo handling jetty and its subsequent upgradation are to be unanimously agreed upon by the two co-venturers and held that the royalty is share of revenue from the joint venture activity but not a fee for services provided by MPT.

The Tribunal then proceeded to analyse whether the activity undertaken by co-venturer (partner) for the furtherance of the joint venture (partnership) can be said to be a service rendered by such co-venturer (partner) to joint venture (partnership). It was held that the response to the above should be negative in as much as whatever the partner does for the furtherance of business of partnership, he does so only for advancing his own interest as he has a stake in the success of the venture and there is neither an intention to render a service to other partners nor is there any consideration fixed as quid pro quo for any particular service of partner. Since there is no principal-client or contractor-contractee relationship, there cannot be any tax liability on the royalty earned by MPT. The Tribunal has kept aside the argument advanced by Commissioner that in terms of Explanation 3 to definition of 'service', the unincorporated association or body of persons, as the case may be, and a member thereof shall be treated as distinct persons by stating that the explanation does not have the effect of rendering the activities undertaken by partner/co-venturer, which are actually for his own benefit, as being a service rendered by it to the partnership. Accordingly, it held that consideration flow from SWPL to MPT under the nomenclature 'royalty' would not be a consideration for rendition of any services but infact represents the MPT's share of revenue arising out of joint venture being carried on by MPT and SWPL.

<u>In the matter of Delhi & Mumbai International Airport Private Limited[8] – Delhi High Court:</u>

The Airports Authority of India (for brevity 'AAI') is responsible to develop, operate, manage and maintain airports in India in addition to maintained related facilitation of air traffic control and other allied issues. Under a policy of Government of India to privatise airports for their better management, AAI has issued request for proposals for offering a long term operation, management and development agreement (for brevity 'OMDA') to suitably qualified parties. The consortium led by GMR Group was selected by AAI as the successful bidder for Delhi Airport and GVK Group was selected for Mumbai Airport.

The AAI have entered OMDAs with the GMR Group and GVK Group (for ease referred as to 'Petitioners'). The Petitioners have been granted the exclusive right and authority to undertake some of the functions of AAI. Under the said agreement, in consideration for rights granted by AAI, the petitioners have to pay an annual fee to AAI. The annual fee payable to AAI in case of Delhi International Airport Limited (for brevity 'DIAL') is 45.99% and 38.7% in case of Mumbai International Airport Limited (for brevity 'MIAL') of the projected revenue to be received by Petitioners.

The revenue share payable to AAI is paid through escrow bank account. Under the escrow mechanism, all receipts from various sources received by Petitioners are deposited into a Receivable Account from which they are transferred to a Proceeds Account. From the Proceeds Account, payments are first made towards statutory dues and out of the balance, AAI is paid the Annual Fees and any other amounts due to it under the OMDA. The balance is transferred to a Surplus Account, which comes to the Petitioner's as their respective share of revenue.

[8] 2017 (2) TMI 775 – Delhi High Court

The Revenue contended that AAI has granted various rights to the Petitioners for better operation and management of the Airport and accordingly demanded service tax on the amounts received from Petitioners as franchisee fee. The order was passed confirming the demand under franchisee services. Aggrieved by the order and since it effects the Petitioners (AAI has instructed bankers to block the sum towards service tax from the escrow accounts), they have approached the High Court invoking writ jurisdiction.

The Petitioners contended that the OMDA is nothing but a joint venture with AAI and later has also stake in them amounting to 26% and the annual fee paid in anyway cannot be called as franchisee fee and accordingly no service tax can be demanded. AAI has also pleaded that no franchisee can be inferred when it comes to the issue of revenue sharing and grant of license by the State or instrumentality of State (like AAI), wherein the State permits a private party to do an activity for profit, which act the private party would not have any right to do but for such a grant by the State.

The High Court stated that a grant of representational right is required to tax a particular service under Franchisee. Since, in the instant case, there was no grant of representational right by AAI to Petitioners, there cannot be any demand under the said category. The High Court accordingly held that there is no element of taxable service qua OMDA. In a way, High Court has stated that AAI and Petitioners have acted on principal to principal basis and accordingly the revenue sharing does not attract any tax obligations. Though the above was not clearly spelt, the same can be inferred.

In the matter of Old World Hospitality Limited[9] - CESTAT New Delhi:

The appellant in the instant case were engaged in manging and operating the hospitality and conference facilities at the premises of India Habitat Centre (for brevity 'IHC') at Delhi. The main dispute is the liability of the appellant to pay service tax on the amount received from IHC towards expenses incurred for operation of the centre. The tax authorities demanded tax under the head 'business auxiliary services'.

The appellant contended that they do not render any service to IHC under the agreement dated 02.08.97. The agreement is for combined management of the facilities available with IHC with the expertise of the appellant. The gross consideration received was shared on a set proportion between the appellant and IHC and IHC is merely reimbursing the expenses incurred by the appellant for managing the facilities. The appellant contended that the transactions between the appellant and IHC are on principal to principal basis and there is no service element.

The Tribunal after referring to the various clauses of the agreement stated that gross operating receipt obtained from the facilities are to be shared between the contracting parties viz. the appellant and IHC, in a fixed percentage. The Tribunal stated from the overall arrangement as seen from the agreement, both IHC and appellant together are involved in providing various facilities available in the premises of IHC. The responsibility of each of the parties in the overall business is clearly mentioned in the agreement and consideration each one will get from their responsibility is also listed and agreed upon. The Tribunal stated that the dealings are more like co-venture agreement with joint purpose and shared income. The Tribunal stated that overall scope of the agreement is not for rendering of service by one to another rather a common pool of resources required for running and maintaining the facilities of IHC successfully was attempted in terms of agreement and the gross revenue is also shared showing the comment intent and accordingly rejected the order demanding service tax.

[9] 2017 (2) TMI 1176 – CESTAT New Delhi

In the matter of BG Exploration & Production India Limited[10] - CESTAT Mumbai:

(Followed in BG Exploration & Production India Limited[11] and BG Exploration & Production India Limited[12])

BG Exploration & Production India Limited (for brevity 'BG') is engaged in the exploration, development and production of hydrocarbons in Panna-Mukta and the Mid-South Tapti fields within the framework of 'production sharing contract' dated 22nd December 1994 entered into by Government of India with M/s Oil & Natural Gas Corporation Limited (ONGC), M/s Reliance Industries Limited and themselves. The monopoly over naturally occurring hydrocarbon resources, retained with Central Government by constitutional prerogative, was offered to corporate entities, both domestic and foreign – for development and recovery in which the risks transferred to the contractors was compensated by 'cost petroleum' to be shared among the three before the Government of India was entitled to a share of 'profit petroleum' with the three co-venture partners.

BG in terms of the above agreement has booked the employee benefit expenses as manpower cost in deploying personnel, on full time or otherwise, for operation and on these amounts the tax authorities demanded liability in light of Circular 179. The Tribunal stated that it has to be examined that if 'joint operation agreement' is a 'joint venture' to which the Circular 179 would apply and if it was correct to conclude that the expenditure booked by BG was consideration for rendering a taxable service. The Tribunal stated that the agreement among entities for rendering of service to another entity is the essence of 'joint venture', however, it is doubtful if 'joint operation agreement', mandated by terms of the 'production sharing contract', can be deemed to be one such in the absence of an external beneficiary. The Tribunal stated the manner in which the contract provides for distribution of 'profit petroleum' and 'cost petroleum' is a business model for ensconcing within itself the alienation of risk by Government of India which necessarily mandates a working arrangement for the disaggregation of 'cost petroleum' as compensation for the mutually exclusive risks undertaken by the contractor. The participating interests in the 'joint operations' have not come together of their own accord for the common purpose of bearing the risk but from one stipulation in the contract setting forth the common purpose including the participation in proceeds of 'profit petroleum' that is extracted. The Tribunal stated that the 'joint operations' does not render service, within the meaning of Section 65B(44), as there is no beneficiary entity outside the 'production sharing contract' to which 'joint operations' is subordinated, for determination as joint venture to which the explanations could be applied.

The Tribunal stated that it is incumbent upon participants in collaborative undertaking to contribute capital for attainment of the common purpose. It is the nature of undertaking, in terms of permanence and of purpose, that determines the mode of contribution and in the impugned 'production sharing contract' Government of India brings in its rights over the resources, ONGC handles contracts and documentation, RIL manages financial and commercial requirements and BG is vested with responsibility of technical operations. The deployment of personnel by BG is in pursuance of that obligation. The Tribunal stated that no business venture can function without capital and the by-passing of

[10] 2020 (10) TMI 579 – CESTAT Mumbai
[11] 2021 (10) TMI 306 – CESTAT Mumbai
[12] 2022 (1) TMI 207 – CESTAT Mumbai

transubstantiation of accumulated capital, in the form of cash and bank balances, into these rights and competencies does not derogate from that. Hence, the activity undertaken by BG with its cost equivalence recorded in the books is nothing but capital contribution and as such capital contributions are obligated for the establishment and operation of a business venture, it is not 'consideration' for rendering any taxable service.

In the matter of PVS Multiplex India Private Limited [13] - CESTAT Allahabad:

The question that needs to be decided by the Tribunal in this matter is whether the PVS Multiplex India Private Limited (for brevity 'PVS') is liable to pay service tax on the screening of the films in their multiplex. PVS has entered agreements with the distributors for screening of the films in their multiplex on revenue sharing basis. The said revenue sharing basis is demonstrated by way of the invoice raised by the distributor on PVS. PVS stated that in terms of Circular 148, they have acted on principal to principal basis and there cannot be any tax on the said revenue share. They have stated if at all there is a taxability the same would be on the distributor who have temporarily transferred copyright in the film. The Tribunal after going through the records and arguments stated that there would not be any tax liability in the hands of PVS, since the agreement is on principal to principal basis.

In the matter of Moti Talkies[14] - CESTAT New Delhi:

(Followed in Golcha Properties Private Limited[15], The Asian Art Printers[16], Satyam Cineplexes Limited [17])

The appellant is the owner of a cinema hall and is engaged in business of exhibiting films in its theatre. The copyrights over the films are owned by distributors and the appellant enters an agreement with distributors to obtain such copyrights under which the right to exhibit films is transferred to appellant, either temporarily or in perpetuity, depending upon the nature of agreement between parties. The tax authorities contended that appellant was providing various elements of interconnected services to the film distributors like lending of theatre for exhibition of films, manpower to manage, control and make arrangements, projector and other related equipment to screen the films, arranging power supply and providing arrangements to collect the box office collections with predominance of 'renting of immovable property service'.

The Appellant contended that there were not providing any service to the distributors and in fact, in terms of agreement with the distributors, it has only granted a copyright license in the form of theatrical right for which appellant is making payments to the distributors as share of the net box office collection. The appellant contended that it is the appellant who has paid certain consideration to the distributors for the grant of copyrights.

The Tribunal after referring to the various agreements between the appellant and distributor stated that

[13] 2017 (11) TMI 156 – CESTAT Allahabad
[14] 2020 (6) TMI 87 – CESTAT New Delhi
[15] 2020 (11) TMI 137 – CESTAT New Delhi
[16] 2020 (12) TMI 1012 – CESTAT New Delhi
[17] 2021 (8) TMI 1222 – CESTAT New Delhi

the payments contemplated under the terms and conditions either require the exhibitor to pay a fixed amount or a certain percentage, subject to minimum exhibitor share or theatre share of effective shows in a week and cannot be inferred that appellant is providing any service to the distributor by renting of immovable property or even any other service in relation to such renting. The Tribunal stated that the distributors are not making any payments to the appellant and no consideration flows from distributors to the appellant for alleged service and accordingly the demand under renting of immovable property service fails.

In the matter of Inox Leisure Limited[18] - CESTAT Hyderabad:

(Followed in Inox Leisure Limited[19], Fun Multiplex Private Limited[20] and PVR Limited[21])

The Appellant is engaged in business of exhibiting cinematographic films across India in theatres owned by the appellant or taken on rent. The Appellant acquires the rights/license to exhibit the films at the designated theatres from various film distributors by entering separate license agreement for each film and consideration towards such license is paid by appellant as per agreed percentage of box office collection and such percentage varies from distributor to distributor, movie to move and week to week, after the release date. The tax authorities contended that since the appellant has the infrastructure to exhibit the film but no right to exhibit and the distributor has right but no infrastructure to exhibit, the appellant extended the support to the suppliers by way of providing the infrastructure they own to exhibit the film and this activity squarely falls under the definition of 'business support services' as it is in the nature of infrastructural support services.

The Tribunal after referring to the agreements entered stated that distributor/producer is engaged in the business of production and distributor of films, while the appellant is engaged in business of exhibition of films. The exhibitor decides which screens would play the motion picture, the number of shows, the show timings and the ticket pricing, whether or not to continue to exhibit the motion picture. The distributor/producer had granted the exhibitor the non-exclusive license to exploit the theatrical rights of a motion picture and each party was entitled to conduct its business in its absolute and sole direction. The Tribunal after referring to the decisions of Moti Talkies (supra), Mormugao Port Trust (supra), Old World Hospitality (supra) and Delhi International Airport Limited (supra) stated that revenue sharing arrangement does not necessarily imply provision of services, unless the service provider and receiver relationship is established and accordingly held that no service tax can be levied on appellant.

[18] 2020 (11) TMI 137 – CESTAT New Delhi
[19] 2022 (3) TMI 1256 – CESTAT Mumbai
[20] 2022 (3) TMI 1166 – CESTAT Mumbai
[21] 2022 (3) TMI 1322 – CESTAT Mumbai

Concluding Remarks:

From the circulars issued by CBIC, it is evident that it tries to tax the transactions between the constituents and the joint venture. Though it was stated that transactions entered on principal to principal basis were not subjected to tax, the attitude of the tax department when it comes to proposing of demands is completely different. Instead of outlining the issue and providing an ambiguous tax position, CBIC has to take various modes of arrangements/agreements and drive home as to when an agreement/arrangement between two or more parties results in birth of a 'person' and when it does not to decide on the taxability. Circular 179 is also in not conformity with the law as held by BG Exploration & Production India Limited and requires a revamp for the purposes of GST laws. Though in terms of Supreme Court judgments, it is evident that the constituent is different from entity (as settled in the matter of Gammon India Limited[22]), but that cannot alone pave way for taxation, unless there was an establishment of service provider – service receiver relationship. It is not out of place to remember that there cannot be an inference of service just because there is a flow of consideration as held by The Cricket Club of India[23] .

[22]2011 (12) SCC 499

[23]2015 (9) TMI 1389 – CESTAT Mumbai

DIRECT TAX

TAXATION OF GIFT OF BRAND 'ESSAR' - MUMBAI TRIBUNAL IN BALAJI TRUST

Contributed by CA Sri Harsha

The recent judgment of Honourable Mumbai Tribunal in the matter of Balaji Trust[1] is a quite interesting and special one. In this article, we shall deal with the pivotal issue of the entire matter, the taxation of transfer of brand 'Essar' by Essar Investments Limited (for brevity 'EIL') to the Balaji Trust (for brevity 'trust'). The revenue tried to tax in different ways in different stages in the hands of the trust but ultimately failed, at least at this level. No doubt, considering the stakes involved, an appeal would be preferred by the Revenue before the High Court in due course of time. Though there are multiple issues in this appeal, this article is only about the taxation of the transfer of brand to the trust.

The facts of the matter are that, the trust is a private discretionary trust which was settled on 29th March 2012 by the settlor, Shashikanth Ruia with an initial settlement of Rs 10,000. The trust was created for sole and exclusive benefit of the beneficiaries being the members of Ruia family. EIL was holding the brand 'Essar' including all the registered and unregistered trademarks, copyrights, service marks, certification marks, design, trade names relating to the logo and slogans used in relation thereto along with the getups incorporating the logo (for brevity 'brand') from 1996. On 29th March 2012, EIL has contributed the brand 'Essar' to the corpus of the trust as voluntary gift and accordingly the 'Essar' brand was settled without consideration. Since no amounts were paid by the trust to EIL for obtaining the brand 'Essar', the trust has not shown the same in the financial statements. Post receipt of such brand, the trust has entered non-exclusive licensing agreements with operative Essar group entities. The said exploitation has resulted in earning of license fees by the trust. The said license fee was offered to tax by the trust by adopting the cash system of accounting in accordance with the provisions of Income Tax Act (for brevity 'ITA')

The Assessing Officer (for brevity 'AO') observed that the license income was not offered by trust in its return of income and accordingly selected the case for conduct of scrutiny assessment under Section 143(2) of ITA. During the course of assessment, the trust was asked to submit the evidence relating to the ownership of brand 'Essar' by EIL. The assessee trust submitted the copy of certificate of trademark registered with EIL along with requisite evidence. Subsequent to this, the AO has passed order under Section 143(3) stating that the definition of 'income' under Section 2(24) is wide in nature, therefore, receipt of trademark and copyright was in the nature of income taxable under the head 'income from other sources' under Section 56(1). The AO adopted the discounted cash flow method and after valuing the trademark and copyright at Rs 1,668 crore raised a demand of Rs 719.14 crores.

The assessee trust has aggrieved by this order has approached the Commissioner of Income Tax (Appeals) [for brevity 'CIT(A)]. The CIT(A) after going through the various documents and other related certificates have come to the conclusion that the brand was owned by EIL and accordingly held that the order of AO needs to be set aside. Aggrieved by this and the other host of issues (which are not being discussed in this piece), the Revenue has appealed before the Tribunal.

[1]TS-1092-ITAT-2021

The Tribunal was seized with two important questions. One, whether on the facts and circumstances, the action of EIL settling the brand 'Essar' to trust without any consideration, constituted taxable income in the hands of trust in terms of Section 56(1) of ITA, if the said can be categorised as 'income' under Section 2(24) of ITA. Second, whether on facts and circumstances, will the provisions of Section56(2)(vii) would apply in the hands of trust and accordingly, the receipt of the brand 'Essar' without consideration becomes taxable? We shall examine the views of Tribunal question wise.

Whether receipt of brand 'Essar' constitutes 'income' and therefore taxable under Section 56(1)?:

Arguments by Revenue:

The stand of revenue is that the though the assessee argued that the receipt of brand 'Essar' is not taxable under Section 56(2), the same may not preclude from taxing under Section 56(1). The said stand was adopted by revenue based on the interpretation that the provisions of Section 56(2) starts with a 'without prejudice to the generality of the provisions of Section 56(1)', meaning that the income though does not satisfy the mandate of Section 56(2), can be still taxable under Section 56(1) and the instant case fits such interpretation. The revenue tried to push away the stand taken by the trust that the receipt of brand 'Essar' is a capital receipt and accordingly not an income under Section 2(24) and hence not taxable under Section 56(1) by stating that if it is established that the value of brand falls under the words 'income of every kind' as mentioned in Section 2(24), then there would be a tax under Section 56(1). The revenue has relied on the judgment of Supreme Court in the matter of GR Karthikeyan, where in it was held that prize money received from motor rally as income. The revenue also placed reliance on the judgment of Supreme Court in the matter of Navin Chandra Mafatlal, wherein the imposition of tax on capital gain was held to be in accordance with the law and pleaded before the Tribunal that the value of brand 'Essar' has to be held as 'income' and brought to tax under Section 56(1). The revenue further argued that depending upon the facts of the case, capital receipts have been treated as revenue receipts and reliance was placed on the judgment of Supreme Court in the matter of TV Sundaram Iyengar & Sons [2], wherein it was held that deposits received from customers in course of business which were originally capital receipts but when transferred to profit and loss account for the reason that they are not claimed by the deposit holders, such receipts would stop being the capital receipts and acquire the nature of revenue receipts.

Arguments by Assessee Trust:

The assessee trust on the other hand argued that the receipt of gift from EIL cannot be treated as 'income' under Section 2(24). They have placed reliance on the judgment of Bombay High Court in the matter of H.H. Maharani Shri Vijaykuverba Saheb of Morvi [3] , wherein it was held that a voluntary payment which is not referable to any binding obligation and depends upon the will of donor is not in the nature of income chargeable to tax under the Act. The assessee also placed reliance on the judgment of Supreme Court in the matter of Parimisetti Seetharamamma [4], wherein it was held that every receipt is not chargeable to tax and the burden is on the department to prove that an amount which is received voluntarily as a gift is an income chargeable to tax. They have further relied on the judgment of the Bombay High Court in the

[2] 88 taxman 429 (SC)
[3] 49 ITR 594
[4] 57 ITR 532

matter of Dilip Kumar Roy[5] , wherein it was held that amount received from devotees which was not on account of vocation carried on by him but was in nature of gift in recognition of his personal qualities and accordingly the amount received by assessee in that case was not chargeable to tax. Accordingly, it is pleaded that the gift of brand 'Essar' cannot be stated to be income in terms of Section 2(24). Further, it was argued that the brand was received on capital account and been employed for generation of license fee (a profit making apparatus) and accordingly the said receipt on capital account cannot be said to be 'income'.Finally, it was pleaded that since the brand 'Essar' is on capital account and does not fall under the ambit of 'income', the same cannot be brought to tax under Section 56(1) and placed reliance on Cadell Waving Mill Co (P) Limited[6] , which was further approved by Supreme Court in DP Sandu Bros Chembur (P) Limited[7] to drive home such point. Also, they have placed reliance on the matter of Vodafone Services Private Limited[8] of Bombay High Court, wherein it was held that amount received in excess of fair market value of shares cannot be held as income under Section 56(1).They have also placed reliance on the judgments of KDA Enterprises Limited[9] , Rasi Exports Private Limited [10] and Nerka Chemicals Private Limited, wherein it was held that receipt of gift is not taxable under Section 56(1).

Decision by Tribunal:

The Tribunal stated that brands along with trademarks and copyrights did not carry any value in the books of accounts for the reason that they were acquired long back and also because they did not have any independent value outside the group since they were inextricably interwoven or in fact intertwined with the group. The tribunal stated if the group entities would have paid 90% lower than the what they have paid to the trust, would the department rework the value of brand? Accordingly it held that the AO does not have any role to play or question the validity of transaction when the shareholders had unanimously passed resolutions and ratified the transaction, unless it is either illegal or against the national interest. The tribunal has held that brand 'Essar' contributed as gift by EIL to trust constituted the profit making apparatus and accordingly forms the fixed capital of the trust and in light of Vazir Sultan and Sons[11] and Bombay High Court in the case of Mahindra & Mahindra[12] has held that the same would constitute a capital receipt. The tribunal proceeded to analyse that once an element of profit is involved, then as argued by Revenue, the same would be taxable under the head 'Income from Other Sources' and may be taxable under Section 56(1). However, there should be an income under the categories of income mentioned under Section 2(24) to proceed to tax under Section 56(1) and the tribunal stated that in the instant case there is no profit element involved in receipt of brand 'Essar' by trust and accordingly the said receipt would not constitute 'income' under Section 2(24). The transaction in question does not involve any exchange of consideration between the parties, and is in the nature of gift of a profit making apparatus which has huge potential to generate royalty income, which is possible only when the group companies are willing to contribute, otherwise, the same has literally no value and accordingly held that receipt of brand 'Essar' would not fall under the income and cannot be taxed under Section 56(1).

[5] 94 ITR 1
[6] 249 ITR 265
[7] 273 ITR 1
[8] 368 ITR 1
[9] 68 SOT 349
[10] 12 TTJ 239
[11] [1959] 36 ITR 175 (SC)
[12] [1973] 191 ITR 130 (Bom)

Whether the provisions of Section 56(2)(vii) would not apply in the hands of Trust:

Arguments by Revenue:

The revenue argued that the since the brand 'Essar' was 'artistic work' under the Copyrights Act, 1957, and therefore falls under the category of 'any work of art' mentioned under Section 56(2)(vii), the receipt of brand 'Essar' without any consideration is taxable in the hands of trust. The revenue further argued that as per Rule 11UA(1)(b) of IT Rules[13] , the property which is received by trust is amounting to Rs 1668.1 crore, the same would be subjected to tax.

Arguments by Assessee Trust:

The assessee trust stated that definition of 'property' in the explanation to Section 56(2)(vii) is restrictive in nature in as much as it is defined exhaustively as opposed to the definition of 'capital asset' in Section 2(14).In light of the restrictive definition of 'property' under Section 56(2)(vii), the brand cannot be called as 'property'. Further, the assessee argued that 'brand' and 'work of art' are different type of capital assets and the definition of 'capital asset' include the personal effects in its ambit subject to exclusion of 'work of art'. Hence, it can be inferred that 'work of art' is something related to personal property that was covered under the ambit of 'capital asset' (for the reason that it is excluded from the ambit of 'personal property') and brand being related to business would not fall under the ambit of personal asset and though it is assumed that the definition of property has to be read in extensive for the purposes of Section 56(2)(vii). Since the brand does not qualify as 'property', there would not be any tax liability under Section 56(2)(vii).

Decision by Tribunal:

The tribunal stated that the genesis of controversy hinges around the claim by the revenue that as 'Essar' brand was registered by EIL as 'artistic work' under the Copyrights Act, 1957, therefore it would fall within the definition of 'property' as contemplated under Section 56(2)(vii). The question before the tribunal was that 'whether or not the 'Essar' brand registered as an 'artistic work' under the Copyrights Act would ipso fact bring the same within the meaning of 'any work of art' as contemplated in definition of 'property' under Section 56(2)(vii)'?

The Tribunal has agreed with the contention of the assessee that the definition of 'property' in Section 56(2)(vii) is restrictive in nature and exhaustively refers to the assets which would fall within the domain of said definition. However, on the other hand, the definition of 'capital asset' as envisaged under Section 2(14), the same provides that it would not include personal effects with an exception for 'work of art'. The Tribunal stated that exclusion of 'work of art' from the ambit of personal effects to be called as 'capital asset', signifies only such work of arts which are personal effects are covered under the definition of 'capital asset'. Since, in the instant case, brand 'Essar' which is related to business and not a personal effect, would not fall under the definition of 'property' as per Section 56(2)(vii). The tribunal further referred to Corpus Juris Secundum, various dictionaries and the decision of M.A Chidambaram [14], since the said expression has not been defined either under Section 56(2)(vii) or Section 2(14), to hold that a

[13] Income Tax Rules, 1962

[14] [1999] 239 ITR 371 (Mad)

simplicitor registration of logo 'Essar' under the Copyrights Act, 1957 as 'an artistic work' would not ipso fact mean that it is in the nature of 'work of art' and agreed with the assessee's argument that 'though all works of art are artistic works but however, all artistic works are not works of art'. Accordingly, the Tribunal held that brand 'Essar' is neither an artistic innovation nor possesses any artistic quality for being brought within the meaning of 'any work of art' as contemplated in Section 56(2)(vii).

Alternatively, assuming that brand 'Essar' falls under 'any work of art', the tribunal stated that there are only three methods prescribed by Rule 11UA(1)(b) and DCF is not one among them, the valuation adopted by the revenue is erroneous and hence held in favour of the assessee trust.

Concluding Remarks:

As stated in the opening paras, the Revenue would undoubtedly challenge the order of Tribunal before the High Court in due course of time. However, in our view, the analysis of the Tribunal is in accordance with the law and hope the High Court upholds the order. The stand of revenue right from the beginning shows the attitude of taxing the transaction in any manner, be it under Section 69A or Section 56(1) or Section 28, which would require a serious reconsideration. The settlement of brand 'Essar' to trust by way of voluntary gift was finally held to be not taxable under any of the sections of ITA. One should wait for the verdict of High Court to see, if it unsettles this proposition.

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BLACK MONEY ACT

PENALITIES UNDER BLACK MONEY ACT - A 'MUST OR 'MAY'

Contributed by CA Sri Harsha & CA Narendra

Introduction

In order to tackle the issues arising from undisclosed foreign income and assets, Central Government has enacted special Act 'Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015' (for brevity 'BMA') with effective from 01.07.2015.

Charge of Tax:

Section 3 of BMA states that a tax of 30 percent shall be levied on every assessee in respect of his total ***undisclosed foreign income and assets.***

Scope of BMA, as stated in section4, is applicable in respect of any income from a source outside India which is not disclosed in the income tax return (ITR) filed under section 139 of Income Ta Act, 1961 (ITA) or any income from a source outside India in respect of which no ITR is filed under section 139 of ITA, or any undisclosed asset located outside India.

In order to attract provisions of section 3 of BMA, it needs to establish that the person is an assessee, and such assessee has undisclosed income or assets.

Undisclosed Foreign Income and Asset vs. Undisclosed Asset:

Section 2(12) of BMA defines the term 'undisclosed foreign income and asset' *to mean total amount of undisclosed income of an assessee* ***from a source located outside India*** and the value of an undisclosed asset located outside India.

"Undisclosed asset located outside India" means an asset (including financial interest in any entity) located outside India, held by the assessee in his name or in respect of which he is a beneficial owner, and he has no explanation about the source of investment in such asset or the explanation given by him is in the opinion of the Assessing Officer unsatisfactory.

On a conjoint reading of both the terms, it is evident that non-disclosure of foreign assets in India may not be construed as undisclosed asset located outside India unless the assessee has no explanation about the source of investment in such asset or explanation given by him is in the opinion of officer unsatisfactory. In simpler words, if the assesse has explanation about source of investment, then the said asset may not fall under the ambit of 'undisclosed foreign asset' and has nothing to do with the disclosure in India qua this obligation. However, the income irrespective of the assessee has explanation or not, if not shown in India, then it amounts to undisclosed foreign income, because of the absence of expression relating to the source of investment in the definition of 'undisclosed Foreign Income and Asset'.

In simple terms, if the assessee has explanation to source of investment, for the purposes of charging section, there would not be any tax implications, even if he fails to disclose the asset in India. For income, the above proposition would not hold good.

Non-disclosure of asset located outside India in ITR may not necessarily be an undisclosed asset.

However, non-disclosure of foreign income may be considered as undisclosed foreign income

The intention behind the enacting the BMA is to bring back the Black Money to India. The term 'undisclosed asset' has to be interpreted with the definition provided in section 2(11) of BMA.

Further, the term 'assessee' is defined under section 2(2) to mean a person being a resident under section 6 ITA or being a non-resident or resident but not ordinary resident (RNOR), who was a resident either in the year to which such income relates or year in which the undisclosed asset located outside India was acquired.

Disclosure of foreign income and assets – Charging Section vs. Penal Provisions:

Section 42 and 43 of BMA deals with levy of penalty in respect of non-disclosure foreign income or asset in the ITR filed by the assessee.

Section 42 is applicable in respect of an assessee being a resident who has failed to furnish the return of income when such assessee is having any asset including beneficiary holding or having any income from a source located outside India.

Section 43 is applicable when the assessee being a resident failed to furnish the details of any asset including beneficiary holding or any income from a source located outside India in the return of income filed by him.

However, it is to be noted that penalty under section 42 or 43 is leviable for non-disclosure any foreign income or asset. Nothing in Section 43 speaks about the disclosure of undisclosed foreign asset, it applies to all foreign assets. Hence, it should not be confused that only undisclosed foreign assets are required to be shown in ITR. All the foreign assets have to shown to avoid penalties.

Powers of AO to levy penalty:

Under both the Section 42 and Section 43 of BMA, AO is empowered to levy penalty of INR 10,00,000. The Hon'ble Mumbai Tribunal in the matter of Leela Gandhi Tiwari[1] has held that penalty under Section 43 of BMA is not tenable when there is a bonafide mistake for not disclosing the details. In this article, we intend to discuss the subject case.

Facts:

The proceedings are started in the name of Mrs. Leela Gandhi Tiwari ('assessee') who is one of signatories of the foreign bank account.

Mr. Arvind V Gandhi, father of the assessee is a businessperson in India who has died during the year 1986. Subsequent to the death of the father, assessee and her husband who are non-residents in India have returned to India to support their family and to look after the business.

Subsequently, it was found, with the help of close friend Mr. Vasanth Thakkar, that Mr. Aravind V Gandhi has left behind, amongst other things, a Swiss bank account for the benefit of his wife, Dr Pramila Gandhi.

As Dr Pramila Gandhi was traversing through a tough patch, including on her health front, she approached her eldest daughter for taking care of the business as also, inter alia, this Swiss bank account as well.

Accordingly, the bank account has been transferred to assessee and her husband's name. However, they are holding the bank account as a trustees and monies are to be used for the benefit of Dr Pramila Gandhi. These formalities have been completed during the year 1986.

[1] LeenaGandhi Tiwari [TS-227-ITAT-2022(Mum)]

After a long time, during July 2016, Dr Pramila Gandhi has enquired about the bank account, and it is found that the account has become dormant as no transactions have been undertaken by the assessee and her husband. In order to make the account operative, fresh KYC requirements have been completed.

When the assessee and her husband have discussed the matter again, Dr Pramila Gandhi, before the demise in August 2016, has expressed a desire to donate the entire balance in the account to a charity in UK. Accordingly, the total amount lying in the account has been transferred to charity during February 2017.

Subsequently, with the input from investigation wing, a search and seizure operations have been conducted during September 2017 and an assessment has been completed in the name of her husband in the representative capacity under section 10 (3) of BMA. As there was no amount, as an undisclosed foreign asset, which was brought to tax, under the BMA, in the hands of the assessee or her husband, the assessment order in the assessee's case concluded that the undisclosed income and asset of the foreign bank is assessed at NIL.

However, assessing officer proceeded to impose penalty under section 43 of BMA in the hands of the assessee for non-disclosing the foreign asset in ITR in India.

<u>Tribunal's Ruling:</u>

- ***The definition of 'undisclosed foreign asset' under BMA is not dependent upon the disclosure made, or not made, in the income tax return. So far as disclosure of an undisclosed foreign asset in the income return is concerned, it is relevant only for the purpose of penalty under section 43 and for no other purpose in the BMA and position so far as undisclosed foreign income is concerned is different as undisclosed foreign income in ITR iscovered under section 4(1) (a)/(b) of the BMA.***

- In the present case, a search operation was carried on the assessee and assessment was also made under section 153A of the ITA for the AY 2017-18. In the return of income filed by the assessee under section 153A, details of foreign bank account have been duly disclosed.

- It could possibly be said that the income tax return filed on 21st April 2018 under section 153A is the income tax return that obliterates the original income tax return filed under section 139(1), and it is that return that is now required to be treated as income tax return filed under section 139(1).

- Therefore, it can indeed be said that non-disclosure of the foreign asset in the original return filed under section 139, even if that be so, cannot be put against the assessee, particularly when the said disclosure was admittedly made in the return filed under section 153A.

- As regards such a non-disclosure for the earlier assessment years, which is what the learned Assessing Officer has harped upon vehemently in the impugned order, those were the assessment years that pertain to the period prior to the BMA coming into force, and, nothing, therefore, turns on those lapses, even if any, so far as the application of the provisions of Section 43 of the BMA is concerned.

Considering the above analysis, Tribunal has held that penalty under section 43 of BMA is not leviable. Accordingly, the Tribunal has upheld the order of the CIT (A). Further, Tribunal has held that there are other reasons as well for holding why penalty under section 43 of BMA is not leviable, which are as under:

- It is only elementary that a mere non-disclosure of a foreign asset in the income tax return, by itself, is not a valid reason for a penalty under the BMA.

- The unambiguous intent of the legislature is to exclude trivial cases of lapses which can be attributed to a reasonable cause.

- It is also to be noted that Section 43 provides that the Assessing Officer ***"may"*** impose the penalty, and the use of the expression ***"may"***signifies that the penalty is not to be imposed in all cases of lapses and that there is no cause-and-effect relationship simpliciter between the lapse and the penalty.

- Imposition of penalty under section 43 is surely at the discretion of the Assessing Officer, but the manner in which this discretion is to be exercised has to meet the well-settled tests of judicious conduct by even quasi-judicial authorities.

- The assessee is an HNI with aggregate payment of taxes around Rs. 2,350 Crores in last several years and the amount held in the alleged undisclosed foreign bank account is a small, if not trivial, amount of £2,34,710, and that it is not, by any stretch of logic or imagination, a case of siphoning unaccounted wealth in India to the undisclosed bank accounts abroad.

- Assessee and her husband were the trustees of the account and total amount is simply donated to a charity.

- Assessee and her husband were signatories because Dr Pramila Gandhi was having health issues and was not in a position to travel. It was more of being a signatory for the operation of the bank account, rather than holding the bank account even in a fiduciary capacity, and, as such, the assessee's belief that she was not required to disclose this bank account cannot be said to be lacking bonafides.

- Once there is a clear finding of bonafides in conduct, irrespective of whether such conduct is lawful or not, the penalty is not imposable unless the penalty is statutorily simply an automatic consequence, in cause and effect relationship.

Accordingly, the Tribunal has held that penalty under section 43 of BMA is not tenable. However, the Tribunal has held that whenever any unaccounted income or undisclosed asset abroad is found, stern action, in accordance with the law, must be taken. The Tribunal has pointed the Hon'ble Finance Minister's Budget Speech wherein the FM said that ***"Tracking down and bringing back the wealth which legitimately belongs to the country is our abiding commitment to the country. Recognising the limitations under the existing legislation, we have taken a considered decision to enact a comprehensive new law on black money to specifically deal with such money stashed away abroad".***

- In the present case, it is the case of inheritance of bank account which is opened by the assessee's father forty years back and amount lying in the bank account is small money.

- The well-intended harsh laws meant for checking the economic offenders, stashing their ill-gotten monies abroad, must not be invoked for punishing a venial breach of the law by a bonafide businessperson. The bonafides actions of the taxpayers must, therefore, be excluded from the application of provisions of such stringent legislation asthe BMA.

Considering the above, Tribunal has held thatin this backdrop in which harsh penalties and prosecutions are contemplated under the BMA, penalty cannot be levied in the cases which more of bonafide mistakes.

Tribunal has further highlighted that this ruling iswithout any prejudice to whatever consequence may follow under the provisions of the Income Tax Act, 1961, the legislation under which the lapse of non-disclosure, even if that be so, occurred.

Author's Comments:

The facts of the present case are different from the ShrivardhanMohta[2] case where in the Calcutta High Court has upheld the proceedings under section 50 and 55 of BMA against the assessee as assessee has failed to disclose the foreign assets despite opportunity is available to the assessee while filing the return of income under section 153A.

Even though the ruling in the present case has been given in assessee's favour, considering the stringent regulations under BMA, every resident in India (ROR) must keep the track of foreign assets and income and have to duly disclose such details in the return of income in order to avoid penalties and other consequences under BMA.

[2]W.P. NO. 568 OF 2018.

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