MOHINDER PURI & CO.
CHARTERED ACCOUNTANTS

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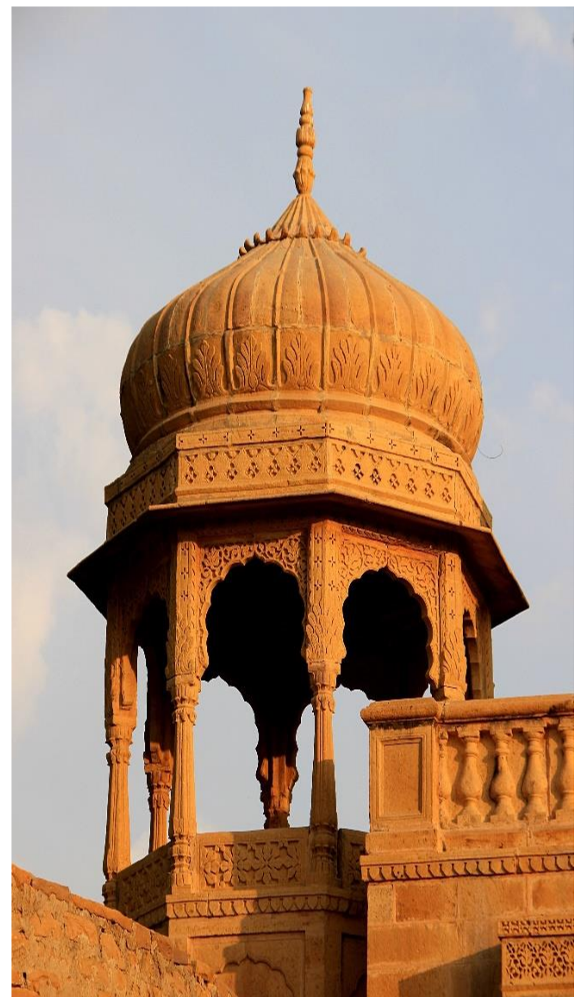

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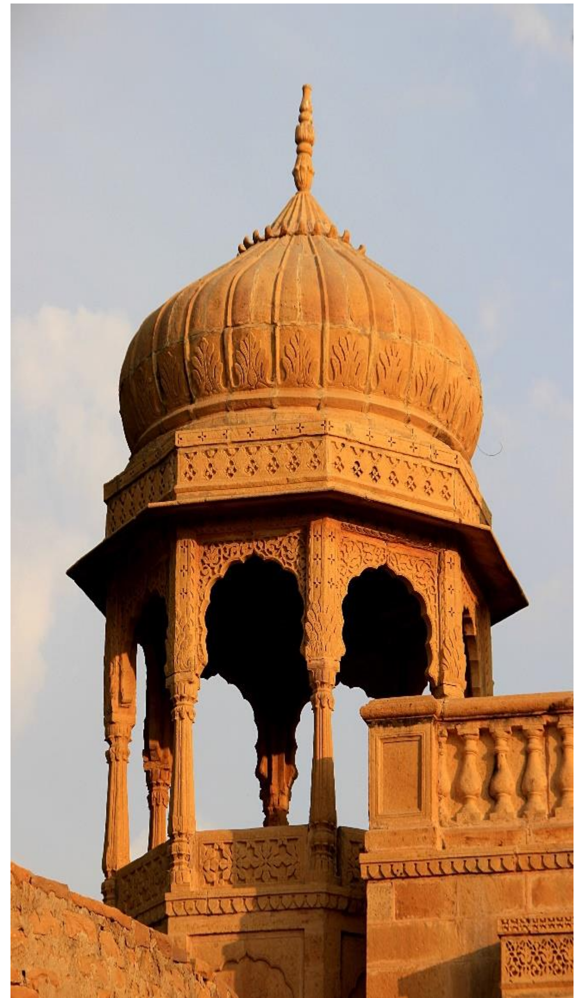

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FOREWORD

Dear Reader,

In the last few weeks, several judgements of Supreme Court have been reported which cover both domestic as well as international taxation aspects.

One of the important judgments is on the issue of right of appeal to the High Court against an order of the tax tribunal, which is the final fact finding authority, on the issue of determination of an arm's length price. The Supreme Court in a separate set of batch matters has declined to interfere with the concurrent orders of Tax Tribunal and the High Court on the quantum of profit attribution to a 'Permanent Establishment', finding the issue as involving only 'facts'. Notes on these judgments are covered in this Update.

In addition, a few other important judgements of the Supreme Court and Tax Tribunals as well as a report on a few changes in the Companies Act, form part of this Update.

The Income Tax Department is already conducting assessment proceedings as well as first appellate proceedings electronically in most of the cases. With most of its filings and proceedings being already in electronic mode, the Central Board of Direct Taxes has now directed Income Tax Authorities to ensure 100% filing of Revenue appeals/ petitions before the High courts and Tax Tribunals in e-filing mode by May 31, 2023, pursuant to the directions given by the Supreme Court to the Government of India.

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DIRECT TAX
INTERNATIONAL TAXATION

Supreme Court holds that attribution of profits to a P.E. is a question of fact which cannot be interfered with if all the relevant factors have been considered

The Supreme Court, in a batch of appeals in the case of Travelport Inc. (Civil Appeal Nos. 6511-6518/2010) and others, has dismissed the appeals of the tax department against the orders of the High Court of Delhi on the issue of quantum of profit attribution to a P.E. in India, by holding that the attribution of income to a P.E. in India is a question of fact which cannot be interfered with.

In the present case, the assessee was engaged in the business of providing electronic global distribution services to Airlines through Computerized Reservation System (CRS). For this purpose, the assessee maintained and operated a Master Computer System consisting of several mainframe computers and servers located in other countries including USA. This Master Computer System was connected to Airlines' server, to and from which data was continuously sent and obtained regarding flight schedules, seat availability, etc.

In order to market and distribute the CRS services to travel agents in India, the assessee appointed Indian entities and entered into distribution agreements with them.

The assessee earned an amount of USD 3/Euro 3, as the case may be, for each booking made in India. Out of the said earnings, the assessee paid commission to the Indian entities ranging from USD/Euro 1 to USD/Euro 1.8.

The tax officer held that the entire income earned by the assessee out of India is taxable, based on the premise that the income was earned through the hardware installed by the assessee in the premises of the travel agents. The said assessment order was upheld by CIT(A).

On an appeal before the Tribunal, the Tribunal held that the assessee constituted a Fixed Place P.E. and a Dependent Agent P.E. However, the Tribunal also held that 'lion's share of activity' was processed in the host computers in USA/Europe and the activities in India were only 'minuscule' in nature.

The Tribunal assessed the profit attribution at 15% of the revenue, which worked out to 0.45 cents. The Tribunal also observed that the payment made to the distribution agents was USD 1/Euro 1 or more and therefore, held that no further income was taxable in India.

The appeals filed by the Revenue and the assessee before the High Court of Delhi against the order of the Tribunal were dismissed by the High Court on the ground that no question of law arose in those matters. The Delhi High Court held that in so far as attribution is concerned, the Tribunal adopted a reasonable approach.

Challenging the order of the High Court, the tax department filed an appeal before the Supreme Court on the two major grounds:

1. Attribution of only 15% of the revenue was completely wrong;

2. The computers placed in the premises of the travel agents and the nodes/leased lines formed a fixed place P.E. of the assessee in India.

The Supreme Court observed that the Tribunal had arrived at the quantum of revenue accruing to the assessee in respect of the booking in India which can be

attributed to the activities carried out in India, based on FAR analysis of the activities. The Supreme Court also noted that the commission paid to the distribution agents by the assessee was more than twice the amount of attribution (ranging from 33.33% to 60% of the earnings), which has already been taxed. The Supreme Court, therefore, upheld that the same extinguished the assessment.

The Supreme Court held that the question as to what proportion of profit arose and accrued in India is essentially one of facts. The Supreme Court observed that the Tribunal had taken into account the relevant factors for arriving at the quantum of the attribution and as such, not interfered with the concurrent orders of the Tribunal and the High Court. The Supreme Court also rejected the reliance placed by the Revenue on the provisions of Article 7 of the DTAA between India and USA regarding the attribution issue, by holding that as per the DTAA, the entire income derived by the assessee will be taxable in the Contracting State, whereas Section 9(1) confines the taxable income to that proportion which is attributable to the operations carried out in India.

As regards the second issue pertaining to the P.E., the Supreme Court declined to entertain the same as the approach of the Tribunal and the High Court on the question of attribution was found to be fair and reasonable.

The Supreme Court, therefore, dismissed all the appeals filed by the tax department.

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Interest income paid by Indian branch office to foreign head office not taxable

Credit Suisse AG vs. DCIT (IT) [2023] 148 taxmann.com 409 (Mumbai - Trib.)

Recently, the Tax Tribunal, Mumbai Bench held that the concept of hypothetical independence of permanent establishment (PE) and head office under Article 7 of the tax treaty is restricted only for computation of profit attributable to PE. It held that the same could not be used for extended purpose of determining income of the head office. As such, the interest income earned by head office/ overseas branches from Indian branch was held to be not taxable in India.

On facts, the taxpayer is a banking company incorporated in Switzerland and tax resident of Switzerland. It has, *inter-alia*, branch offices in Singapore, i.e. Credit Suisse Singapore Branch ("CSSB"), in Mumbai, i.e. Credit Suisse Mumbai Branch ("CSMB") and in London, i.e. Credit Suisse London branch ("CSLB"). The Indian branch office procured loans from CSSB and CSLB and paid interest to these branches. Since the taxpayer is a tax resident of Switzerland, it had opted for benefit of the India-Swiss Confederation Double Taxation Avoidance Agreement ("Indo-Swiss DTAA"). The Indian branch office (CSMB) constituted a fixed place PE of the taxpayer in India as per Article 5 and its business income was offered to tax in India in terms of Article 7 of the Indo-Swiss DTAA. The taxpayer had claimed the interest payment as a deduction while computing the business profits of the Indian branch office. The said interest was not offered to tax in India by the taxpayer on the premise that the taxpayer and the above-mentioned branches are one and the same, relying on the decision of the Special Bench of the Tribunal, Mumbai in Sumitomo Mitsui Banking Corporation vs DDIT (2012) 145 TTJ 649 (Mum.)(SB).

However, in the course of assessment, the Assessing Officer held that interest paid by CSMB was liable to be taxed in India in the hands of the taxpayer. On appeal, the Commissioner (Appeals) held that interest paid by the PE to the head office and other branches etc. was an interest sourced in India and liable to be taxed under the source rule in India.

Before the Tribunal, the taxpayer argued that the separate entity approach as laid down in the DTAA is only applicable for the computation of profit attributable to the PE and the same does not extend to the computation of income of the head office. The taxpayer, thus, contended that interest received by the head office/overseas branches from the Indian branch office was not taxable in India. On the contrary, it was the contention of the Revenue that the Explanation to section 9(1)(v) was specifically inserted to overcome the decision of the Special Bench in Sumitomo Mitsui Banking Corporation (supra) and therefore after the amendment by the Finance Act 2015, the concept that payment to self does not constitute income is no longer valid. As per the said explanation, any interest payable by the PE in India of non-resident person engaged in banking to the head office or any PE outside India shall be chargeable to tax in India and the PE in India shall be deemed to be a person separate and independent of the non-resident person of which it is a PE.

The Tribunal relied on the recent decision of the Mumbai Bench of the Tribunal in BNP Paribas, wherein it was held that interest paid by the Indian branch/PE to the head office is not taxable in India independent of the decision of the Special Bench of the Tribunal in Sumitomo Mitsui Banking Corporation (supra). The coordinate bench had further held that in terms of section 90(2) of the Act, the provisions of the Act or the DTAA, whichever is more beneficial to the taxpayer shall apply. The coordinate bench had observed that the fiction of hypothetical independence or a separate entity approach comes into play for the limited purpose of computing the profit attributable to the PE under Article 7 of the relevant tax treaty. However, this fiction could not be extended for the computation of profit of the head office. The coordinate bench concluded that Explanation to section 9(1)(v) of the Act would not have any impact on taxability of interest income of the head office as the taxpayer was entitled to treaty benefits.

As such, relying on the aforesaid decision of BNP Paribas vs ACIT (supra), the Tribunal concluded that the provisions of the Act or the DTAA, whichever are more beneficial to the taxpayer shall be applicable in view of section 90(2) of the Act and accordingly, interest received by the head office/overseas branches from the Indian branch office was not taxable in India.

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Tax Tribunal rejects applicability of force of attraction rule to non-PE projects under Indo-German Tax treaty

Lahmeyer International GmbH [TS-181-ITAT-2023(DEL)]

Recently, the Tax Tribunal, Delhi Bench, inter-alia, held that force of attraction rule as provided under protocol of India-Germany Double Taxation Avoidance Agreement (the DTAA) shall not apply where the PE constituted in India under one contract was not in any way involved in the execution of the other contracts.

On facts, the taxpayer, Lahmeyer International GmbH is a company tax resident of Germany engaged in engineering consulting in relation to complex infrastructure projects. During the year under consideration, the taxpayer had undertaken contract work with certain Government/Semi-Government projects, such as, Jammu and Kashmir State Power Development Corporation– Baglihar Project (JKSPDC-BCS), JKHCL and JVL projects. The taxpayer had admitted existence of permanent establishment (PE) in respect of receipts from contract with JKSPDC- BCS project. Regarding the other two projects, the taxpayer had offered receipts to tax as Fee for Technical Services (FTS) taxable @ 10% on gross basis under Article 12 of the DTAA.

In the course of assessment, the tax officer observed held that JKHCL had made office space available to the taxpayer and the same would constitute PE. The tax officer further held that irrespective of the fact whether PE in respect of JKHCL and JVL projects existed or not, as the taxpayer had PE in India in the form of JKSPDC-BCS project, applying the 'Force of Attraction' rule, all receipts earned in India would be connected to the said PE. Accordingly, receipts from JKHCL and JVL projects were brought to tax under Section 44DA of the Act. The additions as made by the tax officer were sustained by the Dispute Resolution Panel.

Before the Tax Tribunal, the taxpayer contended that under the contract with JKHCL, it provided services of design review, duration of the contract was only for 3 months and its employees were present in India only for 21 days. As such, the taxpayer contended that it did not have a PE in India for this project. Regarding JVL contract, the taxpayer stated that no observation was made by the tax officer on the existence of PE.

It was further contended by the taxpayer that the force of attraction rule did not apply to the given case. Para 1(c) of Protocol to Article 7 of the DTAA provides that in respect of Article 7(1) of the DTAA, profits derived from sale of goods or from other business activities of the same/ similar kind as those sold/ effected through the PE, may be considered attributable to that PE if it is proved that the transaction has been resorted to for tax avoidance in source jurisdiction and the PE was in any way involved in the transaction.

The Tax Tribunal perused the contract with JKHCL and noted that the taxpayer was required to depute personnel to carry out review and provide comments on the civil design to ensure project feasibility and to suggest design optimization. The documents to be reviewed by the taxpayer included general project drawings, detailed construction drawings, engineering reports, etc. The Tribunal held that the services as rendered were purely technical/consultancy in nature and receipts therefrom had to be treated as FTS. The Tribunal further observed that since the work was completed within 3 months, the office space provided by JKHCL to the taxpayer in its premises did not constitute PE under Article 5(2) of the DTAA.

The Tax Tribunal relied on its earlier order in the taxpayer's own case wherein it was held that the Force of Attraction Rule would not apply. In its earlier order, the Tribunal had observed that owing to geographical region, the PE on account of one project could not be involved in any other project in India. The Tribunal had noted that the contracts were carried out by the taxpayer using different teams at a given point of time, the scope of work and risk involved in the contracts were independent of each other and the performance was not interlinked. Accordingly, the Tribunal had held that the PE constituted in India under one contract

did not play any role or contributed in any manner to the execution of the other contracts or earning of FTS under other contracts and could not be said to be involved in any way with any other projects in India.

As such, relying on its earlier decision, the Tribunal in the given case held that the force of attraction rule shall not apply and deleted the additions as made by the tax officer. Accordingly, the Tribunal directed the tax officer to tax receipts under JKHCL and JVL contracts as FTS.

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SC quashes HC order holding ALP determination by ITAT as final, not appealable before HC

SAP LABS India Private Limited [CIVIL APPEAL NO. 8463 OF 2022]

In a recent judgement the Hon'ble Supreme Court quashed the judgement of Hon'ble High Court of Karnataka in batch matters led by Softbrands /SAP Labs, wherein High Court has held that in the transfer pricing matters, the determination of the arm's length price by the Tribunal is final and cannot be subject matter of appeal before the High Court.

On the facts, the High Court of Karnataka has dismissed the appeals preferred by Revenue by relying upon its judgement in the case of **PCIT v. Softbrands India (P) Ltd.**, reported in **(2018) 406 ITR 513 (Karnataka).** In the said case, the High Court has held that the 'Transfer Pricing' issues decided by the Tribunal are questions of fact and as perversity is neither pleaded nor argued nor demonstrated by placing material to that effect, no substantial question of law arises for consideration under Section 260A of the Income Tax Act, 1961 ('Act').

The revenue submitted that under Transfer pricing the arm's length price is to be determined as per guidelines stated under the Act and the Rules. Thus, it is always open for the Hon'ble High Court to consider whether the guidelines stated are followed by the Tribunal while calculating the arm's length price. Further, if the arm's length price determined by the Tribunal 'de hors' the guidelines, the same can said to be perverse which is always subject to scrutiny by the Hon'ble High Court in an appeal under Section 260A of the Act.

The assessee had submitted that once arm's length price is determined by the Tribunal taking into consideration the guidelines, thereafter challenge to the same cannot be said to be a substantial question of law, to be considered in an appeal under Section 260A of the Act.

It was submitted that the substantial question of law can only arise when a question of law is fairly arguable and where there is room for difference of opinion. The assessee also submitted that there can be certain instances wherein substantial question of law can arise in Transfer pricing, however, unless perversity in the findings of Tribunal can be demonstrated, no substantial question of law arises.

The Supreme Court held that the proposition by High Court of Karnataka cannot be accepted. The High Court shall examine in each case whether the guidelines as stated under the Act and Rules have been taken into consideration while computing the arm's length price by the Tribunal and whether the findings recorded by the Tribunal while

determining the arm's length price are perverse or not. The High Court can also examine the question of comparability of two companies or selection of filters and examine whether the same is done judiciously and on the basis of the relevant material/evidence on record.

In view of the aforesaid, the impugned judgements passed by the High Court have been quashed and remitted back to High Court to decide afresh preferably within a period of nine months.

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Offshore planning, project, construction, etc. connected to Indian PE not taxable in India under protocol to Indo-German Tax treaty

M/s. Fraport A.G. Frankfurt Airport Services Worldwide v ACIT [TS 185-ITAT-2023(DEL)]

In a recent judgment, the Delhi Tax Tribunal, interalia, held that the offshore services provided by a German entity were effectively connected with its Permanent Establishment in India. Thus, income earned therefrom was to be regarded as business profits under Article 7 of India-Germany tax treaty ('tax treaty') rather than Fees for technical services ('FTS') under Article 12 of the tax treaty. Consequently, services that qualify for tax protection under paragraph 1(b) of protocol to the tax treaty would not be regarded as attributable to the PE and hence, not liable to tax in India.

On the facts of the case, M/s Fraport A.G. Frankfurt Airport Services Worldwide a German company, entered into Airport Operator Agreement with DIAL to provide airport related services in the areas of general services, managerial services and consultancy services. To provide these services to DIAL, the taxpayer had set up a project office in India which was treated as its Permanent Establishment ('PE).

During the year under consideration, fee for consultancy services directly provided by the taxpayer being offshore services was claimed as non-taxable in India in terms of the provisions of paragraph 1(b) of protocol to the tax treaty. Under such paragraph, income derived by a resident of a contracting State from activities of planning, project, construction, research and technical services rendered in State of residence even if connected with a PE situated in other State shall not be regarded as attributable to the PE.

However, the tax officer did not accept this claim and treated the service fee as FTS, which is liable to tax in India under Article 12 of the tax treaty and section 9(1)(vii) of the Indian Income-tax Act. Thereafter, the Dispute Resolution Panel also confirmed the order of tax officer.

Being aggrieved, the taxpayer preferred an appeal before the Tax Tribunal. During the course of the arguments, it was contended that the activities of the head office and the Project Office are integrated and inter-dependent, incapable of being rendered exclusively. Based on this argument, the taxpayer contended that the dominant nature of offshore services was to manage the airport and hence, such services are linked with the PE of the taxpayer. Hence, the revenue from such services must be regarded as Business Profits. In this regard, the following facts were highlighted:

- The activities under the airport operator agreement were to be carried out by it

through its employees deputed in India as well as from the head office in Germany.

- The PE in India is dependent on head office with regard to functions such as planning, information, data base and know how.

- The Head office performs all tasks of human resources in relation to PE and also provides technical advice to PE and as such, fully supports the PE;

The Tax Tribunal, while deciding the issue in favour of the taxpayer, held as under:

- Various kind of services in connection with operation of airport cannot be rendered from the head office in Germany without the active involvement of the PE.

- Although some of the services rendered can be covered in the category of managerial or technical or consultancy services (which fall within the scope of FTS), yet income from services which are effectively connected with the PE is expressly excluded from the scope of taxation under the FTS clause by virtue of Article 12(5) of the tax treaty. Therefore, such receipts will be treated as business profits under Article 7 of the tax treaty.

- Once the receipts fall under Article 7 of the tax treaty, paragraph 1(b) of protocol to the tax treaty shall become applicable. In terms of the Protocol, income earned from offshore services provided from Germany and effectively connected to Indian PE in the nature of planning, project, construction, or research activities as well as income from technical services cannot be attributable to PE. Therefore, such income cannot be brought to tax in India under Article 7 of the tax treaty.

The tax Tribunal directed the tax officer to examine whether the services in question fall within the scope of paragraph 1(b) of the Protocol to the tax treaty and to exclude from taxation, the income arising from such services only.

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Benefit of foreign exchange fluctuation adjustment in the cost of acquisition not available to a non-resident while computing capital gain on transfer of unlisted securities

Recently, the Tax Tribunal, Mumbai Bench in the case of **Legatum Ventures Limited v/s ACIT, Int. Tax (ITA no. 1627/Mum/2022)** has held that in case of sale of unlisted shares of an Indian company by a non-resident, capital gains will be computed without giving effect to the first proviso of section 48 (without adjustment of exchange fluctuation) and will be taxable at the rate of 10% under section 112(1)(c)(iii) of the Act.

In the instant case, the taxpayer was an entity incorporated in United Arab Emirates and was involved in investment activities. While filing the tax return of the year under consideration, a long-term capital loss of Rs. 36,387,392/- was claimed from sale of shares of a private company in India. For computing such long-term capital loss, the taxpayer applied the provisions of first proviso to section 48 of the Act which provides for computation of capital gain by converting the sale consideration and cost of acquisition in the foreign currency used for the original purchase to neutralize the exchange fluctuation. The general tax rate applicable under section 112(1)(c)(ii), where

adjustment of foreign exchange fluctuation is allowed, is 20%.

However, the Assessing Officer applied the provisions of section 112(1)(c)(iii) which provides for taxation of capital gains in the case of transfer of unlisted shares or securities without any adjustment of foreign exchange fluctuation in the cost of acquisition. The DRP upheld the action of the Assessing Officer.

On further appeal before the Tribunal, the taxpayer contended that section 112 of the Act merely provides rate of tax and does not provide the mechanism for the computation of capital gain. It was also contended that since the result of applying first proviso to section 48 is a loss, section 112 does not apply as it is applicable only in case of income.

The Tribunal observed that though section 112 of the Act deals with the determination of tax payable in case of sale of unlisted shares by non-resident, however sub-clause (iii) of clause (c) of sub-section (1) also provides the mode of computation in the case of a non-resident. The Tax Tribunal held that section 112(1)(c)(iii) of the Act being a special provision dealing with such sale transaction, will override the general provisions of section 48 of the Act. The Tribunal further stated that if the assessee' s contention is accepted that in the present case the income chargeable under the head "capital gains" is to be computed only as per section 48 of the Act, then the same would render the computation mechanism provided in section 112(1)(c)(iii) of the Act completely otiose and redundant. The Tribunal also rejected the contention of the taxpayer that if the case is governed by two provisions of the Act, then it has the right to choose to be taxed under the provision which leaves him with a lesser tax burden.

In view of the above, the Tax Tribunal upheld the computation of capital gain made by the Assessing Officer in the terms of section 112(1)(c)(iii) of the Act.

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The expression 'whole of the share capital' would include both equity and preference share capital for ascertaining capital gain exemption u/s 47(iv) on transfer of capital asset from a holding company to its wholly owned subsidiary

The Mumbai Bench of Income Tax Appellate Tribunal, in the case of **Reliance Industries Limited v. ACIT (LTU) [ITA no. 7299 / Mum / 2017]** held that for the purpose of section 47(iv) of the Act, which exempts the capital gain on transfer of capital asset by a holding company to its wholly owned subsidiary company, both equity and preference share capital will be considered to ascertain whether 'whole of the share capital' of the subsidiary is held by the parent company.

On the facts, the taxpayer incurred long term capital loss arising on sale of equity and preference shares of M/s. Reliance Exploration and Production DMCC (REP DMCC), to its subsidiary company M/s. Reliance Industrial Investments and Holdings Ltd ('RIIHL), which was claimed as exempt u/s 47 (iv) of the Act, based on the understanding that it held whole of the share capital of its subsidiary RIIHL. Accordingly, 'loss' on sale of equity shares & preference shares was not claimed being arising out of an exempt transaction / transfer.

The taxpayer held 100% of equity shares issued by RIIHL, however RIIHL had also

issued preference share which were not held by the taxpayer.

The claim of such capital loss was raised first time before the Tax Tribunal, as against claim for exemption earlier, wherein it was contended by the taxpayer that as the whole of the share capital of the subsidiary which comprises of both equity and preference share capital was not held by the taxpayer as it only held the equity share capital in such company. Since, the conditions stipulated under section 47(iv) of the Act are not fulfilled, the taxpayer should be allowed to claim such capital loss for set off and carry forward.

The tax department opposed such claim of loss on the ground that 'whole of the share capital' shall only mean the equity share capital and not include preference share capital, in the above company. The holding of preference share capital by other entities does not preclude the taxpayer from being holding company.

The Tribunal, relying on the meaning of share capital provided under section 42 of the Companies Act, held that share capital includes both equity and preference share capital. The Tax Tribunal thus upheld the contention of the taxpayer and allowed the claim of capital loss, holding that the case does not fall under the provisions of section 47(iv), exempting such transaction, on the premise that it only holds the equity share capital and not the preference share capital of the subsidiary to which such sale is made.

The Tax Tribunal observed that wherever legislature wanted particular percentage of particular share capital qua voting right, etc. same is provided in those sections.

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Apex Court rejected the Special Leave Petition filed by the tax department against the High Court decision of treating assignment of 'Loan' as transfer of capital asset

Recently, the Hon'ble Supreme Court of India in the case of **CIT v. M/s Siemens Nixdorf Information Systemse GmbH (PSL No. 7350/2020)**, has rejected the SLP filed by the tax department challenging the order of the Bombay High Court wherein it was held that the loan given to its subsidiary in India, by the foreign company, constitute 'capital asset' within the meaning of section 2(14) of the Act.

In the present case, the respondent, a German company, had given a loan to its subsidiary Siemens Nixdorf Information Systems Ltd. (SNISL) of Euro 9,000,000. SNISL ran into financial trouble and it was likely to be wound up due to which debt was sold to one Siemens AG for Euro 731000, based on valuation carried out by M/s Infrastructure and Leasing Finance Ltd. The difference between amount lent to the subsidiary and consideration received on sale from Siemens AG was claimed by the respondent as short-term capital loss on the premise that loan constitutes a capital asset under section 2(14) of the Act.

The Assessing officer and CIT(A) rejected the abovementioned contention. However, the Mumbai Bench of Income Tax Appellate Tribunal allowed the respondent's appeal.

On appeal by the tax department, the Bombay High Court had observed that section 2(14) of the Act has defined the word 'capital asset' very widely to mean 'property of any kind' except those specifically excluded in the said section from the definition of 'capital asset'. The High Court had further observed that advancement of a loan was not covered by any exclusion clause and the Revenue was not able to

point out any exclusion clause being applicable to an advancement of a loan.

Reference, was also made to the decision of Bombay High Court in the case of **Bafna Charitable Trust v. CIT [1998] 101 Taxman 244/230 ITR 864 (Bom.),** wherein the Court had observed that property is a word of widest import and signifies every possible interest which a person can hold or enjoy except those specifically excluded.

In view of the above, it was concluded that advancement of loan is covered by the definition of capital asset under section 2(14) of the Act.

Against the aforesaid decision of the High Court, the tax department approached the Hon'ble SC to file Special Leave Petition. However, the Apex Court rejected the petition of the tax department holding that the findings of the Tribunal, as upheld by the High Court, do not warrant any interference. Therefore, the decision of the Bombay High Court has reached finality on this matter.

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Due to overriding effect of DTAA over the Income-tax Act, no tax payable in India on Salary of non-resident

Prasanth Nandanuru [ITA-IT No. 369/Hyd/2022]

ITAT Hyderabad holds that the salary received by the assessee in India for the services rendered in USA are not liable to tax in India as Article 16 of DTAA would prevail over section 5(2)(a) of the Income Tax Act.

On the facts of the case, the assessee was under employment with Wells Fargo (EGS) India Private Limited ("Wells India') and was sent on short- term assignment (from October 20,2017 till October 18,2018) to Wells Fargo Bank N.A., (USA) ("Wells USA"). Thereafter, from October 19,2018 the assessee was directly employed by Wells USA.

During his short-term assignment to Wells USA, the assessee was continued on the payroll of Wells India and his salary for such period was credited to his Indian bank account by Wells India after withholding the tax thereon.

For the AY 2019-20 (second year) assessee has filed its tax return in India as Non-Resident and claimed that the salary Income received for the assignment was not taxable in India, on the understanding that he was a tax resident of USA and is eligible to avail the benefit of Article 16(1) of the India- USA DTAA to the extent it is beneficial as provided under section 90 of the Income- tax Act. ('Act').

The Assessing officer (AO) denied the claim of the assessee holding that till the termination from Wells India, assessee was under the payrolls of Wells India and the employment was also exercised in India, thus not entitled to claim the benefit of Article 16(1) of the DTAA.

Hon'ble DRP upheld the order of AO holding that salary income is taxable in India as per section 5(2)(a) and 5(2)(b) of the Act as the Income has accrued in India and also received in the Indian bank account of the assessee.

Before Hon'ble ITAT the assessee contended that salary Income is pertaining to the assignment rendered outside India and hence does not accrue or arise in India. Further mere receiving the salary in Indian

bank account, shall not be taxable in India.

Placing the reliance on the Hon'ble Authority for Advance Ruling, New Delhi in the case of **British Gas India (P) Ltd,** ITAT held that since the assessee was a resident of USA, he is liable to tax in USA in respect of the salary derived, because the employment was exercised in USA. It was further stated that though the provisions under section 5(2)(a) of the Act fastens the tax liability in India on receipt of salary but because of overriding effect of section 90 of the Act, Article 16 of the DTAA would prevail over the Act and hence salary received by the assessee in India for the services rendered in USA are not liable to tax in India.

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DOMESTIC TAXATION

Commissioner cannot revise the assessment order to examine the issue whether offshore supply and onshore activity contracts are composite or whether offshore supply receipts are linked to PE

In a recent decision in case **of Samsung C & T Corporation Vs. CIT (International Taxation)-3 Dehradun [TS-146-ITAT-2023(DEL)],** Dehradun ITAT held that whether the receipts from offshore supply contract are taxable in India or contracts are in nature of composite contract or whether such receipts are linked to PE are highly debatable issues which cannot be considered for exercising jurisdiction under Section 263 of the Act. Also, during the pendency of the issue of taxability of receipts from offshore supply before the AAR, revision proceedings under Section 263 should not have been initiated as two parallel proceedings on the same issue, cannot be initiated at a given point of time.

In the instant case, the assessee company, a tax resident of South-Korea, formed a consortium with its Indian subsidiary, Samsung C & T India Pvt. Ltd (Samsung India), to bid for a contract from Delhi Metro Rail Corporation (DMRC) for work of design verification, detail engineering, supply, installation, testing and commissioning of Environmental Control System (ECS) and Tunnel Verification System (TVS) for underground stations of Line 6 and Line 7 of Delhi Mass Rapid Transportation System Project Phase III. DMRC awarded two separate contracts for (i) offshore CIF supply of plant and equipment including design verification and engineering, and (ii) onshore supply and services including customs clearance, transportation to site, erection, installation, testing and commissioning of ESC and TVS including integrated testing. The payment for offshore supply was payable in foreign currency whereas for onshore activities contract, payment was to be made in Indian currency.

For AY 2014-15, Assessee filed Nil return as offshore supply of plant and equipment were made outside India, transfer of title passed outside India, and no taxable event occurred in India. The assessee had also filed an application before Authority for Advance Ruling (AAR) on 24.12.2013 on taxability of receipts from offshore supply of plant and equipment.

During the pendency of the application before AAR, the AO initiated assessment proceedings under section 143(3). The AO completed the assessment accepting the income returned by the assessee. However, after the completion of the assessment, the Commissioner of Income Tax ('CIT') in

exercise of the powers conferred under Section 263 passed an order setting aside the assessment, holding that the assessment order is erroneous and prejudicial to the interest of the Revenue due to lack of proper inquiry by the Assessing Officer, and issued directions to the AO to make proper enquiries.

The CIT held the assessment order as erroneous and prejudicial due to lack of examination of the following issues:

(i) taxability of receipts from offshore supply treating the contract for offshore onshore supply as a composite contract;
(ii) existence of PE in India and the role and involvement of PE in offshore supply of Plant/ equipment;
(iii) taxability of Surety Commission;
(iv) TP adjustment with respect to transaction with Indian subsidiary and
(v) Difference in the amount offered to tax as FTS by the assessee and actual receipt as disclosed in the Financial Statements of Samsung India.

Before the ITAT, the assessee submitted that the material and equipment were supplied to DMRC from outside India and the sale consideration was paid to the assessee outside India in foreign currency. As the sale transaction had completed outside the territory of India, the income was not taxable in India. Further, the contractee entered into two separate and distinct contracts, one for offshore supply and the second one for onshore services, which cannot be clubbed together to consider a single contract. It was further submitted that the scope of work under both contracts was well defined and had to be performed by the concerned entities. Therefore, the offshore supply contract had no link with the contract for onshore services, supply, installation, commissioning etc.

It was also submitted that the AO conducted necessary inquiry with regard to the nature and character of receipts from offshore supply of plants and equipment by calling for copies of contracts, invoices raised and various other details. The AO completed the assessment accepting the claim of the assessee and that in any case of the matter, taxability of amounts received towards offshore supply of goods/material is a highly debatable issue in view of the decision of the Hon'ble Supreme Court in case of Ishikawajma-Harima Heavy Industries Pvt. Ltd. [288 ITR 408 (S.C.) AIR [2007] 929].As such, keeping in view the ratio laid down by the Hon'ble Supreme Court, the view taken by the AO can be considered to be a plausible view. Regarding the issue relating to PE, it was submitted that the assessee had clarified the position in course of assessment proceedings. Once it is established that there is no PE, the offshore supply cannot be linked to any PE.

In relation to the Surety commission amounting to Rs. 4,04,15,466 the assessee very clearly and categorically submitted that the said amount was reported in Form 3CEB as corporate guarantee and offered to tax in return. As such, the allegation of the revisionary authority on the issue is contrary to facts on record.

Apropos whether the transaction with related parties are subject to TP adjustment, it was submitted that all the transactions with AEs have been reported in Form 3CEB and there is no transaction with M/s. Samsung C & T Corporation India Pvt. Ltd during the year.

As regards the allegation of the revisionary authority that Indian subsidiary has been paying salary to the personnel of the assessee based in India, the assessee submitted that this issue was never put to the assessee either in the show cause notice or in course of hearing.

Regarding the difference in the receipts offered to tax as FTS and the actual FTS received by the assesse as per the information available in the financials of the subsidiary, the issue was never confronted to the assessee either in the show cause notice issued under Section 263 of the Act or in course of the revisionary proceedings.

The ITAT held as under:

(i) In respect to offshore supply, the ITAT observed that there is no dispute that the goods were supplied from outside India and the transfer of title over the goods passed in favour of DMRC outside India and the payments for offshore supply were made in foreign currency in Korea. Copies of invoices, bill of lading and bill of entry demonstrate that goods have been consigned directly to DMRC from Korea.

While completing the assessment the AO did not tax the receipts from offshore supply as the issue was pending before the AAR and also by relying on the decision of SC in case of Ishikawajma-Harima Heavy Industries Pvt. Ltd. 288 ITR 408 (S.C) AIR [2007] 929. Also, the AO made detailed enquiry by calling for the contract, invoices, the nature of work executed under the contract, details of AEs, details of work executed by AEs before passing the order. Therefore, CIT's allegation that Revenue has not examined the issue, is not borne out from the facts and material on record. Further, in any case, whether the receipts from offshore supply contract are taxable in India or contracts are in the nature of composite contract or whether such receipts are linked to the PE are highly debatable issues which cannot be considered under revisionary proceedings.

(ii) With respect to constitution of PE, it was held that CIT made a vague allegation that the assesse's project office in India constituted its PE, without demonstrating how it fits into the definition of PE as per the treaty. Further, unless the offshore supplies made are with active involvement of the PE, profit in relation to such contract cannot be attributed to the PE. Therefore, PE cannot be established merely on conjecture, surmises and suspicion.

(iii) With respect to taxability of surety commission, the ITAT observed that the assessee had offered the commission to tax.

(iv) Regarding non-examination of transaction with Indian Subsidiary from the point of view of transfer pricing, it was observed that in the year under consideration, the assessee had reported the transaction with Indian AEs in Form 3CEB. In said report, the assessee has claimed the transaction to be at arm's length. Learned CIT has not demonstrated even remotely how the transactions are not at arm's length. As such, the observations of CIT are in the nature of roving and fishing inquiry without examining the facts and material on record.

(v) With respect to allegation of learned CIT that there is difference in the quantum of FTS offered to tax by the assessee and actually received and further that the Indian subsidiary M/s. Samsung C & T India Pvt. Ltd. was paying salary to the personnel of the assessee based in India, it was observed by ITAT that these allegations were neither made in the first show cause notice issued under Section 263 of the Act nor they were part of subsequent notices issued by the learned CIT. Though, learned CIT is

empowered to consider fresh issues which are not there in the show cause notice, however, it is trite law that CIT has to issue fresh show cause notice to the Assessee confronting the fresh issues on which the revisionary authority seeks to revise the assessment order which was not the case in the present appeal.

The ITAT further stated that the learned CIT being conscious of the fact that a proceeding is pending before AAR, should not have initiated proceedings under section 263 as two parallel proceedings on the same issue, cannot be initiated at a given point of time. Thus, the ITAT concluded that the assessment order passed cannot be held to be erroneous and prejudicial to the interest of the Revenue in the given facts and circumstances of the case. Therefore, the impugned order passed under section 263 of the Act was set aside and the assessment order was restored.

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Income from sale of shares, if in the nature of business income, is to be considered for computing deduction u/s 80HHC, whereas interest on surplus funds is to be considered as income from 'other sources'

Magnum International Trading Company (P.) Ltd. [2023] 149 taxmann.com 329 (SC)

The Supreme Court has held that the income from sale of shares shall be treated as business income and income from interest on surplus funds as income from other sources, while computing the deduction under Section 80HHC of the Act.

The issue relates to Section 80HHC of the Act which provides for deduction in respect of profits retained for export business. In order to arrive at the quantum of deduction, provisions of Section 80HHC prescribe a formula for computing profits of the business. The Finance (No. 2) Act, 1991 brought an amendment to the provisions of Section 80HHC and the prescribed formula was changed. The Supreme Court of India, while deciding the matter in the case of P.R. Prabhakar v. CIT, Coimbatore, held that the above amendment is not applicable to the earlier years.

The instant case related to appeals filed for Assessment Years 1989-90 to 1991-92. The High Court of Delhi decided the appeal against the Assessee by the amended Section 80HHC retrospectively. Following the rule of law laid down in the case of P.R. Prabhakar v. CIT, Coimbatore, the Supreme Court held that the judgement of the High Court of Delhi in the case of Assessee is unsustainable outrightly as same is based on the amendment made to the provisions of Section 80HHC. Nevertheless, the Supreme Court proceeded to decide the issue on merits as well.

In this case, the Assessee had earned income from sale of shares, as well as interest income from depositing the surplus business funds with bank or otherwise. While computing the deduction under Section 80HHC, the Assessing officer ('AO') had excluded both, income from sale of shares and interest income, from business income of the Assessee. The AO though held that the income from sale of shares is a business income.

The Apex Court observed that the AO has

put aside his own finding recorded at one place of the assessment order stating that the income from sale of shares shall be treated as business income instead of income from Capital Gains. However, for the purpose of computing the deduction under Section 80HHC, the AO conveniently excluded the income from sale of shares from business profits/ turnover of the Assessee. The Supreme Court thus accepted the stand of the Assessee that income from sale of shares should be treated as 'income from business' as well as part of total turnover of the business for computation of deduction under Section 80HHC(3)(b) of the Act.

Regarding interest income earned by the Assessee, the decision of the AO was reversed at the first appellate stage based on the premise that the surplus business funds are of the nature of transitory surplus funds and utilization of the same for earning interest income cannot change its character of business income. The Supreme Court did not concur with this view and clearly laid down that the surplus funds, when deposited in a bank or otherwise to earn interest, are not taxable under the head 'income from business', but under the head 'income from other sources'. This income does not have direct nexus nor is it earned by way of business activity.

In view of the above, the Apex Court held that the interest income was to be excluded from business income while computing the deduction under Section 80HHC, whereas income from sale of shares shall be considered as part of business income of the Assessee.

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Loss incurred on confiscation of smuggled silver bars is not allowable as a deduction

CIT v. Prakash Chand Lunia (D) Thr. Lrs. & Anr.[TS-206-SC-2023 (SC)]

Recently, the Supreme Court has held that loss incurred on confiscation of smuggled silver bars cannot be claimed as a deduction under Section 37(1) of the Income-tax Act regardless of the nature of business of the Appellant.

Section 37(1) of the Income-tax Act is the residuary provision for admissibility of expenses. Under the said provision, any expenditure incurred for any purpose which is an offence or prohibited by law shall not be allowed as a deduction in computing income under head 'business or profession'.

In facts of the case, a search was conducted on the premises of the Appellant and slabs of silver were recovered and confiscated. The tax officer held that the Appellant could not explain the nature and source of such silver acquired and accordingly, an addition was made to Appellant's total income. Subsequently, Commissioner (Appeals) and Tax Tribunal upheld the aforesaid action of the tax officer. Although, the Rajasthan High Court upheld the addition made by the tax officer, it did allow loss on confiscation of silver bars to the Appellant.

On appeal by the tax authorities before Supreme Court, the Court denied deduction of aforesaid confiscation loss to the Appellant and *inter-alia*, made the following observations:

1. Any loss incurred by way of expenditure towards an offence or prohibition in law is not deductible under Section 37(1) as such loss is not incidental to the business being carried on. Further, such a loss

shall not be allowed irrespective of the nature of business (i.e., legitimate, or illegitimate) being carried on by the taxpayer.

2. For claiming deduction under Section 37(1), the word 'any expenditure' takes within its sweep 'loss' occasioned in the course of business as well.

3. The Court deviated from its older decision in the case of CIT v. Piara Singh [(124 ITR 41) (SC)] by contending that said decision is based on a prior law which did not incorporate Section 37(1) provisions.

In view of the aforesaid, the Supreme Court denied deduction of loss on confiscation of smuggled silver bars to the Appellant.

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External Development Charges (EDC) paid to Haryana Urban Development Authority are not in nature of Rent and therefore TDS under section 194-I of the Act is not applicable

In a recent Judgement, in a batch of appeals, the High court of Delhi has held that that the order of the Assessing officer (AO) contending that EDC paid to Development Authority are in nature of Rent and TDS under section 194-I (TDS on payment of Rent) of the Act should be withheld on such payments is fundamentally flawed and is liable to be set aside.

The Petitioner (in the lead case), a company engaged in business of developing real estate, had entered into an agreement with State Government of Haryana for setting up an IT park and Group Housing Colony. Under said agreement, it paid EDC to Haryana Urban Development Authority (HUDA) as fee for developed urban infrastructure.

The AO issued show cause notice to the petitioner for treating it as an 'assessee in default' in respect of TDS deductible in terms of Sections 194C (TDS on payment to contactors) /194J (TDS on Fess for professional or technical services), of the Act on the amount of EDC paid to HUDA.

The petitioner responded to the said show cause notice contending that since said payments were in the nature of charges paid to State Government of Haryana, no TDS was to be deducted. The EDC were paid pursuant to the statutory obligation and that the payment of EDC was one of the conditions for obtaining license for developing of land. The petitioner also referred to various other provisions of the Act relating to TDS and submitted that none of the sections of the Act were applicable. The petitioner specifically submitted that section 194C/ 194J are not applicable as there is no contractual obligation to use the services of the other party to carry on any development work on behalf of the developer.

The AO though did not mention that sections 194C/194J of the Act were inapplicable, however held that EDC were in nature of rent and therefore, TDS was liable to be deducted under section 194-I of the Act.

During the writ proceedings before the High Court, the Revenue admitted that the AO had erroneously mentioned that TDS was required to be deducted under section 194-I instead of section 194C on payment of EDC. The Revenue contended that since the AO had jurisdiction to determine whether TDS was payable or not, the order should be set aside, and matter be remanded back to the

AO. The Revenue contended that merely mentioning an incorrect provision is a curable defect and it did not affect substratum of the order.

The High Court held that the nature of EDC payment was one of the major issues that was required to be addressed by the AO. The AO had concluded that the same was 'rent' as it was in nature of an arrangement to use land. Therefore, it was not open for the Revenue to now contend that EDC charges are payment made to a contractor under a contract and not 'rent' under an arrangement to use land.

The High court also referred to the decision of the Coordinate Bench in BPTP Ltd. v. Principal Commissioner of Income Tax, (Central)-III, wherein the High Court rejected the reassessment for non-deduction of TDS on EDC payment.

The High Court held that the determination of the nature of payment is vital for ascertaining whether there was any obligation on the part of the petitioner to deduct and deposit TDS on EDC. The Revenue appears to be approaching the issue from quite the reverse direction; it has for an inexplicable reason, concluded that assessee ought to deduct TDS from EDC and now seeks to find provisions of law to sustain the said conclusion. Thus, the High Court set aside the order passed by the AO that held the petitioners as 'assessee in default' for non-deduction of TDS.

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CORPORATE LAW

CORPORATE LAW COMPLIANCE

The Companies (Removal of Names of Companies from the Register of Companies) Amendment Rules, 2023

The Ministry of Corporate Affairs (MCA), vide its notification dated March 17, 2023, has established a Centre for Processing Accelerated Corporate Exit [C-PACE] with effect from April 01, 2023, in order to expedite the process of Corporate Exit under the Companies Act, 2013.

In line with the above notification, the MCA, vide Notification dated April 17, 2023, has made amendments to the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 [hereinafter referred to as "the rules"] by notifying Companies (Removal of Names of Companies from the Register of Companies) Amendment Rules, 2023, [hereinafter referred to as "the amendment rules"]. These amendment rules have come into force with effect from May 01, 2023.

The MCA has made further amendments to the said rules vide Notification dated May 10, 2023. This Notification has come into force with effect from May 10, 2023.

Brief details of these two amendments are mentioned below:

Amendments brought out by the Notification dated April 17, 2023:

a) As per the existing rules, the application for removal of name of a company was required to be made with the concerned Registrar of Companies. However, as per the amendment rules, such an

application now needs to be made to the Registrar, C-PACE.

b) Also, before filing of the application, the Company was required to file its overdue returns, up to the end of the financial year in which it ceased to carry of the business operations.

This condition was omitted in the amendment rules.

c) Further, a new sub-rule (3A) has been inserted in the amendment rules, which provides that the Registrar C-PACE shall be the Registrar of Companies for the purposes of exercising functional jurisdiction of processing and disposal of applications made in Form STK-2 and all matters related thereto under Section 248, having territorial jurisdiction all over India.

d) Consequent upon the above changes, the amendment rules have also substituted existing Form STK-2 [Company Name removal application], STK-6 [Public Notice by Registrar] and STK-7 [Notice of striking off and dissolution] with the new forms.

Amendments brought out by the Notification dated May, 10, 2023:

a) By these amendment Rules, the proviso to sub-rule (1) of rule 4 has been restored. Accordingly, a Company shall not file an application unless it has filed overdue financial statements and annual returns as before.

b) These amendment rules have restored the following two provisions under sub-rule (1) of rule 4:

"Provided further that in case a company intends to file the application after the action under sub-section (1) of section 248 has been initiated by the Registrar, it shall file all pending financial statements under section 137 and all pending annual returns under section 92, before filing the application.

Provided also that once notice under sub-section (5) of section 248 has been issued by the Registrar for publication pursuant to the action initiated under sub-section (1) of section 248, a company shall not be allowed to file the application under this sub-rule."

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Changes in IND-AS

MCA notified Companies (Indian Accounting Standards) Amendment Rules, 2023, effective from April 01, 2023, vide notification dated March 31, 2023 to further amend the Companies (Indian Accounting Standards) Rules, 2015 amending in respect of Ind ASs 1,8,12,34.101,102,103,107,109 and 115.The major amendments relate to Ind AS 1 ,8 and 12

Ind AS 1: Presentation of Financial Statements: - There is a shift from disclosure of erstwhile "significant accounting policies" in the notes to the financial statements to "material accounting policy information"; requiring companies to reframe their accounting policies to make them more "entity specific".

Companies will now be required to include

notes comprising material accounting policy information and other explanatory information, as part of the financial statements.

The main objective of this change is to –

- identify and disclose all accounting policies that provide material information to primary users of financial statements and

- identify immaterial accounting policies and eliminate them from their financial statements.

As per **para 117B** of Ind AS 1, Accounting policy information is expected to be material if users of an entity's financial statements would need it to understand other material information in the financial statements. For example, an entity is likely to consider accounting policy information material to its financial statements if that information relates to material transactions, other events or conditions and:

a) the entity changed its accounting policy during the reporting period and this change resulted in a material change to the information in the financial statements;

b) the entity chose the accounting policy from one or more options permitted by Ind ASs;

c) the accounting policy was developed in accordance with Ind AS 8 in the absence of an Ind AS that specifically applies;

d) the accounting policy relates to an area for which an entity is required to make significant judgements or assumptions in applying an accounting policy, and the entity discloses those judgements or assumptions in accordance with paragraphs or

e) the accounting required for them is complex and users of the entity's financial statements would otherwise not understand those material transactions, other events or conditions— such a situation could arise if an entity applies more than one Ind AS to a class of material transactions.

Paragraph 117B elucidates what accounting policy could be regarded as material accounting policy. Thus, the intention of the standard-setters seems to be that corporates must disclose accounting policies that are relevant to their company and even if they are relevant, how they have applied them in a specific situation. For example, if an accounting standard allows alternatives, then one should disclose which alternative has been adopted by the company.

Ind AS 8, Accounting Policies, Changes in Accounting Estimates and Errors: Definition of 'change in accounting estimate' replaced with the definition of 'accounting estimates' by defining Accounting estimates as under:

Accounting estimates are monetary amounts in financial statements that are subject to measurement uncertainty."

Examples of accounting estimates include:

a) a loss allowance for expected credit losses, applying Ind AS 109, Financial Instruments;

b) the net realisable value of an item of inventory, applying Ind AS 2 Inventories;

c) the fair value of an asset or liability, applying Ind AS 113, Fair Value Measurement;

d) the depreciation expense for an item of property, plant and equipment, applying Ind AS 16; and

e) a provision for warranty obligations, applying Ind AS 37, Provisions, Contingent Liabilities and Contingent Assets.

As per para 34A The effects on an accounting estimate of a change in an input or a change in a measurement technique are changes in accounting estimates unless they result from the correction of prior period errors.";

As per para 38 A change in an accounting estimate may affect only the current period's profit or loss, or the profit or loss of both the current period and future periods. For example, a change in a loss allowance for expected credit losses affects only the current period's profit or loss and therefore is recognised in the current period. However, a change in the estimated useful life of, or the expected pattern of consumption of the future economic benefits embodied in, a depreciable asset affects depreciation expense for the current period and for each future period during the asset's remaining useful life. In both cases, the effect of the change relating to the current period is recognised as income or expense in the current period. The effect, if any, on future periods is recognised as income or expense in those future periods.";

Ind AS 12, Income Taxes:

Amendments have been made clarifying that in cases of transactions where equal amounts of assets and liabilities are recognised on initial recognition, the initial recognition exemption provided in para 15 and 24 does not apply. This has been done by including an exemption on initial recognition that "at the time of the transaction, does not give rise to equal taxable and deductible temporary differences" .Thus where equal amounts of deductible and temporary differences arise the initial recognition exemption will not apply

As per amended para 22A, A transaction that is not a business combination may lead to the initial recognition of an asset and a liability and, at the time of the transaction, affect neither accounting profit nor taxable profit. For example, at the commencement date of a lease, a lessee typically recognises a lease liability and the corresponding amount as part of the cost of a right-of-use asset. Depending on the applicable tax law, equal taxable and deductible temporary differences may arise on initial recognition of the asset and liability in such a transaction. Similar is the case with decommissioning, restoration and similar liabilities and the corresponding amounts recognised as part of the cost of the related asset The exemption provided by paragraphs 15 and 24 does not apply to such temporary differences and an entity recognises any resulting deferred tax liability and asset.";

If a company has not yet recognised deferred tax asset and deferred tax liability on right-of-use assets and lease liabilities or has recognised deferred tax asset or deferred tax liability on net basis, that company shall have to recognise deferred tax assets and deferred tax liabilities on gross basis based on the carrying amount of right-of-use assets and lease liabilities existing at the beginning of April 01, 2022 (opening balance of retained earnings). Similar is the case with decommissioning, restoration and similar liabilities and the corresponding amounts recognised as part of the cost of the related asset.

Consequential amendments

Ind AS 101, First-time Adoption of Indian Accounting Standards:

Deferred tax related to leases and decommissioning, restoration and similar

liabilities' to the list of exceptions from retrospective application of other Ind ASs. This is pursuant to change in Ind AS 12.

Amendments to Ind AS 107, Financial Instruments: Disclosures

Amendments to Ind AS 107 are consequent to the amendment in Ind AS 1 related to change from 'significant accounting policies' to 'material accounting policy information. The phrase Significant accounting policies has been replaced with material accounting policy information'.

Amendments to Ind AS 34, Interim Financial Reporting:

Amendment to Ind AS 34 is consequent to the amendment in Ind AS 1 related to change from 'significant accounting policies' to 'material accounting policy information'. The phrase Significant accounting policies has been replaced with material accounting policy information'.

Other minor amendments:

Other amendments made to Ind AS 102, Share-based Payments, Ind AS 103, Business Combinations, Ind AS 109 Financial Instruments and AS 115 (Revenue from Contracts with customers are minor cosmetic changes like para numbers, correction of some earlier typo errors in past etc and are not significant.

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