# Legal Decisions[1]


**Income-tax Act**

**LD/62/36**

*Eruditus Education (P.) Ltd., In re*
*September 20, 2013 (AAR)*

**Section 9 read with Section 90 of the Income-tax Act, 1961 read with Article 12.5 of the Agreement for avoidance of the Double Taxation and prevention of fiscal evasion between India and Singapore - Income - Deemed to accrue or arise in India**

*Where applicant entered into a Programme Partnership Agreement with a Singapore company for providing various management education programmes by way of conducting teaching intervention, while applicant shall assist in the marketing, organising, managing and facilitating a conduct of the programme in India, payment made to Singapore company for various services will not be Fees for Technical Services*

The applicant entered into a Programme Partnership Agreement with Ms. INSEAD, a tax resident company at Singapore which is in the business of providing various management education programmes globally. As per the Programme Partnership Agreement INSEAD is obliged to conduct teaching intervention as per the agreed terms while Eruditus, the applicant, shall assist in the marketing, organising, managing and facilitating a conduct of the programme.

The applicant shall compensate INSEAD for the cost involved in teaching the entire programme and are the incidental expenses.

The applicant seeks ruling from the Authority for Advance Rulings on the following questions:-

> *"Whether the payments made by the applicant to INSEAD for various services under the terms of the programme partnership agreement is in the nature of "Fees for Technical Services" within the meaning of the term in Article 12 of the Convention between the Govt. of Republic of India and the Govt. of Republic of Singapore for the Avoidance of Double Taxation and the Convention of fiscal evasion with respect to taxes on income and/or under the provisions of Section 9(1)(vii) of the Income tax Act, 1961?"*

The Authority for Advance Rulings held as follows:

The services rendered involve expertise in or possession of special skill or knowledge that are technical in nature. The payment for the services falls under the broad definition "Fees for Technical Services" both under the Indian Income-tax Act and under the India-Singapore Tax Treaty. However, the case of the applicant will fall in the exclusive clause of Article 12.5(c) of the Agreement for avoidance of the Double Taxation and prevention of fiscal evasion between India and Singapore (India-Singapore Tax Treaty).

[1] *Readers are invited to send their comments on the selection of cases and their utility at eboard@icai.in.*

In this case there is no dispute about the teaching conducted by INSEAD for the applicant. There is also no dispute about the status of INSEAD being an education institution.

As per Section 90(2) of the Indian Income-tax Act, 1961 where the Central Government has entered into an agreement with the Govt. of any country outside India or specific territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to the assessee. It is a settled position in law now that tax treaty shall override the provision of the Act to the extent the same is beneficial to the applicant. In this case the applicant opted for the provisions of the Tax Treaty as it is found more beneficial to it and we do not find any reason for not allowing it. The payments made by the applicant to INSEAD for services rendered under the terms of Agreement are not in the nature of "Fees for Technical Services" as it falls under the exclusive clause of Article 12.5(c) of the Treaty though the payment for the service may be fees for technical services under the provision of Section 9(1)(vii) of the Indian Income Tax Act, 1961.

**LD/62/37**

***CIT-II, New Delhi***

***vs.***

***Mira Exim Ltd.***

***October 3, 2014 (DEL)***

***[Assessment Years 2005-06 to 2008-09]***

## Section 32 read with Section 43 of the Income-tax Act, 1961 - Depreciation

*Even where imported motor cars were originally acquired by the merged entities between 1st March, 1975 and 31st March, 2001 while scheme of arrangement and merger was sanctioned by the High Court after 1st April, 2001, transferee-company was entitled to claim depreciation*

Under a scheme of arrangement and merger sanctioned by the Delhi High Court under Section 394 of the Companies Act, 1956 by order dated 5th October, 2004 three proprietary concerns of the directors had merged with the respondent-assessee. As per the said scheme, sanctioned by the High Court, upon merger, the assets and affects owned by the three concerns became assets and affects owned by the respondent company. Share capital was issued to the proprietors, as consideration for transfer of the said assets and business of the three concerns. Imported motor cars were originally acquired by the merged entities between 1st March, 1975 and 31st March, 2001, but upon and in view of the scheme sanctioned by the Delhi High Court vide order dated 5th October, 2004, the said cars became the properties of the respondent-assessee with effect from 1st April, 2004.

The question raised is whether the respondent-assessee is entitled to claim depreciation as the imported cars were acquired by them after 1st April, 2001.

The High Court of Delhi held as follows:

*Explanation* 7 to section 43(1) refers to acquisition of an asset under the scheme of amalgamation. This indicates that the Legislature has treated amalgamation as transfer and, therefore, had specifically thought it appropriate to provide how actual cost of the capital asset should be computed. Similarly, under sub-section (6) to Section 43 by defining the expression "written down value" reference is made to the written down value in the block of assets of the amalgamating company transferred to the amalgamated company. The said provision also uses the term "transferee company and transferor company" clearly indicating that in cases of amalgamation there is transfer of assets. Thus, we do not agree with the findings recorded by the tribunal that it is not a case of amalgamation; or merger and amalgamation are different or it is a case of purchase of business as a going concern and, therefore, different principles apply. In the present case, there was transfer, as merger or amalgamation results in transfer.

In case of merger, there is complete blending of the merged undertaking into the other company, but this does result in the transfer of the assets from the merged undertaking. Assets are acquired by the other undertaking. Upon merger, the earlier concern or undertaking loses its identity and the ownership in the asset.

*Explanation* 2 to Section 43(1) refers to acquisition of asset by gift or inheritance. Thus, acquisition of asset may be by way of sale for a price i.e. money, in exchange, or by way of several other modes including gift or inheritance. Merger and acquisition can be modes of acquisition of an asset.

In terms of the order passed under Section 394 of the Companies Act, 1956, the respondent company acquired the imported motor cars. The cars were not acquired and the respondent assessee was not owner of the motor cars prior to the said date. On merger

of the three concerns with the respondent assessee, shares were issued as consideration to the proprietors of the business concerns. The shares issued were consideration for the transfer of the assets. It is immaterial, according to us, whether there was transfer of an undertaking, including the block of assets, which also included the imported motor cars.

It is clear that the respondent assessee had acquired the asset i.e. imported cars after the cutoff date *i.e.* 1st April, 2001 and, therefore, is entitled to depreciation and the bar/prohibition in clause (a) to proviso to Section 32(1) would not apply.

**LD/62/38**
***CIT, Central Circle***
***vs.***
***Dynamic Enterprises***
***September 16, 2013 (KAR)(FB)***
***[Assessment Year 1995-1996]***

**Section 45 read with Section 2(47) of the Income-tax Act, 1961 read with Section 14 of Indian Partnership Act, 1932 - Capital gains - Chargeable as**

*When at time of retirement of a partner from a firm, retiring partner takes only money towards the value of his share and there is no distribution of capital asset/assets among the partners, there is no transfer of a capital asset and consequently, no profits or gains is taxable in hands of firm under Section 45(4)*

A Division Bench of this Court felt that there is a conflict between the proposition of law laid down by this court in the case of *Commissioner of Income Tax vs. Mangalore Ganesh Beedi Works, (2004) 265 ITR 658 and in the case of Commissioner of Income Tax And Another vs. Gurunath Talkies, (2010) 328 ITR 59*.

The substantial questions of law referred for consideration are as under: *"When a retiring partner takes only the money towards the value of his share, whether the firm should be made liable to pay capital gains tax even when there is no distribution of capital asset/ assets among the partners under Section 45(4)?*

The High Court of Karnataka held as follows:

The Income Tax Act recognises the firm as a distinct assessable legal entity apart from its partners. Sub-sections (3) and (4) of Section 45 were introduced by Finance Act, 1987, which came into effect from 01.04.1988. In sub-section (3) what is sought to be taxed is the profits or gains arising from the transfer of a capital asset by a person to a firm or other association of persons or body of individuals. After such transfer, he is or becomes a partner or member, by way of capital contribution or otherwise. Then the said capital contribution shall be chargeable to tax as his income of the previous year in which such transfer takes place and, for the purposes of Section 48, the amount recorded in the books of account of the firm, association or body as the value of the capital asset shall be deemed to be the full value of the consideration received or accruing as a result of the transfer

of the capital asset. When a partner brings in his personal asset into a partnership firm as his contribution to its capital, an asset which was originally exclusively belonging to him, becomes the trading asset of the firm, in which all partners acquire interest in proportion to their respective share in the firm. His right during the subsistence of the partnership is to get his share of profits from time to time as agreed upon among the partners. On dissolution of the firm or on retirement from the firm to get the value of his share in the net partnership asset as on the date of dissolution or retirement. Therefore, this is a case of a partner bringing capital asset to a partnership firm as his capital contribution.

Sub-section (4) of Section 45 deals with a distribution of capital assets on the dissolution of a firm or other association of persons or body of individuals or otherwise. If in the course of such distribution of capital asset there is a transfer of a capital asset by the firm in favour of a person and it results in profits or gains to the firm, then the said profits or gains shall be chargeable to tax as income of the firm and again for computing such income, Section 48 is attracted. In other words, in the process of dissolution of a firm, if a capital asset is transferred to a partner which results in profits or gains, then that income is chargeable at the hands of the firm under this provision. In order to attract sub-section (4) of Section 45, the condition precedent is,

(1) There should be a distribution of capital assets of a firm;
(2) Such distribution should result in transfer of a capital asset by firm in favour of the partner; and
(3) On account of the transfer there should be a profit or gain derived by the firm.
(4) Such distribution should be on dissolution of the firm or otherwise.

Therefore, in order to attract Section 45(4) of the Act, the capital asset of the firm should be transferred in favour of a partner, resulting in firm ceasing to have any interest in the capital asset transferred and the partners should acquire exclusive interest in the capital asset. In other words, the interest the firm has in the capital asset should be extinguished and the partners in whose favour the transfer is made should acquire that interest. Then only the profits or gains arising from such transfer are liable to tax under Section 45(4) of the Act.

In the instant case, the partnership firm had purchased the property under a registered sale deed in the name of the firm. The property did not stand in the name of any individual partners. No individual partners brought that capital asset as capital contribution into the firm. Five partners brought in cash by way of capital when the firm was reconstituted on 28.04.1993. Nearly a year thereafter on 01.04.1994 by way of retirement, the erstwhile three partners took their share in the partnership asset and went out of the partnership. After the retirement of three partners, the partnership continued to exist and the business was carried on by the remaining five partners.

There was no dissolution of the firm or at any rate there was no distribution of capital asset on 01.04.1994 when three partners retired from the partnership firm. What was given to the retiring partners is cash representing the value of their share in the partnership. No capital asset was transferred on the date of retirement under the deed of retirement deed dated 01.04.1994. In the absence of distribution of capital asset and in the absence of transfer of capital asset in favour of the retiring partners, no profit or gain arose in the hands of the partnership firm. Therefore, the question of the firm being assessed under Section 45(4) and charging them tax for the profits or gains which did not accrue to them would not arise.

The property belongs to the partnership firm. It did not belong to the partners. The partners only had a share in the partnership asset. When the five partners came into the partnership and brought cash by way of capital contribution to the extent of their contribution, they were entitled to the proportionate share in the interest in the partnership firm. When the retiring partners took cash and retired, they were not relinquishing their interest in the immovable property. What they relinquished is their share in the partnership. Therefore, there is no transfer of a capital asset, as such, no capital gains or profit arises in the facts of this case. In that view of the matter, Section 45(4) has no application to the facts of this case.

In the instant case, the partnership firm did not transfer any right in the capital asset in favour of the retiring partner. The partnership firm did not cease to hold the property and consequently, its right to the property is not extinguished. Conversely, the retiring partner did not acquire any right in the property as no property was transferred in their favour. The Division Bench in *Gurunath's case (supra)* did not appreciate this distinguishing factor and by wrong application of the law laid down by the Bombay High

Court in *CIT Vs. A.N. Naik Associate, (2004) 265 ITR 346* held the assessee in that case is also liable to pay capital gains tax under Section 45(4). Therefore, the said judgment (Gurunath Talkies) does not lay down the correct law.

**LD/62/39**

***Cairn UK Holdings Ltd.***
***vs.***
***Director of Income-tax***
***October 7, 2013 (DEL)***
***[Assessment Year 2010-2011]***

**Section 112 read with Section 48 of the Income-tax Act, 1961 - Capital gains - Tax on long term capital gains**

*Tax payable on long term capital gains arising to a foreign company on sale of equity shares held by it in an Indian company will be 10% of amount of capital gains as per proviso to Section 112(1)*

Petitioner CUHL, a Scottish company, transferred 4,36,00,000 equity shares of ₹10 each of an Indian company CIL to a Malaysian company PCIL for consideration of US$ 241,426,379. This transaction dated 12th October, 2009, pursuant to an agreement dated 14th October, 2009, was an off market transaction i.e. not through a stock exchange. The transaction resulted in long-term capital gain of US$ 85,584,251 in the hands of the petitioner, after applying the benefit under first proviso to Section 48. The question raised as to whether the tax payable on long term capital gains arisen to petitioner CUHL on sale of equity shares of CIL will be 10% of the amount of capital gains as per proviso to Section 112(1).

The High Court of Delhi held as follows:

A non-resident assessee is entitled to benefit of the proviso to Section 112(1). The proviso to Section 112(1) does not state that an assessee, who avails benefits of the first proviso to Section 48, is not entitled to benefit of lower rate of tax @ 10%. The said benefit cannot be denied because the second proviso to Section 48 is not applicable. The stipulation for taking advantage of the proviso to Section 112(1) is that the aggregate of long-term capital gains to the extent it exceeds 10% of the amount of capital gains, should be before giving effect to the provisions of second proviso to Section 48. Inflation indexation shall be

ignored. In case the Legislature wanted to deny the said advantage/benefit where the assessee had taken benefit of the first proviso to Section 48, it was easy and this would have been specifically stipulated, that an assessee, who takes advantage of neutralisation of exchange rate fluctuation under the first proviso to Section 48 would not be entitled to pay lower rate of tax @10%. Legislature had a far easier and simpler way to deny benefit of the proviso to Section 112(1) by using different words and phrases had thus been the intention. The legislature in fact did not intend to deny the said benefit.

Non-resident under the first proviso to Section 48 are entitled to neutralise exchange rate fluctuation for computing long-term capital gains, when the shares/derivatives were purchased utilising foreign currency. The second proviso is not applicable to non-residents covered by the first proviso and entitles an assessee to claim benefit of indexation while computing long-term capital gains. Thus, the second proviso to Section 48 has object of neutralizing the effect of inflation. Proviso to Section 112(1) is certainly not applicable in case where an assessee is entitled to benefit of indexation under the second proviso to Section 48. If an assessee does not take benefit of indexation under the second proviso of section 48, they are eligible for the lower rate of tax @ 10%. Otherwise, an assessee is liable to pay tax @ 20% after taking benefit of indexation. If an assessee covered by the first proviso to Section 48 is allowed benefit of the proviso to Section 112(1), two consequences flow: (i) a non-resident become entitled to two or double deductions. Firstly, under the first proviso to Section 48 and then benefit of lower rate of tax under the proviso to Section 112(1); and (ii) this interpretation would discriminate between the assessees covered by the first proviso and those covered by the second proviso to Section 48.

The argument of double benefit was not a taboo under law and protection against exchange rate fluctuation under the first proviso to Section 48 does not go against the concept of lower rate of tax. It has been further observed that enquiry to delve into legislative intent and purpose would be a hazardous guess.

First proviso to Section 48 is applicable when a non-resident had purchased an asset being a share or debenture with foreign currency, converted into Indian rupee. It stipulates that on transfer or sale of the said share or debenture the consideration received in Indian rupee should be reconverted into the same foreign currency. Sale and purchase of shares has to be in Indian rupee, the legal tender in India, but the foreign investor had brought in foreign currency and, therefore, logically and naturally for him, the gain should be computed in foreign currency. The said investor would like to convert the sale consideration received in Indian rupee into foreign currency. This would reflect the true gain or income earned. For a non-resident who has utilised/brought in foreign currency for purchase of shares or debentures in Indian rupee, inflation in India is immaterial and inconsequential. For him, the gain or loss is to be computed with reference to the foreign currency utilized for purchase and foreign currency available to him for repatriation after the sale. From the said assessee's view point and objective, he is most concerned with exchange rate fluctuation and his true and actual gain should take into account the exchange rate fluctuation. The second proviso is applicable to all others including non-residents, who are not covered by the first proviso and they are entitled to benefit of cost of indexation which neutralise inflation.

The first proviso to Section 48 ensures that a non-resident, who utilised his foreign currency, is taxed after taking into consideration the fluctuation in exchange rate. Indian rupee can and has in past appreciated against foreign currencies. In such cases, the long-term capital gains payable can increase. On the contrary we are not aware of occasions of deflation in India in last two decades and it would be incorrect to hold that the Legislature while enacting the second proviso had in mind or assumed that there would be deflation. The two provisos cannot be equated as granting same relief or benefit. They operate independently and have different purpose and objective.

In view of the above, it is difficult to state that benefits under the first proviso and the second proviso to Section 48 are identical or serve the same purpose.

There is some merit in the contention that if proviso to Section 112(1) is applied, then almost all assessees covered by the first proviso to Section 48 would be liable to pay tax @ 10% only and not @ 20% on long-term capital gains. This appears to be correct and a logical consequence of the proviso to Section 112(1), but this cannot be a ground to contextually read the proviso to Section 112(1) differently. The said proviso is applicable to listed securities or units or zero coupon bonds. Long-term capital gain is not payable on listed securities sold through stock

exchanges as STT is payable. First proviso to Section 48 is applicable on sale of shares or debentures in Indian company, whether or not the said shares or debentures are listed or not. Thus, proviso to Section 112(1) is more restrictive and will not necessarily apply in all cases covered by the first proviso to Section 48. Secondly, the proviso to Section 112(1) is not applicable to debentures. Nevertheless, the proviso to Section 112(1) is applicable to units and zero coupon bonds, which are not covered by the first proviso to section 48 of the Act. Second proviso to Section 48 is not applicable on transfer of long-term capital asset being bond, debenture other than the capital index bond. Zero coupon bonds are, however, specifically made eligible for benefit under the proviso to Section 112(1).

The purpose and object behind the proviso to Section 112(1) itself is somewhat debatable, except that the legislative intention was to tax long-term capital gain on listed shares, bonds and units @ 10%, without benefit of indexation under second proviso to Section 48 of the Act. Legislative policy and object is nothing more, and it is impermissible to read into the said provision an affirmative legislative intention on assumption and guess work and this would be beyond the acceptable principles of interpretation.

It is declared that the petitioner will be entitled to benefit of proviso to Section 112(1) on sale of equity shares in question.

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**LD/62/40**

***CIT, Gujarat***

***vs.***

***Gujarat Fluoro Chemicals***

***September 18, 2013 (SC)(FB)***

### Section 214 read wit Section 244A of the Income-tax Act, 1961 - Interest - Payable by Government

*No interest is payable by the Revenue to the assessee even if the aggregate of installments of Advance Tax or TDS paid exceeds the assessed tax*

The question which arose was, whether interest is payable by the Revenue to the assessee if the aggregate of installments of Advance Tax of TDS paid exceeds the assessed tax.

The Supreme Court of India held as follows:

In *Sandvik Asia Limited vs. Commissioner of Income Tax, (2006) 2 SCC 508*, the Supreme Court was

considering the issue whether an assessee who is made to wait for refund of interest for decades be compensated for the great prejudice caused to it due to the delay in its payment after the lapse of statutory period. In the facts of that case, this Court had come to the conclusion that there was an inordinate delay on the part of the Revenue in refunding certain amount which included the statutory interest and therefore, directed the Revenue to pay compensation for the same, and not an interest on interest.

In *Sandvik case (Supra)* the Supreme Court cannot be said to have directed the Revenue to pay interest on the statutory interest in case of delay in the payment. In other words, it cannot be interpretated that the Revenue is obliged to pay an interest on interest in the event of its failure to refund the interest payable within the statutory period.

Further the Legislature by the Act No. 4 of 1988 (*w.e.f.* 01.04.1989) has inserted Section 244A which provides for interest on refunds under various contingencies. Therefore, it is to be clarified that it is only that interest provided for under the statute which may be claimed by an assessee from the Revenue and no other interest on such statutory interest.

**LD/62/41**

***DIT-I, International Taxation***

***vs.***

***Alcatel Lucent USA, INC and Alcatel Lucent World Service INC***

***November 7, 2013 (DEL)***

***[Assessment Years 2004-05 to 2008-09]***

### Section 234B of the Income-tax Act, 1961 - Interest - For defaults in payment of Advance tax

*Even if a foreign company itself claimed that it did not have any taxable presence in India and, hence, no portion of its Indian business profits was taxable in India, it cannot escape its liability of interest subsequent to assessment of Indian income on the ground that the Indian payers ought to have deducted the tax*

The assessee-Alcatel Lucent USA, INC, is a tax-resident of USA and is part of the Alcatel Lucent Group. The Indian subsidiary provided marketing support services to the assessees. Based on the materials found during the survey, the assessing officer concluded that the assessee had a PE in India in terms of the Double Taxation Avoidance Agreement between India and US and was liable to tax in India on the income earned therein.

In response to the notice, the assessee filed returns of income for all the assessment years declaring "nil" income. In the returns, a note was appended, explaining why the assessee took the position that it was not liable to tax in India. It was submitted that the assessee-company was incorporated in USA. It was a tax resident of USA and entitled to be governed by the provisions of the Double Taxation Avoidance Agreement between India and USA (the DTAA). b) It did not have any office, premises or other place of business in India. During the year under consideration, the assessee had supplied certain goods and equipments to Indian customers engaged in telecom business. The sales of these goods were made from outside of India. The payments for the same were also received outside of India. In view of above, the Company did not have any taxable presence in India and hence no portion of its business profits was taxable in India.

The assessing officer however did not accept the assessee's stand and computed profit attributable to the PE in India. In addition to the aforesaid income, the assessing officer also directed that interest under Sections 234A, 234B and 234C would be charged. However, the CIT (Appeals) held that the assessee was not liable to pay any interest under Section 234B.

The High Court of Delhi held as follows:

The assessee claimed that the Indian payers ought to have deducted the tax irrespective of the fact that the assessee itself claimed the Indian income to be not taxable. It must be remembered that in the note appended to the return the assessee was quite categorical in denying its liability to be assessed in India. It relied on the double taxation avoidance agreement between India and USA and pointed out that there was no permanent establishment in India. It further stated that the telecom equipments were sold outside India and the payments were also received outside India and thus the assessee did not have any taxable presence in India so as to be liable for tax on its Indian income. If this was the stand of the assessee, it is not impermissible or unreasonable to visualise a situation where, the assessee would have represented to its Indian telecom dealers not to deduct tax from the remittances made to it. On the contrary it would be surprising if the assessee did not make any such representation; such a representation would only be consistent with the assessee's stand

regarding its tax liability in India. Moreover, no purpose would have been served by the assessee taking such a categorical stand regarding its tax liability in India and at the same time suffering tax deduction under Section 195(1). Therefore, even though there may not be any positive or direct evidence to show that the assessee did make a representation to its Indian telecom dealers not to deduct tax from the remittances, such a representation or informal communication of the request can be reasonably inferred or presumed. The Tribunal ought to have accorded due weightage to the strong possibility or probability of such a request having been made by the assessee to the Indian payers since otherwise the denial of its tax liability on its Indian income would have served little purpose for the assessee .

The Tribunal ought to have drawn the inference that the Indian payers did not deduct the tax under Section 195(1) because of the request made by the assessee, consistent with its stand that it was not liable to be taxed in India.

Taking a practical view of the matter, it is difficult to see how the Indian payers could have resisted the request which was made by the assessee to them not to deduct tax from the remittances. The Indian payers have to keep in mind the future business prospects and it was necessary for them to keep the assessee in good humour so that the business relationship remains profitable for them. They would have been in no position to resist the request. Moreover, since the sales were claimed to have been concluded outside India, again it would be a fair and reasonable inference to be drawn that the Indian dealers would have had an interface with the assessee in USA while concluding the sale contracts and on such an occasion it is normal for the parties to finalise all aspects touching on their relationship including the tax compliances. It should also be remembered that no reason whatsoever has been given by the assessee as to why it did not press its appeals before the CIT (Appeals) on the question of liability to tax on its Indian income.

Having denied its tax liability, it seems unfair on the part of the assessee to expect the Indian payers to deduct tax from the remittances. It is also open to the assessee to change its stand at the first appellate stage and submit to the assessment of the income.

When it does so, all consequences under the Act follow, including its liability to pay interest under Section 234B since it would not have paid any advance tax. Such liabilities would arise right from the time when the income was earned. Advance tax was introduced as a PAYE Scheme – "pay as you earn". It is not open to the assessee, after accepting the assessment at the first appellate stage to claim that the Indian payers ought to have deducted the tax irrespective of the fact that the assessee itself claimed the Indian income to be not taxable. An assessee who admits its tax liability right from the beginning to contend that it was the responsibility of the payers to deduct the tax and if they did not, even then the tax which ought to have been deducted by them should be set off against the assessee's advance tax liabilities.

It further seems inequitable that the assessee, who accepted the tax liability after initially denying it, should be permitted to shift the responsibility to the Indian payers for not deducting the tax at source from the remittances, after leading them to believe that no tax was deductible. The assessee must take responsibility for its *volte face*. Once liability to tax is accepted, all consequences follow; they cannot be avoided. After having accepted the liability to tax at the first appellate stage, it is unfair on the part of the assessee to invoke section 201 and point fingers at the Indian payers. The argument advanced by the learned counsel for the assessee that the Indian payers failed to deduct tax at their own risk seems to us to be only an argument of convenience or despair.

It is difficult to imagine that the Indian telecom equipment dealers of the assessee would have failed to deduct tax at source except on being prompted by the assessee. It may be true that the general rule is that equity has no place in the interpretation of tax laws. When the facts of a particular case justify it, it is open to the court to invoke the principles of equity even in the interpretation of tax laws. Tax laws and equity need not be sworn enemies at all times. The rule of strict interpretation may be relaxed where mischief can result because of the inconsistent or contradictory stands taken by the assessee or even the revenue. Moreover, interest is, inter alia, compensation for the use of the money. The assessee has had the use of the money, which would otherwise have been paid as advance tax, until it accepted the assessments at the first appellate stage. Where the revenue has been deprived of the use of the monies and thereby put to loss for no fault on its part and where the loss arose as a result of vacillating stands taken by the assessee, it is not expected of the assessee to shift the responsibility to the Indian payers. The assessee should take responsibility for its actions.

The present case is one where such considerations should prevail in the interpretation of section 234B; otherwise, it will not merely result in injustice but the purpose of the provision would not have been achieved.

For the aforesaid reasons the issue was to be decided against the assessee.

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**LD/62/42**

***UPS Worldwide Forwarding Inc***
***vs.***
***UPS Jetair Express (P.) Ltd.***
***September 30, 2013 (BOM)***
***[Assessment Year 2010-2011]***

### Section 264 read with Section 197 of the Income-tax Act, 1961 red with Article 27 of the DTAA between India and USA – Revision – Of Other Orders – Multi Agreement Procedure (MAP)

*Even when an Assessment Year for which a certificate as sought has expired, if the proceedings are under consideration of Competent Authorities under the MAP; the suspension of assessment and collection of taxes will take place, not only in respect of current taxation years but also for previous and future years*

The petitioner is a Company incorporated in USA. The petitioner pointed out that NIL Tax Withholding order/certificate were issued for earlier years and also its application to the Competent Authority to include Assessment Year 2010-11 in the pending MAP proceeding. In view of the above, it sought a direction from the Assistant Director of Income Tax (International Taxation) to the Indian

company not to deduct any tax in respect of any payment made to petitioner for Assessment Year 2010-11. The petitioner's application for NIL Tax Withholding certificate under Section 197 was rejected by Assistant Director of Income Tax (International Taxation). By the impugned order, the Director of Income Tax (International Taxation) had upheld the order passed by the Assistant Director of Income Tax (International Taxation).

The High Court of Bombay held as follows:

As is evident from Article 27 of the DTAA entered into between USA and India, a procedure for resolving a conflict between the DTAA and the tax regime in one of the Contracting States has been evolved and is known as Mutual Agreement Procedure i.e. MAP. If the tax payer in any one or both of the Contracting States considers the action of the one of the Contracting State would result in his being charged to tax not in accordance with the provisions of the convention, he may invoke the MAP proceeding (notwithstanding that a remedy is available under the domestic law of the State) by moving Competent Authority of the Contracting State of which he is a resident or national. By the aforesaid MAP proceeding, the competent authority of both the Contracting States would endeavour to resolve the conflict by mutual agreement.

Consequent to the above, the competent authorities in USA and India, exercising powers under MAP procedure realised that during the pendency of MAP proceedings, it would be necessary to protect the assessees (tax payer) concerned till the successful resolution or failure of the issue referred to MAP. In view thereof, an MOU was arrived at between USA and India which *inter alia*, provides for deferment of assessment and/or suspension of collection of tax during MAP procedure. This MOU was arrived at so as to prevent unnecessary harassment and/or collection of taxes during the time the issue raised by the tax payers is under consideration of MAP. The fact that MOU was entered into between USA and India so as to obviate harassment and/or hardship to the tax payer is also stated in Instruction No.2 dated 28 April 2013 issued by Central Board of Direct Taxes (CBDT).

However, to protect the interest of the revenue, the MOU provides that deferment/suspension of assessment and collection of taxes to only available those tax payers who provide a security. The MOU provides that the security should be in the nature of irrevocable bank guarantee, securing the revenue of the Contracting State whose assessment or collection of taxes is suspended pending the MAP procedure.

Under Article 27 of the DTAA, the tax payer is entitled to apply for MAP procedure and claim deferment/suspension of assessment and collection of tax within three years of receipt of notice from the authorities.

MOU provides that withholding tax on income can be a subject matter of MAP for prior, current and future taxation years. Consequently, even when an Assessment Year for which a certificate as sought has expired, yet the suspension of assessment and collection of taxes will take place, if the proceedings are under consideration of Competent Authorities under the MAP. The collection and assessment of taxes will stop at least from that date when the MAP proceedings are commenced.

It cannot be said that the suspension of Assessment and collection of taxes would be applicable only in respect of current taxation years and not previous and future years Saying so will be clearly contrary to and in the face clause 6 (iii) of MOU.


## Excise

**LD/62/43**

*Akshay Steel Works (P.) Ltd.*
*vs.*
*Union of India*
*July 19, 2013 (Jharkhand)*

### Section 35F of the Central Excise Act, 1944, read with Rule 3 of Cenvat Credit Rules, 2004 - Deposit, pending appeal, of duty demanded or penalty levied

*An assessee is entitled to adjustment of credit entry against the condition of pre-deposit*

The petitioner's application for exemption from the condition of pre-deposit was rejected by the Commissioner (Appeals). The petitioner was entitled to adjustment of this credit entry against the condition of pre-deposit and, therefore, he immediately complied with the order of the Tribunal.

The High Court of Jharkhand held as follows:

Rule 3 of the Cenvat Credit Rules, 2004 allows an assessee to take the benefit of his credit under any of the category as mentioned under Sub-rule(1) of Rule 3 of the Cenvat Credit Rules, 2004. This is not a provision, which prohibits the assessee to adjust the said credit against its liability created by either order which is sought to be challenged in appeal requiring the deposit of the amount under Section 35 F of the Central Excise Act. Thus, the petitioner was entitled to have this adjustment of his credit amount against his liability under Section 35 F of the Central Excise Act.


## Companies Act

**LD/62/44**

*Dinesh Sud*
*vs.*
*Stitchwell Qualitex (P.) Ltd.*
*September 18, 2013 (DEL)*

### Section 111 read with Section 58 of the Companies Act, 1956 – Power to refuse registration and appeal against refusal

*One should claim his rights to transfer share within a reasonable period; where there was a delay of 15 years to file application for transfer of shares, appellant would be held guilty of laches or unreasonable delay in asserting his claim*

There was an oral family settlement in 1993 under which the appellant gave up his shares in the company. For a long period of 15-16 years the appellant accepted the settlement and acted upon it. Not only the appellant, but also the other members of the family did act upon the settlement. Only in terms of the family settlement, the appellant himself got the bag-closing and conveying systems business, earlier carried on by the partnership firm of himself and his father. He also resigned from the directorship of the company as he no longer had any interest in the working of the company, having foregone his shares in favour of the other family members. It would, therefore, be counter-productive for him to question the very existence of the family settlement. But the contention was that the long period of silence or inaction on his part does not amount to acquiescence or estoppel.

The High Court of Delhi held as follows:

A shareholder did not have to do anything except hold on to his shares which is what he did in all these years. He also became ill due to acute ulcerative colitis and severe eye problem between 2001 and 2008. But when once he came to know that his name did not appear in the register of members, he immediately hastened to take action.

The appellant very well knew of the settlement, because it was only under the settlement that he was getting the bag-closing and conveying systems business, which was henceforth to belong to him exclusively, at least from April, 1994, in return for giving up the shares.

If he had not accepted the terms of the settlement, he would have made his intentions known at a very early stage and would have resisted when asked to part with the shares in the company. He kept his mouth shut, when there was no compulsion upon him to do so, which can only mean acceptance of the settlement.

His long silence for a period of 15-16 years was in conformity and consistent with the family settlement. He had consciously given up his shares in the company. For reasons best known to him, he now wants to resile from the earlier position. That cannot be permitted. There is no explanation for his long silence. The illness from which he was said to have been suffering is not supported by any medical reports. That does not appear to have hampered the business which he was carrying on - at any rate, no evidence has been brought on record to show that his individual business also suffered on account of his illness.

Even assuming that the Limitation Act, 1963 does not apply to proceedings before the CLB and that sub-section (4) of Section 111 does not provide for any period of limitation, it is expected of the appellant to claim his rights within a reasonable period. The appellant is guilty of laches or unreasonable delay in asserting his claim.

## SEBI

**LD/62/45**

*Axes Multi Developers Ltd.*
*vs.*
*State of West Bengal*
*September 18, 2013 (CAL)*

### Section 11B of the Securities and Exchange Board of India Act, 1992 - Power and function of the Board – Power to issue Direction

*Where SEBI and Regional Director, Ministry of Corporate Affairs discovered serious anomalies in obtaining deposits by petitioner company and Petitioner was interested in paying off depositors and did not wish to proceed with writ petition filed by it; Petitioner should pay costs of to Ministry of Corporate Affairs, to SEBI and to the Commissionerate*

Monies had been collected from the depositors by the petitioner company without obtaining appropriate permission or sanction from the relevant authorities. Proceedings were initiated against the petitioner. At the behest of the petitioner, notices were issued to SEBI and the Regional Director, Ministry of Corporate Affairs. An affidavit was filed by the Regional Director. The petitioner was interested in paying off the depositors and did not wish to proceed with the writ petition filed by it.

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The High Court of Calcutta held as follows:

Both the Regional Director, Ministry of Corporate Affairs and the Securities and Exchange Board of India were represented and it was submitted on their behalf that serious anomalies had been discovered in the functioning of the petitioner company, including in the manner of obtaining the deposits, the deployment thereof, the accounting therefor and the use of funds.

The petitioner would pay costs of ₹1 lakh each to the Ministry of Corporate Affairs, to SEBI and to the Commissionerate for the court having issued directions on such authorities to deploy personnel to conduct an investigation following the petitioner's original plea.

**LD/62/46**

***Tower Infotech Ltd.***

***vs.***

***Union of India***

***September 20, 2013 (CAL)***

**Section 11B of the Securities and Exchange Board of India Act, 1992 – Power and function of the Board – Power to issue Direction**

*Where SEBI had to approve the final list of depositors from whom the Petitioner illegally collected deposits and determines the mode of payment, a chartered accountant was to be appointed to whom the petitioner should furnish all required details*

The petitioner company obtained deposits. The SEBI had to approve the final list and determines the mode of payment.

The SEBI suggested that a chartered accountant be appointed to look into the deposits obtained by the petitioner company before the SEBI approves the final list and determines the mode of payment. A comprehensive list of the depositors was to be completed in consultation with the SEBI before the matter appears next before the court.

The High Court of Calcutta held as follows:

A chartered accountant was appointed for the purpose of identifying the depositors who have put in deposits with the petitioner company and the quantum of the deposits.

Necessary order of injunction restraining the petitioners from dealing with or transferring the immovable properties, was to be passed. The petitioner company would furnish a comprehensive list of its immovable properties alongwith copies of the title deeds to SEBI and the particulars of the bank. ■