ITAT Bar reporter – April 2020

1. M/s. Society for Indian Automobile Manufacturers v. ITO (ITA No. 1284/D/15) (30/04/20) (ITAT, Delhi)

SECTION 11 – FOREIGN GRANTS PENDING FCRA APPROVAL – THE RECEIPT OF FOREIGN GRANT WHERE APPROVAL OF FCRA PENDING CANNOT BE TREATED AS INCOME U/S 11 AND THERE IS NO NEED FOR APPLICATION OF THE SAME – THE FOREIGN FUND SO RECEIVED PENDING FCRA APPROVAL CANNOT BE USED BY ASSESSEE TRUST AS THERE IS NO PERMISSION TO WITHDRAW THE SAME – RECEIPT WITHOUT A RIGHT OF APPROPRIATION IS NOT AN INCOME

Held, We have heard the rival contentions and perused the record. The issue which needs adjudication vide Ground No.5 against the foreign grant which was admittedly pending for approval and utilization. The assessee in its balance sheet under schedule A had pointed out that in respect of Simba Project, the grant received was Rs.33,68,659/- and under stadium project Rs.9,93,520/-. In this regard, a note was given under schedule 19 which read as under:-

"The society has since applied to Ministry of Home Affairs, Government of India under Foreign Contribution Regulation Act, 1976 (FCRA) for permission to accept the foreign contributions received during the year in respect of two projects viz. SIMBA and STADIUM. Pending approval of the same, the amount received in advance has been kept in a Foreign Contribution designated bank account along with the interest earned thereon. The corresponding credits have been shown in the Balance Sheet under the "Foreign grant pending approval and utilization". The grants and interest earned have not been considered as income of the year for computation of income under section 11 of the Income tax Act."

23. In the note, it was clearly pointed out that the assessee had applied to the Ministry of Home Affairs for permission to accept foreign contribution received. Further, the amount was kept in foreign contribution designated bank account pending approval of Ministry of Home Affairs. Further, the bank interest was also earned on such deposits which was shown as Rs.1,10,468/-. The question which arises is whether the said foreign grant received by the assessee and the interest on the same are taxable in the hands of the assessee. The certain FAQs have been answered by the Ministry of home Affairs on the said foreign grant and vide Question No.15, it has been clarified that interest of any other income earned from foreign contribution was to be considered as foreign contribution; the answer was "yes". Further, vide Question No.31, the query raised was it was pointed out

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24. In case, the same is viewed then it is clarified by the authorities that the banks made credit in foreign contribution received by an association without registration or prior permission. However, the banks are required to sent the report to MHA as per rule and the bank was also ensure that no withdrawal or transfer or utilization of the FC amount shall be made by the party, till such time the association produced documentary evidence from MHA permitting it to do so. So, the requirement of the law is that MHA has to permit the association to receive any foreign contribution and pending such permission, the receipts though credited to the bank accounts of the association would notbecame the income of the association as it has no power to withdraw the sum or utilize the sum.

25. Section 11 of the Foreign Contribution (Regulation) Act of 2010, subsection (1) very clearly provides that no person shall accept foreign contribution unless such persons obtained a certificate from Central Government. Further, sub-section (2) provides that foreign contribution is to be utilized for specific purpose only after obtaining appropriate permission of the Central Government. In such a scenario, the assessee did not have the authority to utilize the sum which was received by it as foreign contribution though it was credited to its bank account. Similarly, the bank interest earned on such deposits was in the form of foreign contribution and the same does not approve to the assessee till specific approval for utilization of funds was given by the Central Government.

26. In such circumstances, we hold that there is no merit in access the foreign grant received pending sanction as income of the assessee. Now coming to the second aspect of the issue that where the assessee has following cash system of accounting, can be added in the hands of the assessee. The Hon'ble Delhi High Court in CIT vs Om Prakash Khaitan (supra) had laid down the proposition that the characterization of a receipt could taxable only at the time of appropriation and not at the time of receipt which at best was advanced received, which did not bear in particular characterization for the purpose of treating it as income. Applying the said proposition to the issue in hand, wefind no merit including the foreign grant as pending approval as income of the assessee. Accordingly, Ground No.5 raised by the assessee is allowed.

2. BERGEN ENGINES INDIA PVT LTD, AY 2013-14, (ITA 7802/Del./2017) (27/04/20)

SECTION 92C - TRANSFER PRICING – TNMM – COMPARABLE - A**SSESSEE IS ENGAGED IN SUPPLY OF SPARE PARTS AND OTHER EQUIPMENT USED BY ENGINE BASED POWER PLANTS AND OIL AND GAS PUMPING SYSTEM AND ALSO PROVIDE TECHNICAL SERVICES IN RELATION THERETO. IT ALSO RENDERS MARKET SUPPORT SERVICES AND PROJECT MANAGEMENT SERVICES TO ITS AE – TPO CHANGED THE MAM AND APPLIED TNMM WHICH WAS ACCEPTED BY ASSESSEE – ITAT ON SELECTION OF COMPARABLES HELD:**

(a) **Payment of excise duty is an evidence that the comparable functions are of manufacturer, such comparable has to be excluded from the list of comparables**

(b) **Aliaisoning company is not to be compared with a company whose profile reflects consumption of special knowledge and manpower.** The support services rendered by the assessee i.e. liasioning and logistic etc are of very basic level and don't require highly skilled manpower, whereas the skill development and entrepreneurship development require special knowledge and manpower

(c) A **Govt Company can not be compared with Private Entrepreneur** due to different risk undertaken and the commercial purpose of private companies as comparedto Social objective of Govt. Companies;

3. <u>Jaswinder Kaur v. ITO [ITA No. 8248/Del./2018] [Dated: 28.4.2020]</u>

SECTION 44AD V. SECTION 68/CASH DEPOSIT – WHERE ASSESSING OFFICER ACCEPTED PART CASH DEPOSITED IN THE BANK ACCOUNT AS CONTRACT RECEIPTS, ALREADY OFFERED TO TAX ON PRESUMPTIVE BASIS UNDER SECTION 44AD, THE ASSESSING OFFICER COULD NOT HAVE CONSIDERED BALANCE CASH DEPOSITED AS UNEXPLAINED INCOME.

Held, 6.1 We find, the assessee before the AO had categorically stated that the grossreceipt of Rs.15,17,890/- was on account of petty construction, repair &maintenance contract work and has declared profit u/s 44AD of the IT Act, 1961on such contract receipt. We find, out of the total deposit of Rs.15,21,00/- in thebank account, the AO has accepted Rs.1,21,000/- and has doubted the source of thebalance Rs.14 lakhs and accordingly made addition of the same as unexplainedcash deposit. We do not find anymerit in the stand taken by the Revenue. Eitherthe whole amount should have beenconsidered as unexplained cash credit or thewhole amount should have been accepted ascontract receipt from construction,repair and maintenance contract work. Since theassessee has declared an incomeof Rs.1,87,603/- on the total contract receipt of Rs.15,21,000/- which is more thanthe prescribed rate of 8% u/s 44AD, therefore, we do notfind any merit in theaddition of the amount of Rs.14 lakhs to the total income asunexplained cashdeposit. Accordingly, the order of the CIT(A) is set aside and the AO isdirected todelete the addition of Rs.14 lakhs.**[Para 6.1]**

4. Shri Kundan Lal Sachdev, ITA No.1589/DEL/2018, Assessment Year 2013-14

INCOME TAX ACT – SECTION 68 – INTEREST FREE UNSECURED LOAN - AO ISSUED NOTICES U/S 133(6) WAS ISSUED TO THE LENDER COMPANY - AS PER AO NOTICES WAS RECEIVED BACK AS UNSERVED - ASSESSE WAS CONFRONTED WITH THE THIS FACT, FIND A DETAILED REPLY AND SUBMITTED THE CONFIRMATION OF ACCOUNT ALONGWITH BANK STATEMENT, BALANCE SHEET AND THE OTHER DOCUMENTS OF M/S SIDHESHWARICOMMOTRADEPVT. LTD. – AO DEPUTED ITO WHO REPORTED THAT NO SUCH ENTITY EXISTED AT THE ADDRESS MENTIONED AND THE SAID PREMISE WAS VACANT – AO MADE ADDITION U/S 68 ON GROUNDS THAT :

(i) existence of the lender company is not proved

(ii) creditworthiness of the company is not established, because it has shown losses in the Assessment Years 2012-13 and 2013-14;

(iii) perusal of the bank statement revealed that as on 01.03.2013 there was a meager balance of Rs.69,207/- and Rs.48,926/- as on 05.03.2013 and he further deduced that on the same date the company gets deposit from other parties and same was transferred to the assessee.

ITAT deleted addition and held that:

(a) During the course of assessment proceedings itself has made due compliance of notice u/s 133(6) and also through e-mail directly communicated to the Assessing Officer and assessee. Along with the said letter, the lender company has filed the desired details which included balance sheet, bank statement, profit and loss account, etc.

(b) Apart from that, it was also brought on record that the lender company had net worth of more than Rs.60 crores and it has turnover / revenue from operations was at Rs.95 crore which was entirely from trading, therefore, it cannot be held that the lender company was merely a paper company.

(c) The facts and circumstances clearly point out that assessee has taken a loan for purchasing a residential house and thereafter within the span of six months he has sold his property to repay back the loan. If these factors are taken into consideration, then genuineness of the loan cannot be doubted. When the factum of repayment of loan in the next financial year has not been doubted, no adverse inference has been

drawn by the AO nor any comment has been given in the subsequent assessment year nor has any adverse comment been given in the impugned assessment order, then all these factors proves the genuineness of the transaction.

(d) Simply drawing an adverse inference about the creditworthiness based on return of income and value of return of per share cannot be the parameter for examining the creditworthiness of the lender company. What needs to be seen whether the lender company had source of funds available to lend the money or not.

5. **Pawan Kumar Dua vs ACIT (ITA Nos.6588 to 6590/Del/2018) (AY: 2013-14, 2014-15 & 2015-16) Dtd 28.04.2020**

SECTION 132(4) – ADDITION OF UNACCOUNTED TURNOVER ON THE BASIS OF STATEMENT OF THIRD PARTY WHO WAS ALSO INVOVLED IN THE SAME BUSINESS – NO EVIDENCE FOUND DURING SEARCH INDICATING ANY OUT OF BOOKS SALES BY THE ASSESSEE - NO ADDITION CAN BE MADE IN THE HANDS OF ASSESSEE MERELY ON THE BASIS OF STATEMENT RECORDED OF THIRD PARTY IF THAT THIRD PARTY IS ALSO INVOLVED IN SAME BUSINESS AS THAT OF ASSESSEE AND ALL THE TRANSACTION BETWEEN ASSESSEE AND THIRD PARTY PROPERLY RECORDED IN BOOKS OF ACCOUNTS.

39. Thus, a perusal of the statement of Shri Himanshu Kohli and assessment order of Shri Kewal Kohli conclusively shows that both the premises D-237, 3rd Floor Ashok Vihar, New Delhi and Flat No. 1-B, Pocket-A, Near Satyawati College, Ashok Vihar, New Delhi are owned by Shri Himanshu Kohli who is also engaged in metal trading and was owning different godowns. Under these circumstances, merely because Shri Himanshu Kohli, in his statement has admitted only 30% belongs to him and 70% of the unaccounted turnover belongs to Shri Dua cannot be the basis for making addition in the hands of Shri Pawan Kumar Dua especially when the assessee in his statement had categorically stated that Shri Himanshu Kohli was doing some business through the family concern named M/s Klaxon Trading (P) Ltd. and the transactions were duly recorded in their books of account and payments were made by cheque and TDS was deducted from the said payments. We further find merit in the argument of the ld. Counsel for the assessee that had there been such huge unaccounted transactions outside the books of account by the assessee, at least some evidence in some form could have been found during the course of search from the premises of the assessee. However, not a single piece of evidence was found from the premises of the assesseeso as to prove that the assessee was also engaged in some unaccounted metal trading business with Shri Himanshu Kohli. Since the documents relating to unaccounted trading outside the books of account along with Dharam Kanta slips showing weight of different types of metals weighed alongwith vehicle number and handwritten slips containing noting of receipt/delivery of purchase/sale of such metals along with dates were found from the premises owned by Shri Himanshu Kohli who himself along with his father are also engaged in such metal trading business and not a single paper giving any hint of any unaccounted trading by the assessee outside his books of account was found from his premises, therefore, we are not able to agree with the finding of the CIT(A) that 70% of such unaccounted turnover belongs to the assessee for which the corresponding profit to be taxed in the hands of the assessee. In this view of the matter, we set aside the order of the CIT(A) and direct the AO to delete the addition of Rs.1,70,72,313/- being the profit on such unaccounted turnover outside the books of account.

40. Since the addition on account of unaccounted turnover outside the books of account is deleted, the question of initial investment in such unaccounted turnover does not arise and therefore the same cannot be sustained. Accordingly, the same is directed to be deleted.

41. So far as the addition on account of unaccounted commission is concerned, we have held in the preceding paragraphs that the assessee has not done any unaccounted trading in metal in his name and whatever trading has been done was done by Shri Himanshu Kohli from whose premises all the seized documents, which are the basis of addition in the hands of the assessee, were found and that Shri Himanshu Kohli has done some business of metal trading for the family concern, namely, M/s Klaxon Trading (P) Ltd. and all the transactions were recorded in the books of account of the said concern as stated and the commission so paid was through account payee cheque on which TDS has duly been deducted, therefore, no addition on account of unaccounted commission paid by the assessee to Shri Himanshu Kohli is called for. Accordingly, the same is directed to be deleted.

53. We have heard the rival arguments made by both the sides and perused the record. We find the AO, on the basis of the seized document as per Exhibit-4 where the name 'Pawan' appears, made the addition of Rs.55,08,739/- which has been upheld by the CIT(A) and the reasons for which have already been reproduced in the preceding paragraphs. We have already held in the preceding paragraphs that when Shri Himanshu Kohli was himself engaged in such type of business and he has done some business for one of the concerns where the assessee is a director, namely, Klaxon Trading (P) Ltd., therefore, merely because the name of the assessee appears in a code word, addition could not have been made in the hands of the assessee especially in absence of any other corroborative evidence. The submission of the ld. Counsel that the assessee in his individual capacity was not engaged in unaccounted metal trading business also has some force since in his statement recorded u/s 132(4), the assessee had categorically stated that his family concern, namely, Klaxon Trading (P) Ltd., was engaged in metal trading business and whatever commission has been paid to Shri Pawan Kumar Dua was paid by the company through proper banking channel which was duly recorded in the books of account and due TDS procedures have been followed. In this view of the matter, the order of the CIT(A) is set aside and the ground raised by the assessee is allowed.

6. Veolia India P. Ltd. (ITA No. 4615/D/16) (27/04/20) (ITAT, Delhi)

SECTION 145 – ACCOUNTING STANDARD 7 – RECOGNITION OF REVENUE FROM CONSTRUCTION CONTRACT – VAT COMPONENT RECEIVED AS PART OF RECEIPT IS LIABLE TO EXCLUDED WHILE DETERMINING REVENUE UNDER AS-7

Held, 15. The CBDT Circular No. 4/2008 dated 04.04.2008 clarified that service tax doesn't partake the nature of income. The Circular was issued while dealing with Section 194-I. Since, the sum and substance of the circular is that the service tax doesn't form a part of the income of the assessee, the same need not be considered for calculating the profits of the assessee for the year. Similarly, the Value Added Tax which do not form the part of the income of the assessee also needs to be excluded while determining the revenues of the year in the instant case. As a result, appeal of the assessee on ground no. 2.2 is hereby allowed.

7. Sheela Foam Ltd. v. DCIT (ITA No.4096/Del/2018) (27/04/20) (ITAT, Delhi)

SECTION 147 – REASSESSMENT PROCEEDINGS – THE REASONS WERE RECORDED IN RESPECT OF 'A' ISSUE – THE ASSESSING OFFICER COMPLETED THE ASSESSMENT AFTER MAKING ADDITION IN RESPECT OF 'B' AND 'C' ISSUE – NO ADDITION WAS MADE WITH RESPECT TO 'A' ISSUE – HELD – WHERE THE ASSESSING OFFICER ACCEPTS THE ISSUE ON WHICH NOTICE U/S 148 WAS ISSUED, HE CEASES TO EXERCISE JURISDICTION TO ASSESSEE OTHER ISSUES – ADDITIONS WERE HELD TO BE BAD IN LAW

Held, Applying the principle laid down by the Hon'ble Bombay High Court in Jet Airways (I) Ltd.(supra) and Hon'ble Delhi High Court in Ranbaxy Laboratories Ltd. vs CIT (supra), we hold that in the facts and circumstances of the case where the basis for issuing the notice u/s 148 of the Act was, on account of reasons recorded for re-opening the reassessment u/s 147 of the Act, i.e. share application money received from VPC Financial Services Ltd. of Rs.10 Lakhs and no addition on this account has been made in the hands of the assessee, then any other addition made in the case of the assessee would not survive. Accordingly, we hold so. Thus, we decide the preliminary issue raised before us i.e. one of the aspect of the preliminary issue raised before us, where no addition has been made on account of the reasons recorded for re-opening the assessment under the provisions of section 147/148 of the Act, then no addition can be made in the hands of the assessee on any other account. Hence, the order passed u/s 147 r.w.s. 143(3) of the Act is invalid. Accordingly, Ground No.1 raised by the assessee stands allowed and the other issues raised on the merits of addition become academic in nature. [Para 16]