IN THE HIGH COURT OF DELHI AT KARNATAKA

Judgment Reserved on: February 11, 2016

Judgment Delivered on: February 12, 2016

W.P.(C) 10000/2015

HASSLETON INVESTMENT LIMITED, SINGAPORE ..... Petitioners

Represented by: Mr. Nani Palkhiwala and

Mr.K.K Venugopal,

Advocates.

versus

THE AUTHORITY FOR ADVANCE RULING (INCOME TAX), NEW DELHI
(RESPONDENT 1)

DIRECTOR OF INCOME-TAX (INTERNATIONAL TAXATION), BENGALURU
(RESPONDENT 2)

Represented by: Mr. Arvind P Datar,

Advocate for R-2.

Mr.V.P.Singh, Senior Advocate

instructed by Mr.K.C.Mittal,

CORAM:

The Hon'ble Acting Chief Justice Subhro Kamal Mukherjee

Hon'ble Mr. Justice N.Kumar

1. Invoking the jurisdiction of this Court under Article 226 of the Constitution of India, the petitioner, who has been ordered to pay Minimum Alternate Tax u/s 115JB of the Income Tax Act, 1961 has prayed for issue of a Certiorarified mandamus or appropriate writ or direction for setting aside the order dated September 07, 2015, passed by the Authority for Advance Ruling, Bengaluru designated authority under the Income Tax Act, 1961, in order to ascertain the Income-tax liability of the petitioner, issue a writ of prohibition prohibiting the respondents and each one of them along with their subordinates/agents/assigns from taking steps in pursuance of the orders dated September 07, 2015, and, further to pass a mandatory declaration as to fresh consideration of the matter or any such order that is required in the said situation.

2. Before we advert to the factual assertions made in the writ petition by the petitioner and the stand and stance put forth by the respondents, we are obliged to refer to certain developments that took place in the before the initiation of judicial proceedings before this Court.

3. Hassleton Investment Limited (HIL) is a company incorporated and tax resident of Singapore registered in India as an FII and was engaged in investing in Indian listed securities and later converted itself into an FPI under the SEBI (FPI) Regulations, 2014. HIL engaged Securities Advisors India Ltd (SAIL) which acts as a key advisor to HIL where the decisions taken by the Investment Manager or other key personnel of HIL to invest in Indian listed securities were at the Bengaluru office of SAIL. SAIL played a significant role by assisting HIL on investment and therefore was paid huge commission fees every year as HIL made huge profits. HIL's investments, unlike other FIIs' capricious investments in India, had been consistent for the last 2 years. The STCG were covered under the beneficial provision of § 115AD of the I.T Act, 1961 while it availed the exemption the u/s 10(38) of the Act on the usual LTCG and accordingly paid the Securities Transaction Tax (STT). HIL in January 2015, taking advantage of Stock Market rallying, disposed of its major investments made in Indian listed securities making huge capital

gains. HIL filed an application before AAR on January 27, 2015 to inquire whether such capital gains were exempted u/s 10(38) of the Act and no further tax apart from STT was required to be paid.

4. The AAR, Bengaluru has held that in the light of the facts so presented that HIL had an Agency PE in India and therefore, was liable to pay MAT u/s 115JB by virtue of the clear position of the Govt. of India and CBDT as per the press release and instruction issued in the month of September 2015. It also held that the definition of 'foreign company' should be borrowed from Companies Act, 2013 and that HIL had a place of business in India through SAIL.

5. The ITD at Bengaluru appeared before the AAR and forth its argument that HIL's case was squarely covered by the rulings of AAR in The Timken Company case (2010) 326 ITR 193 (AAR) and Praxair Pacific Limited case (2010) 326 ITR 276 (AAR) in which the same AAR explicitly held that if foreign companies have any place of business in India then such companies will be liable to pay Minimum Alternate Tax (MAT) under section 115JB of the Act. The ITD argued that, SAIL, which is the sole and the key investment advisor of HIL is its permanent establishment (PE) i.e. Agency PE in India and therefore, it clearly falls within the decisions of the Timken and Praxair cases, more specifically because these two rulings have attained finality as neither the ITD nor the concerned taxpayers questioned the ruling before a superior forum. Therefore, it was argued that HIL was required to pay MAT as per section 115JB of the Act on the total income of HIL. HIL forcefully argued before AAR that SAIL was an independent agent and was never working under the control or supervision of HIL and therefore, can never be treated as its Agency PE. HIL argued that the business premises of SAIL can never be treated as that of HIL's and therefore, it has never established a fixed place of business as required under Timken and Praxair cases as held by this AAR. HIL also argued that since it neither had place of business nor PE in India, it was never required to prepare its financials as per erstwhile

Companies Act, 1956 as well as new Companies Act, 2013 which is applicable to the present case. It further argued that being an FII and later converted into FPI, it is purely covered by special regime of SEBI (FII) Regulations, 1995 and SEBI (FPI) Regulations, 2015 and therefore, Companies Act of 1956 and 2013 will not be applicable to it. On June 30, 2015, HIL pointed out to AAR that as per the Finance Act, 2015 (FA 2015) which was passed in the Union Budget in February 2015, the Government has amended the Act in such a way that foreign companies (which infers that whether or not they had a place of business or permanent establishment in India) were not liable to pay MAT by inserting clauses (fb) and (iid) to Explanation 1 to subsection (2) to section 115JB. HIL argued that the Act defines 'foreign company' means a company which is not a domestic company and that the Act being a complete code in itself, the need to borrow the meaning from other enactments especially, the Companies Act 2013 does not arise. Therefore, the FA 2015 which has carved out the capital gains made on sale of listed securities by foreign companies from the ambit of MAT, HIL was not required to pay any MAT. Interestingly, HIL argued that since an amendment was made only to Explanation 1 of 115JB (2) of the Act, it was not just prospective but was also retrospective in nature and therefore, HIL was also covered by this amendment. HIL cited the example of amendment to section 9(1) (i) of the Act by inserting Explanations 4 and 5 to section 9(1) (i) of the Act which was retrospectively inserted from 1961 just to cover Vodafone like transactions. On the other hand, the ITD vehemently argued that the amendment to section 115JB by the FA 2015 was only prospective in nature since a new exemption from taxation was granted to specified category of taxpayers and therefore, taxpayers like HIL were very much covered prior to the amendment i.e. prior to April 1, 2015 within the ambit of levy of MAT.

Further, the ITD argued that the term 'company' in section 115 JB(1) of the Act very much covers foreign companies which are required to prepare its financials as per Companies Act, 2013 since HIL had a place of business in India through SAIL. ITD argued that the Companies

Act, 2013 defined 'foreign company' in a wider manner to mean that any company incorporated outside India which has a place of business in India whether by themselves or through an agent, physically or through electronic mode; and such company conducts any business activity in India in any manner. The ITD argued that since section 115JB makes a reference to the Companies Act (be it 1956 or 2013), the definition of 'foreign company' has to be relied under the Companies Act, 2013. HIL on the other hand argued that it never had place of business in India directly and SAIL was never its agent under any circumstances. Even assuming that SAIL was its agent, HIL argued that it never conducted its business from India as all investment decisions were made in Singapore being its country of incorporation.

6. The dispute that is presently before this court is pressing on various issues as such however can be summed up in three basic points of law.

1. Whether MAT provisions will be applicable to the petitioner being a 'foreign company' as per the definition under Income Tax Act, 1961 and the Companies Act, 2013?
2. Whether the Finance Act, 2015 amendment on imposition of MAT on foreign company is prospective or retrospective as argued by both parties?
3. Whether capital gains exemption as per India – Singapore tax treaty will be applicable to the petitioner and whether imposition of MAT will be violative of the tax treaty.
    - Whether the petitioner can cherry pick the provisions of Income Tax Act and tax treaty?

7. The question as to whether MAT provisions will be applicable to the petitioner being a 'foreign company' as per the applicability of definition under Income Tax Act, 1961 or Companies Act, 2013 is primarily based on the construction of a certain term with regard to the specific reference or the specific act as such for the definition.

8. Only by incorporation or adoption of provisions of a statute for the construction of other, no aid is permissible.[1] In *Hotel and Restaurant Association* v. *Star India Pvt. Ltd.*[2], the S.C held that the definition of a term in one statute cannot be used as a guide for construction of a same term in another statute particularly in a case where statutes have been enacted for different purposes. As the definition of the term in one statute does not afford a guide to the construction of the same term in another statute and, the sense in which the term has been understood in the several statutes does not necessarily throw any light on the manner in which the term should be understood generally.[3]In *Hari Khemu Gawali* v. *DCP, Bombay*[4], the S.C held that it is not safe to pronounce on the provisions of one Act with reference to decisions dealing with other Acts which may not be in pari materia. Statutes need to have a common object in order to provide aid to each other.[5]

9. The CA, 2013 was enacted to consolidate and amend the law relating to companies whereas the I.T Act, 1961 was enacted to consolidate and amend the law relating the income-tax and super-tax. Both serve different purpose for which the term 'foreign company' has been defined differently in both Acts. They cannot be used interchangeably.

<u>The IT Act, 1961 is a code in itself.</u>

Provisions of the Indian Income-tax Act must be construed as forming a code complete in itself and exhaustive of the matters dealt with therein.[6]Since, it is not a sound rule of interpretation to

[1] *Western Agencies Pvt. Ltd.* v. *Commissioner of Central Excise*, [2011] 31 STT 498

[2] AIR 2007 SC 1168

[3] *Maheshwari Fish Seed Farm* v. *TNSEB*, AIR 2004 SC 2341

[4] AIR 1956 SC 559

[5] *Supra* note 1

[6] *ACIT* v. *Vinayaka Cinema, Nellore*, AIR 1978 AP 51

import the definition of an expression in one Act into another,[7] the need to borrow the meaning from other enactments does not arise.

Though the amendment to § 115JB by the FA, 2015 was only prospective in nature, the same need not be discussed now. However, if the Hon'ble Court so wishes it is humbly submitted that 'Foreign company' has been defined u/s 2 (23A) of the I.T Act, however, the § 2 opens with the words "in this Act, unless the context otherwise requires." In *CIT* v. *B. C. Srinivasa Shetty*[8], the S.C. has held that the definitions in § 2 are subject to an overall restrictive clause and hence, it would be necessary to enquire as to whether contextually the words defined under said § would apply to a particular provision. Due consideration should be given to the legislative history, background and context while interpreting a statute.[9]Legislative history of a fiscal statute is a valid interpretive aid for construing an enacted provision, especially for ascertaining the evil sought to be remedied.[10]

Thereby keeping in mind the arguments from both the sides it is to be stated that with regard to the specific context of the definition clause, the Companies Act, 2013 is applicable to the present case.

With regard to the question of Finance Act amendment, 2015 it is to be stated that the amendment on imposition of mat on foreign company is prospective.

In a taxing statute one has to look merely at what has been clearly said. There is no room for intendment, no equity, no presumption, no reading in, nothing implied. One can only look fairly at the language used.[11] In *Garikapati Veeraya* v. *N. Subbiah Choudhry*[12], the S.C held

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[7] *UOI* v. *R.C. Jain*, 1981 AIR SC 951

[8] 128 ITR 294 (SC)

[9] *Imperial Chit Fund (P) Ltd v. ITO*, (1996) 8 SCC 303

[10] *S.C. Prashar* v. *Vasantsen Dwarkadas*, [1963] 49 ITR 1 (SC)

[11]JUSTICE G.P. SINGH, *Principles of Statutory Interpretation*, LexisNexis Butterworth's Wadhwa, Gurgaon, 12th Edition, (2010), pg 879 *Also in, Bansal Wire Industries Ltd.* v. *State of UP* (2011) 6 SCC 545

that *the golden rule of construction is that, in the absence of anything in the enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act was passed.* In *Govinddas* v. *Income Tax Officer*[13] it was further held, *One of the established rules of interpretation was that unless explicitly stated, a piece of legislation is presumed not to be intended to have a retrospective operation.*

The FA, 2015 inserted clauses (iid) & (fb) in Explanation 1 to §§ 2 of § 115JB of the I.T Act This amendment has excluded capital gains arising from transaction in securities from the computation of Book Profit. However, the 2015 amendment is only intended to apply prospectively from 1st April 2015 (financial year 2015-16), i.e. w.e.f. assessment year 2016-17.[14] The literal interpretation of FA, 2015 directly implies that the amendment is prospective.

The Memorandum to the Finance Bill of 2015, which under the heading "Rationalizing the provisions of § 115JB" states-

> *"It is, therefore, proposed to amend the provisions of § 115JB so as to provide that income from transactions in securities (other than short term capital gains arising on transactions on which securities transaction tax is not chargeable) arising to a Foreign Institutional Investor, shall be excluded from the chargeability of MAT and the profit corresponding to such income shall be reduced from the book profit"….These amendments will take effect from 1st April, 2016 and will, accordingly, apply in relation to the assessment year 2016-17 and subsequent assessment years."*

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[12] AIR 1957 SC 540

[13] [1976] 1 SCC 906

[14] Report on Applicability of Minimum Alternate Tax (MAT) on FIIs / FPIs for the period prior to April 1st, 2015, Justice Shah Committee Report on Direct Tax Matters (2015)

Therefore it is conclusive that the legislature did not intent for the retrospective application of these amendments. In *CIT* v. *Vatika Township Private Limited*[15] referring to the Notes on Clauses of Finance Bill, 2002 the Supreme Court held that there were certain other amendments in the Finance Bill 2002 specifically making them applicable retrospectively, e.g., § 92F (as the amendment was clarificatory). Thus, the decision taken by the legislature to insert the proviso from June 1, 2002 was a conscious one. It must be noted that few of the amendments in the FA, 2015 are retrospective.[16] Hence in the lines of above judgement we can say that the decision taken to amend § 115JB *vide* FA, 2015 prospectively was a conscious one.

THE CAPITAL GAINS EXEMPTION AS PER INDIA – SINGAPORE TAX TREATY WILL BE NOT BE APPLICABLE TO THE PETITIONER AND IMPOSITION OF MAT IS NOT VIOLATIVE OF THE TAX TREATY.

DTAA BENEFITS DO NOT ACCRUE TO FOREIGN COMPANIES HAVING A P.E

India Singapore Tax Treaty follows to OECD Model.

In the OECD Commentary is a useful, reliable and legally accepted basis/guideline for interpreting treaties.[17]These model conventions and commentaries thereon constitute international tax language and the meanings assigned by such literature to various technical terms should be given due weightage.[18] Even in a treaty involving a non-OECD country, one has to proceed on the basis that it is used in the same meaning and with the same

[15] *CIT* v. *Vatika Township Private Limited*, 367 ITR 466 (SC)

[16] Namely, Power of the Central Board of Direct Taxes to prescribe the manner and procedure for computing the period of stay in India, Tax benefits under § 80C for the girl child under the Sukanya Samriddhi Account Scheme. Tax benefits for Swachh Bharat Kosh and Clean Ganga Fund.

[17] *DIT* v. *Balaji Shipping UK Ltd*., (2012) 24 TAXMAN229 (Bom)

[18] *CIT* v. *Visakhapatnam Port Trust*, (1983) 144 ITR 146 (AP)

connotations as assigned to it by the OECD Commentary.[19] In *UOI* v. *Azadi Bachao Andolan & Anr.*[20], it was held that the international accepted meaning and interpretation placed on identical or similar terms employed in various DTAAs should be followed by the Courts in India when it comes to construing similar terms occurring in the Act.The OECD Commentary has been followed in cases pertaining to India-Singapore DTAA.[21]

Government Notification vis-à-vis application of DTAA.

The Government issued a notification instructing to grant benefits under respective DTAA to Foreign Company not having a P.E as defined in the respective Tax Treaty.[22]

Thereby it is stated that the application of the said MAT won't be violative of the DTAA provisions as such and thereby it will be applicable.

Furthermore, with regard to the issue of cherry picking it is not allowed as such to choose beneficial provisions.

Thereby the writ petition as such is dismissed with no order as to costs.

[19] *Met-Chem Canada Inc.* v. *DCIT* 100 ITD 251 (Mum)

[20] 263 ITR 706 (SC)

[21] *Rolls Royce Singapore (P) Ltd.* v. *ADIT*, MANU/ID/0531/2010

[22] INSTRUCTION NO.18/2015 [F.NO.153/12/2015-TPL], DATED 23-12-2015