KHAITAN &CO ADVOCATES SINCE 1911

UPDATE

ERGO

Analysing developments impacting business

ITAT HOLDS SIXTEEN-YEAR REOPENING PERIOD IS RETROSPECTIVE | DELHI HC'S BRAHM DUTT RULING DISTINGUISHED

26 February 2022

Facts and Background

The income-tax authorities conducted a search and seizure operation at the residential premises of Mr Dilip Thakkar (Taxpayer). Some material found during the exercise indicated that the Taxpayer was linked to an offshore bank account.

With this background and alleging that income from an asset located outside India had escaped assessment, the income-tax authorities, on 27 March 2015 reopened assessment for the Financial Year (FY) 1998-1999 / Assessment Year (AY) 1999-2000.

The litigation stems from the varied interpretation of Section 149 of the Income-tax Act, 1961 (IT Act) by the Taxpayer and income-tax authorities, respectively.

Section 149 of the IT Act prescribes a time limit for issuance of a notice by the income-tax authorities to a taxpayer. With effect from 1 July 2012, the law provided that no notice could be issued "*if four years, but not more than sixteen years, have elapsed from the end of the relevant assessment year unless the income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment.*" An explanation to Section 149 clarified that the aforementioned provision would also be applicable for "*any assessment year beginning on or before the 1st day of April, 2012.*"

The Delhi High Court (HC) in Braham Dutt vs ACIT[1] had the occasion to consider the aforementioned provision and inferred the amendment to be prospective in effect and hence applicable only to assessments that had not attained finality. In the Brahm Dutt ruling, (*supra*), it was held that assessments beyond 31 March 2005 could not be reopened under the newly inserted sixteen years limit as these years had already become time barred when this extension was introduced (i.e., on 1 July 2012). Backed by this ruling, the Taxpayer contended that the extended time limit of sixteen years (as against the limit of six years prevailing as on 1 July 2012 when the provision came into force), was not applicable to AY 1999-2000 (even though it fell within the 16 years period from its issuance on 27 March 2015). On the other hand, the assessing officer argued that the time limit for reopening such cases is sixteen years from the end of the AY which is being sought to be reopened and is the unambiguous position under Section 149 of the IT Act.

[1] [(2018) 100 taxmann.com 324 (Del)]

While the Taxpayer's stand found favour with the Commissioner of Income-tax (Appeals) (CIT (A)), the assessing officer appealed against the CIT(A)'s decision before the Income Tax Appellate Tribunal (ITAT).

Decision of the ITAT

The question for consideration before the ITAT was what the time limit was under Section 149 of IT Act within which notice for reassessment can be issued where 'income in relation to any asset (including financial interest in any entity) located outside India chargeable to tax has escaped assessment'.

In ITAT's view the statutory provisions were clear and unambiguous; relying on the Explanation to Section 149, the ITAT held that the amendment to Section 149(1) was retrospective in nature and has been expressly stated to be so by the legislature. Accordingly, the ITAT reversed the CIT(A)'s ruling.

In arriving at its decision, the ITAT considered and reiterated a cardinal principle of construction that every statute is *prima facie* prospective unless it is expressly, or by necessary implication, made to have a retrospective operation. The ITAT however stated that there is no bar on a statute being retrospective in nature and the validity of a statute being retrospective cannot be questioned in principle. In the ITAT's opinion, a corollary to the above propositions is that when a legislation is expressly stated to be retrospective, there is no bar on retrospective application of the said provision.

Following this reasoning and as Explanation to Section 149 specifically states the provision to be retrospective in effect, the ITAT held that there cannot be any good reasons to hold the section to be only prospective in effect and it must be given full effect as visualised and stated by the law itself.

With respect to the Delhi HC's decision in the case of Brahm Dutt *(supra)*, the ITAT noted that the Delhi HC had proceeded on the basis that the amendment was prospective since there was no specific mention about its retrospective effect and reference to Explanation. This, it held, was different from the HC noting that the law is retrospective in effect and reading down the law on the ground that such a retrospectivity is *ultra vires* or unconstitutional. The ITAT noted that in Braham Dutt's case *(supra)*, there was no occasion for the bench to refer to or take note of the Explanation which categorically made the amendment retrospective.

Further, the ITAT also held that a decision of a non-jurisdictional HC is not binding on the ITAT and more so in the particular instance where the Explanation which did not come up for consideration before the HC has been explicitly been relied upon by the tax authorities as party to the litigation.

The ITAT also touched upon the Supreme Court's summary dismissal of SLP against the Braham Dutt judgment *(supra)* and confirmed that a mere summary dismissal of an SLP does not amount to a decision on the law and cannot be treated as a binding precedent under article 141 of the Constitution of India.

The ITAT thus vacated the relief granted to the Taxpayer by the CIT(A) and restored the stand of the assessing officer.

Comments

The ITAT decision will have no impact in terms of reopening of new cases now as reassessment provisions were completely revamped in 2021 and the sixteen years period is no more applicable. However, it gives the income-tax authorities an edge in matters concerning taxation of undisclosed foreign income by adding to their arsenal

vis a vis reassessments that were previously reopened beyond the period that had become time barred as ruled by the HC in in *Brahm Dutt (supra)*.

It is interesting to note that the newly introduced reassessment provisions (applicable from 1 April 2021) explicitly provide that no notice can be issued under the new law if such notice could not have been issued under the applicable old reassessment provision timelines and it will be interesting to see whether the reasoning in this ITAT decision will result in any regulatory changes or impact on the time lines prescribed under the new reassessment provisions.

- *Ashish Mehta (Partner) and Krutika Chitre (Principal Associate)*

For any queries please contact: editors@khaitanco.com