



Saturday
International
Tax
Gyaan

SITG

SATURDAY INTERNATIONAL TAX GYAN !!!

#taxmadeeasy

SITG
No. 184

Augustus Capital Pte. Ltd. v. CIT (International Taxation)

Amendment made to the explanation which is in relation to another explanation or is beneficial to assessee should apply retrospectively.

Facts of the case

- A company incorporated in Singapore, invested in equity and preference shares of Accelyst Pte Ltd. (APL) (also incorporated in Singapore) for an amount of Rs. 4,91,20,000, which is 2.98% interest of APL.
- Such investments were sold to an Indian company on 27.03.2015 for an amount of Rs. 41,24,35,969. Therefore, the assessee filed the ITR showing taxable income as 'NIL' on a belief that it had no management and control over the affairs of APL.
- The A.O. did not accept the view taken by the assessee and proposed an addition of Rs. 36,33,15,969 as LTCG. Hon'ble Tribunal ruled in favor of the assessee on the appeal made by latter. Now, the appeal is filed by the Revenue against the decision passed by Hon'ble Tribunal.

Issues of the Case

There were 2 major issues to be decided by Hon'ble Tribunal which are as follows-

- Whether there shall be **retrospective application** of Explanation 6 and 7 to Section 9(1)(i) of the Income Tax Act, 1961, and
- Whether Explanation 6 and 7 to Section 9(1)(i) of Income Tax Act are **clarificatory or amendatory** in nature.

The Hon'ble Tribunal, however settled the first issue, where it was held that such explanations shall be applied retrospectively. While drawing such conclusions, the hon'ble tribunal applied the mischief rule.

[Mischief Rule- It means the problem that prompted the statute to be introduced in the act.]

However, the **second issue** regarding nature of explanation included is the moot question that is still needs to be decided by the Hon'ble High Court (the appeal filed by Revenue).

Hence we shall discuss the arguments and relevant concepts related to the case in today's edition of SITG.

Revenue's contention

- **Retrospective effect:** If any amendment to law is made, which aims to remove hardship caused to the assessee, then such law does not necessarily apply retrospectively, especially if no such legislative declaration is passed. Hence, the language and object of such amendment should be construed. ***[Commissioner of Wealth Tax v. Atma Ram Properties (P.) Ltd. (2017) 399 ITR 380 (Delhi)]***
- **Ambiguity in Explanation- 5-** There has been ambiguity in Explanation 5 to section 9(1)(i), and even the amendments made to explanation 6 and 7 does not expressly suggest whether they shall operate retrospectively, or otherwise. And hence it was referred to Shome Committee.

Assessee's contention

- **Retrospective amendment:** As per the recommendations of Shome Committee, explanation 6 was inserted, where it was clarified as to what shall constitute the substantial value of assets located in India upon transfer of shares and interest in a foreign company.
- An insertion to Explanation 7 says those transfer of shares or interest were excluded, where such share shall not exceed 5% of total voting power/ share capital of the company, and,
- the transferor does not have control over the management in such company for 12 months preceding the date of transfer
- From the above, it is important to note that Explanation 6 and 7 were brought only to curb the unintended consequences of Explanation 5. Hence, Exp. 6 and 7 shall be applicable from the date when Explanation 5 was operational.

Revenue's contention

- **Clarificatory Amendment:** If an amendment to the law is considered clarificatory, which also results in the substantial amendment, then in such cases, the amendment cannot have a retrospective effect.
- Here, Explanations 6 and 7 to Section 9(1)(i) can neither be declaratory nor clarificatory, as the amendment introduced exemptions for small taxpayers, therefore such amendment was substantive in nature, and hence it can only be prospective in nature.

Assessee's contention

- **Uncanalised power and undue hardship-** If we go beyond Explanation 7 to Section 9(1)(i), even the transfer of a single share of a foreign company deriving its value substantially from the assets located in India, shall result in taxable gain in India, leading to undue hardship to small investors.
- Hence in the same context the word 'substantially' grants an uncanalised power on the A.O. Therefore, it is in the same context, that the issue was referred to the Shome committee.
- **Clarificatory or curative amendment:** Where it is not expressly stated that amendment is retrospective is not necessarily a determinative factor. Similarly, merely because a date of operation of an amendment is explicitly provided, is not conclusive, whether it is not clarificatory or curative amendment. [***Chettian Veetil Ammad & Anr. v. Taluk Land Board & Ors. (1980) 1 SCC 499***]

Judicial Pronouncement

- Section 9(1)(i) of the act imposes tax on all the income accruing or arising, whether directly or indirectly, through or from any property/ asset/ transfer of asset/ transfer of capital asset situated in India.
- **No meaning to explanation 6 and 7:** The submission of revenue with regards to the prospective application of explanation 6 and 7 is misconceived as it shall not have any meaning if they are not read with explanation 5. Hence, if explanation 6 and 7 have to be read with explanation 5 (operating from 1962), they would have to be construed as clarificatory and curative. Moreover, there shall be no legislative guidance available to the A.O. with regards to the meaning of terms 'substantially' or 'share/ interest' found in explanation 5, if explanation 6 and 7 are not read with explanation 5.
- **Treated as retrospective:** It is safe to conclude that the explanation 6 and 7 shall be treated retrospectively, even though they were to effect from 01.04.2016.

Thus, for the above reasons, the Hon'ble High Court is not inclined to interfere with the order passed by the Tribunal. According to them, there is no question of law arises for consideration. Hence the appeal of the revenue stands disposed off.

#taxinpic



Explanation- 6, 7

Explanation- 5

Explanation 5 forms the very basis of explanation 6, 7



If explanation 6 and 7 are to be read in isolation with explanation 5, then the existence of explanation 6 and 7 shall be in question

Further, according to the revenue, if explanation 6 and 7 are to be applied prospectively, then in such case what shall be treatment for similar transactions (as in the present case) from the year 1962 (year when explanation 5 was introduced) till 2016.

Our Comments

- **Beneficial Law:** As an interpretation of law, if any provision or an amendment to any provision of law or explanation has been made to the legislature by any appropriate authority, which is beneficial to assessee, then it is within the ambit of law and right of the assessee to avail benefit of such beneficial law or an amendment retrospectively, unless otherwise stated. Hence, when in the present case, it is not explicitly stated that whether such amendment to explanation 6 and 7 shall be retrospective or prospective, therefore the assessee is well within the rights to take the benefit of such beneficial law retrospectively itself.

Section/Article	Explanation 5,6, and 7 to Section 9(1)(i)
DTAA/Country	-
Court	High Court of Delhi
Date of decision	30.11.2023



Visit our website blog for previous case laws.-

<https://jainshrimal.com/blog/#taxgyaan>



**Join Whatsapp group for discussion on International taxation
By scanning the QR-**



International Tax Gyan 
WhatsApp group



Disclaimer

- This presentation has been prepared on the basis of information available in the public domain and is intended for guidance purposes only.
- Jain Shrimal & Co. has taken reasonable care to ensure that the information in this presentation is accurate. It however accepts no legal responsibility for any consequential incidents that may arise from errors or omissions contained in this presentation.
- This presentation is based on the information available to us at the time of preparing the same, all of which are subject to changes that may, directly or indirectly impact the information and statements given in this presentation.
- Neither Jain Shrimal & co. nor any person associated with us will be responsible for any loss however sustained by any person or entity who relies on this presentation. Interested parties are strongly advised to examine their precise requirements for themselves, form their own judgments, and seek appropriate professional advice.