

Tax Review/Taxation

Daily Alert Service

Huzaima & Ikram
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This special email service from Monday to Friday, part of subscription package, is aimed at keeping you informed about tax and fiscal matters. It contains news, legislative changes, case-law, in-depth articles and analyses covering all areas of taxes at domestic and international level. On every Saturday evening, we email weekly compilation of the entire material. Every month, *Taxation* in printed form, is sent through post and digital version of *Tax Review International* is made available for download at www.huzaimaikram.com.

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v.
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Kind Regards,

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Australia

Australia needs tax reform, businesses say

James Pearson, the CEO of the Australian Chamber of Commerce and Industry (ACCI), has said that the country “needs broad-based tax reform rather than a piecemeal approach in order to stimulate economic growth.”

Pearson made the comment in response to the publication of the Government’s Mid-Year Economic and Fiscal Outlook (MYEFO).

Real gross domestic product (GDP) is forecast to grow by two percent in 2016-17, and by 2.75 percent in 2017-18. The underlying cash deficit is expected to fall from 2.1 percent of GDP in 2016-17 to 0.5 percent in 2019-20. Net debt is projected to peak at 19 percent of GDP in 2018-19, and then decline over the medium term to around 10 percent. The Budget repair measures implemented since May’s general election are worth more than AUD22bn (USD16bn).

The Government still expects the budget to return to surplus in 2020-21.

Treasurer Scott Morrison said that to support economic growth, the Government will continue to implement its plan for jobs and growth, which will increase living standards and underpin revenue growth.

He said: “The Government remains cautious about overtaxing the Australian economy on the basis that it constrains growth and hence revenues. This assumption provides the Government with the flexibility to adjust tax policy in the future as well as accommodating our enterprise tax plan, without impacting on the medium term position.”

Reacting to the announcements, Pearson said Morrison had “rightly avoided the temptation to reach for economy-crushing tax increases to improve the budget bottom line.” He stressed that “Australia needs to do all it can to get its budget in shape,” and cannot rely on growing export demand or temporary increases in commodity prices to boost the economy.

Pearson added that Morrison is right to stand by the Government’s commitment to cut the company tax rate to 25 percent as part of the 10-year enterprise tax plan. He said Parliament should allow the policy to be put into action, and pointed out that the Treasury expects that two-thirds of the benefit will flow to households,

“making it a vital tool to improve wages and the prosperity of all Australian families.”

Pearson’s comments were echoed by Jennifer Westacott, Chief Executive of the Business Council of Australia (BCA), who said the MYEFO was “yet another reality check for the parliament that this nation cannot spend what it cannot afford.”

“One thing is very clear: you can’t tax your way to balance or prosperity,” she stated.

According to Westacott, the MYEFO shows that “there is still a long way to go before the nation’s finances reach a sustainable footing.” The BCA called on MPs to support the Government’s policies and to “move on from the phony, dead-end argument that supporting growth comes at the cost of fairness.” – *Courtesy tax-news.com*

ATO moves to reassure taxpayers after online outage

Australian Tax Commissioner Chris Jordan has said that there has been no loss or compromise of data as a result of a recent “significant and unprecedented failure of storage hardware.”

According to Jordan, the Australian Taxation Office (ATO) “suffered its worst unplanned system outage in recent memory.”

Jordan explained that the storage hardware was upgraded in November 2015 and “was seen to be ‘state-of-the-art’ at the time.” He said that the failure was compounded by the subsequent failure of the ATO’s back-up arrangements to work as planned, meaning that restoration and resumption of data and services “has been very complex and time consuming.”

The Commissioner moved to reassure taxpayers that they will not be disadvantaged as a result of the outage. He said that taxpayers who were unable to make payments or lodge forms will not be penalized. All refunds that were due to be issued when the system went down on December 12 have now been processed, and will be paid on December 16 and 17. Any other refunds still in the system will be fast-tracked.

There have been media reports that the ATO lost one petabyte of data. However, the ATO said that this figure “relates to storage capacity, which includes not only data but applications and systems as well.”

“This figure does not relate to data impacted by outages. While we experienced some data corruption, we are in the process of fully restoring this data from back-up. No data has been lost.”

The ATO website, the Tax Agent Portal, BAS Portal, and Business Portals are now up and running. The ATO is continuing to work on the stabilization of ATO online services.

Jordan announced that there will be an independent review of the outage, to determine the nature of the failures and their root causes, the adequacy of the ATO’s backup and contingency arrangements, and the likelihood of recurrence. In addition, the review will consider the ATO’s immediate response to the failure, its management of the business resumption processes, and the effectiveness of its communication with taxpayers.

“I will be doing everything I can to learn from what has happened this week and to put in place any necessary changes to minimize the risk of any recurrence,” Jordan said. – *Courtesy tax-news.com*

Canada

Canadian tax cuts receive royal assent

Canadian legislation to reduce the middle income tax rate to 20.5 percent received Royal Assent on December 15.

Bill C-2 reduces the tax rate on incomes between CAD44,701 (USD33,449) and CAD89,401 from 22 percent to 20.5 percent. The Finance Department estimates that single individuals will see an average tax reduction of CAD330 a year, while couples will benefit to the tune of CAD540 a year.

The tax cut took effect as of January 1, 2016. According to the Finance Department, “it supports the Government’s effort to foster long-term economic growth, create jobs, and help Canada’s middle class prosper.”

Also given Royal Assent were Bill C-29, which indexes the Canada Child Benefit, and Bill C-26, which facilitates the implementation of an agreement between Canada’s federal, provincial, and territorial governments on enhancing the Canada Pension Plan.

Finance Minister Bill Morneau said: “A strong economy starts with a strong middle class. Canadians understand this, and so does the Government. Our first step to strengthen the middle class is now passed into law by parliamentarians. We are also helping Canadian families across the country with increasing child care

costs through the Canada Child Benefit, and ensuring its viability in the long term through indexation.”

“These measures give middle class Canadians more money to save, invest, and grow the economy.” – *Courtesy tax-news.com*

South Africa

South African tax bills approved by parliament

South Africa’s Ministry of Finance has published the 2016 Taxation Laws Amendment Bill (TLAB), which has received parliamentary approval and gives effect to the tax changes announced in the Budget in February this year, together with legislation confirming the final details of the Special Voluntary Disclosure Program (SVDP).

With changes to the tax rates and thresholds announced in the 2016 Budget already included in previous legislation, the TLAB deals with the Budget’s more substantive changes to the country’s tax laws.

The TLAB includes the following Budget proposals:

- Introduction of measures, with effect from March 1, 2017, to prevent the avoidance of estate duty and donations tax through the transfer of assets to a trust using interest-free or low interest loans;
- Refinements to the taxation of retirement savings, following harmonization of the tax treatment of contributions to retirement funds from March 1, 2016;
- Addressing the circumvention of rules dealing with employee share incentive schemes, when restricted shares held by employees are liquidated;
- Modifications to the anti-avoidance rules dealing with cross-border hybrid debt instruments and hybrid interest, to stop opportunities for tax arbitrage by non-resident issuers;
- Extension of the learnership tax incentive, until March 31, 2022;
- Expansion of the accelerated capital allowance to include supporting infrastructure used in producing renewable energy;

- Allowing further municipalities to apply for the urban development zone tax incentive;
- Extension until February 28, 2019 of the employment tax incentive, which reduces the costs associated with hiring younger workers;
- Repeal of the 15 percent withholding tax payable on services provided by South African residents to non-residents from January 1, 2017, and its replacement under reportable arrangements provisions; and
- Revision of a previous value added tax amendment so as to allow the deduction of notional input tax credit on second-hand goods containing gold.

Final details of the SVDP have also been included in the approved 2016 tax legislation. The SVDP offers non-compliant taxpayers an amnesty on offshore assets and income until August 31, 2017 (previously March 31, 2017).

The program is intended to encourage taxpayers to come forward on a voluntary basis to regularize their tax affairs with the South African Revenue Service prior to the coming into operation of the OECD's Common Reporting Standard in September next year. Taxpayers, both individuals and companies, can avoid the imposition of understatement and administrative penalties, and criminal prosecution.

Trusts will not qualify to apply for the SVDP, but settlors, donors, deceased estates, and beneficiaries of foreign discretionary trusts may participate if they elect to have the trust's offshore assets and income deemed to be held by them for tax purposes.

Under the finalized SVDP, 40 per cent of the highest value of the aggregate of all assets situated outside South Africa between March 1, 2010 and February 28, 2015, that were derived from undeclared income, will be included in taxable income and subject to tax in South Africa.

The undeclared income that originally gave rise to those undeclared assets, will be exempted from income tax, donations tax, and estate duty in the past. However, future income will be fully taxed and declared assets will remain liable for donations tax and estate duty in the future, should the applicant donate these assets or pass away while holding them. – *Courtesy tax-news.com*

India

Indian equalization levy implementation successful

India's new equalization levy on specified digital services has fetched the Government over INR1.46bn (USD21.5m) in revenue in six months, Minister of State for Finance, Santosh Gangwar, has revealed.

The 2016 Budget included proposals for an "equalization levy" of six percent of the consideration paid for online advertising services received by a non-resident without a permanent establishment in India from an Indian tax resident. The levy covers only business-to-business transactions worth INR100,000 (USD1,484) or more and was introduced from June 1, 2016.

"The revenue accrued for the Government exchequer through the equalization levy amounts to INR1.46bn from June 1, 2016, to December 3, 2016," Gangwar said in response to a question posed by a lawmaker in India's lower house of Parliament on December 9.

The levy was proposed by India in response to the value-added tax recommendations put forward by the OECD on the taxation of the digital economy under Action 1 of its base erosion and profit shifting initiative. – *Courtesy tax-news.com*

United States

IRS issues guidance for energy tax credit claimants

The US Internal Revenue Service, in its Notice 2017-04, has updated and clarified the guidance provided in its prior notices regarding the extension, at the end of last year, of the dates by which facilities must begin construction to claim the renewable electricity production tax credit (PTC) and investment tax credit (ITC).

Under the Protecting Americans from Tax Hikes Act, taxpayers can now claim the PTC for certain renewable energy facilities if construction begins before January 1, 2017. The Act also renewed the PTC for wind facilities if construction begins before January 1, 2020 (with the credit being phased out over that period), and extended the ITC for solar energy facilities, if construction begins before January 1, 2022.

A taxpayer may establish that construction of a qualified facility has begun by starting physical work of a significant nature

(“Physical Work Test”) or incurring at least five percent of the costs of the planned project (“Safe Harbor Provision”). Notice 2017-04 clarifies the costs that may be included in the Safe Harbor Provision for retrofitted renewable energy facilities.

A taxpayer is also required to make continuous progress towards completion, determined by the relevant facts and circumstances, once construction has begun. Previously, the IRS would agree that a project had satisfied the continuous construction test if the facility was placed in service and generated power within four calendar years after the calendar year during which construction of the facility began, or by December 31, 2016, whichever is later (“Continuity Safe Harbor”).

Under the new Notice, December 31, 2016, is now replaced by December 31, 2018. For example, if construction began on a facility on January 15, 2013, and the facility is placed in service by December 31, 2018, the facility will be considered to satisfy the Continuity Safe Harbor, as will a facility where construction began on January 15, 2016, and is placed in service by December 31, 2020.

The guidance confirms that taxpayers are prohibited from combining methods to satisfy the beginning of construction requirement. For example, a taxpayer may not rely upon the Physical Work Test and the Safe Harbor Provision in alternating calendar years to satisfy the beginning of construction requirement or the continuity requirement. The Notice confirms that this rule applies to facilities for which construction began after June 6, 2016.

The PTC and ITC are aimed at leveling the playing field between US-produced wind, solar, and geothermal energy and cheaper non-renewable alternatives, such as natural gas. – *Courtesy tax-news.com*

Accurate assessment of duties and taxes: Reference values of 45 imported items issued

Directorate General Customs Valuation Karachi has issued reference values of 45 imported items in cases where declarations of importers do not reflect correct customs values in line with the trading at international market. Sources said that for the first time a comprehensive valuation database is being compiled by the Directorate General Customs Valuation Karachi for accurate assessment of duties and taxes on all imported items to plug in leakages and increase revenue collection at import stage.

According to a letter of Syed Tanvir Ahmed, Director General Customs Valuation Karachi to the Model Customs Collectorate (MCCs) here on Monday, the Directorate General is developing database values for different items wherein it has been observed that declarations are of wide range and do not correctly reflect values of the items as traded in the international market. During the scrutiny of previous clearance data, items were identified where watchful intervention at senior level was required.

The said values advised by the Directorate General are for reference/ guidance only and final assessment would be made after considering other factors which have been bearing on the customs value. Syed Tanvir Ahmed analysed that during this exercise on individual items, the Directorate General has adequately sensitised the clearance collectorate through a number of reference values/ VDB letters which were sent individually in respect of the following items:

McCain wedges (all origins) customs value would be C&F US \$1.68/kg; McCain Spicy Peri Peri Fries (all origins) C&F US \$3.12/kg; McCain Tandoori Veggie Nuggets (all origins) C&F US \$1.76/kg; McCain Smiles Fries (all origins) C&F US \$3.66/kg; Clear Glass Tubing of a kind used for the manufacture of ampoules (China) C&F US \$1.05/kg; Amber Glass Tubing of a kind used for the manufacture of ampoules (China) C&F US \$1.15/kg; Clear Glass Tubing of a kind used for the manufacture of ampoules (Europe) C&F US \$1.71/kg; Amber Glass Tubing of a kind used for the manufacture of ampoules (Europe) C&F US \$1.81/kg; Safety Pin made of iron and steel (China) C&F US \$2.20/kg; Welded steel wheel rim (other than alloy) for motorcycle (Thailand) C&F US \$2.30/kg; Adjacent Hi Liquid Chemical for water treatment (all origins) C&F US \$5.84/kg; Lawn Tennis ball (China) C&F US \$0.35/pc (other origins), US \$0.45/pc; Disposable gas/ cigarette

lighters (China) C&F US \$0.12/pc, (Far East) US \$0.15/pc, (other origins) US \$0.18/pc; Nebulizer mask (China) C&F US \$4.25/kg, (other origins) US \$5.10/kg; Oxygen mask (China) C&F US \$4.30/kg, (other origins) US \$5.25/kg; Electric water heater 15 litres (low end brands) (China) C&F US \$46.00/pc; Computer keyboard (low end brands) (China) C&F US \$1.25/pc; Computer mouse (low end brands) (China) C&F US \$1.00/pc; Epoxy hardener (China) C&F US \$3.81/kg, (other origins) US \$5.16/kg; Acrylic bath tub without motor and accessories Chinese low end brands (China) C&F US \$3.5/kg; Key chain made of plastic material (China) C&F US \$2.5/kg; Samsonite brand lap top backpack (China) C&F US \$20/pc; Levis brand ladies & gents shirts (all types) (all origin) C&F US \$18/pc; Levis brand ladies & gents T-shirts (all types) (all origin) C&F US \$16/pc; Levis brand ladies & gents jeans & casual pants (all types) (all origin) C&F US \$26/pc; Levis brand ladies & gents men's short (all types) (all origin) C&F US \$17/pc Toluene diisocyanate (China) C&F US \$2.45/kg; Citric Acid mono hydrate (China) C&F US \$1.00/kg; Urine pregnancy test strip (China) C&F US \$7.45/kg; Polyester FDY Yarn 108 Denier/2 ply (36 to 48 Filament) (all origin) C&F US \$1.92/kg; Polyester FDY Yarn 150 Denier/2 ply (48 Filament) (all origin) C&F US \$2.00/kg; Red Herring Brand Ladies & gents shirts all types (all origin) C&F US \$15/pc; Red Herring Brand Ladies & gents T-shirts all types (all origin) C&F US \$20/pc; Red Herring Brand Ladies & gents jeans & casual pants all types (all origin) C&F US \$25/pc; Timberland Brand Ladies & gents shirts all types (all origin) C&F US \$30/pc; Timberland Brand Ladies & gents T-shirts all types (all origin) C&F US \$25/pc; Timberland Brand Ladies & gents T-shirts all types (all origin) C&F US \$25/pc; Timberland Brand Ladies & gents jeans/casual pants all types (all origin) C&F US \$96/pc; Electric room heater (single rod) low end brands (China) C&F US \$5.00/pc; Electric room heater (double rod) low end brands (China) C&F US \$9.50/pc; Welding machine 100 Ampere (single phase) (China) C&F US \$42/pc; Welding machine 200 Ampere (single phase) (China) C&F US \$58/pc; Welding machine 250 Ampere (single phase) (China) C&F US \$86/pc; Welding machine 400 Ampere (three phase) (China) C&F US \$225/pc; American tourister brand hard top suitcase 75 cm (China) C&F US \$65/pc; Bathroom accessories made of plastic material (flush tanks, seat covers, fittings, showers, soap dish, towel hangers, cabinets, cloth hangers/ holders, drain/ waste pipe etc) low end brands (China) C&F US \$3.50/kg; Lincomycin injections (China) C&F US

\$10.667/kg; Metronidazole injection (China) C&F US \$1.65/kg; Palm fatty acid distillate (all origin) C&F US \$0.64/kg; Empty plastic bottles excluding pharmaceutical grade (China) C&F US \$3.50/kg; PVC hose pipe (Korea) C&F US \$2.50/kg, (China) US \$2.00/kg; Groundnut in shells (India) C&F US \$0.65/kg; Groundnut kernel (HPS) in shells (India) C&F US \$0.85/kg; Groundnut Blanched splits (India) C&F US \$0.95/kg; Groundnut in shells (China) C&F US \$0.70/kg; Groundnut kernel (HPS) (India) C&F US \$0.90/kg; Groundnut in shells (African region) C&F US \$0.62/kg; Groundnut kernel (HPS) (African region) C&F US \$0.82/kg; Groundnut blanched splits (African brand) C&F US \$0.92/kg; American tourist brand duffle bags (China) C&F US \$18.00/pc; Plain decorative paper width 1250 mm (China) C&F US \$2.80/kg; Butyl Rubber (BK 1675) (Russia) C&F US \$1.90/kg; Assel pure butter ghee (all origin) C&F US \$5.10/kg; Almarai pure butter ghee (all origin) C&F US \$5.05/kg; Cashew nuts (all origin) C&F US \$7.50/kg; stainless steel kitchen knife with fixed blade and plastic handle (low end/ unpopular brands only (china) C&F US \$4.50/kg; Digital mini Electronic kitchen weighing scale (capacity upto 5-kg) low end brands (China) C&F US \$6.10/pc, (Turkey) US \$7.57/pc; Festive/ Christmas snow spray (China) C&F US \$1.75/ pc; Lancor milk skimmed (all origin) C&F US \$0.85/kg; Lancor milk low fat (all origin) C&F US \$0.85/kg; Lancor milk full cream (all origin) C&F US \$0.85/kg; Lancor milk flavoured milk (all origin) C&F US \$0.75/kg; Almarai milk skimmed (all origin) C&F US \$0.71/kg; Almarai milk low fat (all origin) C&F US \$0.71/kg; Almarai milk full fat (all origin) C&F US \$0.71/kg; Soya fresh Soya milk (all origin) C&F US \$0.78/kg; Other brand skimmed milk (all origin) C&F US \$0.70/kg; Other brand milk low fat (all origin) C&F US \$0.70/kg; Other brand milk full cream (all origin) C&F US \$0.70/kg; Other brand flavored milk (all origin) C&F US \$0.75/kg; Nail cutter/ clipper (low end/ unpopular brands only) (China) C&F US \$3.75/kg and key chain made of iron and steel (low end/ unpopular brands only) (China) customs value would C&F US \$3.00/kg.

These values, as advised by the Directorate General are for reference/ guidance only and final assessment is to be made after considering other factors which have bearing on the customs value. These values are now also available on WeBOC system, Syed Tanvir Ahmed added. – *Courtesy Business Recorder*

FBR clarifies exemption from advance tax on properties

The Federal Board of Revenue (FBR) has dispelled an impression created through Income Tax (Amendment) Ordinance 2016 that exemption from collection of advance tax under section 236C is available to any/every first sale of immovable property irrespective of laid down qualification/conditions, which was not the intent of the legislature. The FBR has issued circular number 19 of 2016 here on Monday.

The FBR has clarified that the exemption from collection of advance tax under section 236C of the Income Tax Ordinance shall be restricted to a singular transaction represented by the first sale of immovable property by a seller, who is the dependent of a Shaheed (martyr) belonging to the Pakistan Armed Forces, a person who dies while in the service of the Pakistan Armed Forces or the service of the federal or provincial government in respect of immovable property acquired from or allotted by the federal government, provincial government or any authority duly certified by the official allotment authority being in recognition of or for services rendered by the Shaheed or the person who dies in service.

According to the FBR, Income Tax (Amendment) Ordinance 2016 was promulgated on 31st July, 2016 whereby a new sub-section (4) was added in section 236C of the Ordinance relating collection of Advance Tax on sale or transfer of immovable property. The aforementioned sub-section is reproduced hereunder for ease of reference:

“(4) Sub-section (1) shall not apply to:-

(a) A seller, if the seller is dependent of:

(i) a Shaheed belonging to Pakistan Armed Forces; or (ii) a person who dies in the service of the Pakistan Armed Force or the Federal and Provincial Government; and

(b) to the first safe of immovable property which has been acquired or allotted as an original allottee, duly certified by the official allotment authority.

The FBR said that some ambiguity/confusion prevailed with regard to the interpretation of the aforementioned sub-section, whereby, a plain reading of clause (b) of sub-section (4) created an impression that exemption from the applicability of section 236C of the Ordinance is available to any/every first sale of immovable property irrespective of qualification/ conditions laid down in

clause (a) of sub-section (4) of section: 236C of the Ordinance which was not the intent of the legislature.

Therefore, cognisance of the same was taken and in order to remedy the situation sub-section (4) of section 236C was omitted and a proviso was added in Sub-section (1) of section 236C of the Income Tax Ordinance, 2001 through the Tax laws (Amendment) Ordinance, 2016 dated 31st August, 2016 which is reproduced hereunder:

“Provided that this sub-section shall not apply to a seller, being the dependent of a Shaheed belonging to the Pakistan Armed Forces or a person who dies while in the service of the Pakistan armed forces or the service of federal or provincial government, in respect of first sale of immovable properly acquired from or allotted by the federal government or provincial government or any authority duly certified by the official allotment authority, and the property acquired or allotted is in recognition of or for services rendered by the Shaheed or the person who dies in service.

The FBR said that in light of the aforementioned proviso added in sub-section (1) of section 236C of the Income Tax Ordinance, 2001, it is manifest that exemption from collection of advance tax under section 236C of the Ordinance shall be restricted to a singular transaction represented by the first sale of immovable property by a seller, who is the dependent of a Shaheed belonging to the Pakistan armed forces, a person who dies while in the service of the Pakistan armed forces or the service of the federal or provincial government in respect of immovable property acquired from or allotted by the federal government, provincial government or any authority duly certified by the official allotment authority being in recognition of or for services rendered by the Shaheed or the person who dies in service, the FBR added. – *Courtesy Business Recorder*

KTBA seeks tax return deadline extension

Tax Bar Association (KTBA) on Monday requested to extend the date of e-filing of income tax returns for the tax year 2016 up to December 31, 2016. In a letter sent to Finance Minister Ishaq Dar, the KTBA said that the IRIS system had been malfunctioning till the end of October, 2016 and subsequently from November 1, 2016, it was improved and since then taxpayers and tax consultants were trying their level best and working day & night for tax compliance.

It further said that the last date of filing of sales tax, advance income tax under section 147 and monthly statements under section 165 of the Income Tax Ordinance, 2001 were on the same date, consequently, the system was again collapsed at the last hour on December 15, 2016 and majority of taxpayers were unable to file tax returns.

The letter requested to look into the matter in order to facilitate the genuine taxpayers and also the tax consultants who were regularly contributing into the national kitty as their moral and legal obligation as they were now unable to complete their backlog of three months in one and a half months period. Keeping the said in view, it has been requested to extend the date of e-filing of tax return and statements for the tax year 2016 up to December 31, 2016, the letter added. – *Courtesy Business Recorder*

2016 TRI 577 (H.C. Del.)

HIGH COURT OF NEW DELHI

S. Ravindra Bhat and Najmi Waziri, JJ.

Triune Projects Private Limited

v.

Deputy Commissioner of Income Tax

FACTS/HELD

S. 2(42C)/ 50B: The fact that certain assets of the “undertaking” are left out of the sale transaction because it would cause inconvenience for the purchaser does not mean that the transaction is not a “slump sale”. To expect a purchaser to buy and pay value for defunct or superfluous assets flies in the face of commercial sense

- (i) The sale transaction was reported for a total consideration of Rs.45.83 crores. The sale was for a going concern, which included ongoing service contracts, employment contracts and other tangible assets, and intangible assets such as technical know-how etc. To expect a purchaser to buy and pay value for defunct or superfluous assets flies in the face of commercial sense. Unfortunately, the Revenue’s understanding is that in a going concern the buyer is bound to pay good money, transact and purchase bad and irrecoverable debts. Not only does it fly in the face of common and commercial understanding, but it is not even a pre-condition , as is evident from the definition of “undertaking”, cited in Explanation (1) to Section 2 (19) (A) of the Act.
- (ii) This definition of “undertaking” is what has been engrafted into by reference, under Section 2(42C) of the Act. Therefore, if certain assets or properties are left out because they would cause inconvenience or lead to some kind of a trouble for the purchasing party, it is well within its right to exclude it from the list of assets.

Appeal consequently allowed.

ITA 448/2016, CM APPL. 26426/2016.

Decided on: 22nd November, 2016.

Present at hearing: Tarun Gulati with Rony O John, Shashi Mathews and Rachana Yadav, Advocates, for Appellant. Zoheb Hossain, Sr. Standing Counsel, for Respondent.

JUDGMENT

S. Ravindra Bhat, J.—

1. Admit.

2. The question of law is “whether in the circumstances of the case the Income Tax Appellate Tribunal (ITAT) fell into error in holding that the assessee’s transactions of sale to Triune Energy Services Pvt. Ltd. (hereafter referred to as ‘buyer’) is not a genuine slump sale to qualify treatment under Section 50B of the Income Tax Act, 1961”.

3. The assessee is engaged in the business of design, engineering and consultancy in the oil and gas (both onshore and offshore), petroleum refinery and allied sector. It provides a range of services starting from concept or project which includes feasibility study, process design and detail engineering procurement services, construction supervision etc. On 22.09.2006 it entered into a Slump Sale Agreement (hereafter referred to as ‘the agreement’) with the buyer. The agreement had the effect of transferring the business undertaking entered by the appellant/assessee as a going concern. All tangible assets and liabilities together with goodwill were conveyed for a lump sum consideration of Rs. 45.85 crores. The net book value of the assets so transferred was Rs. 5.27 crores. In the return filed by the assessee on 10.11.2007 it declared a corresponding income and since its undertaking had been in existence for more than three years it computed long term capital gains under Section 50B and offered 20% of it as tax.

4. The assessee’s claim was selected for scrutiny during which it relied upon the agreement dated 22.09.2016 and its various terms. The Assessing Officer (AO) rejected the assessee’s claim holding *inter alia* that the slump sale tax claim was a “sham transaction” designed to avoid tax liability by artificially inflating assets value and that the assets so transferred were short term in nature. The AO decided that the considerations, i.e., lump sum amount received was income from other sources and directed a higher rate of tax.

5. The assessee unsuccessfully appealed to the Commissioner of Income Tax (Appeals) [CIT(A)], who upheld the finding that the transaction was not genuine and so had colourable device. The assessee accordingly appealed to the ITAT. In the meanwhile, parallelly the buyer, which was formerly known as ‘Saipem Triune Engineering Private Limited’, preferred an appeal to the ITAT against a similar finding that the transaction was colourable and there was no expression of slump sale which resulted in purchase of such assets. The ITAT, on that occasion, in its order made in the buyer’s appeal, accepted the genuineness of this slump sale agreement of 22.09.2006 and set aside the findings of the AO

and the CIT(A). The ITAT, however, remanded the matter with respect to valuation of goodwill to the AO. The buyer, therefore, appealed to this Court. By judgment and order reported as *Triune Energy Services Pvt. Ltd. Vs. Deputy Commissioner of Income Tax*, 2015-TIOL-2701-HC-Del-IT, it was held that the finding of the ITAT with respect to the genuineness of slump sale was on account of a cross appeal by the Revenue on this point.

6. On the other issue of the remit (for which the assessee had appealed), this Court held that goodwill was an intangible asset and the question of its valuation, in any manner, other than the one disclosed by the assessee could not have arisen. In so holding, this Court relied upon the decision of the Supreme Court in *Commissioner of Income Tax Vs. Smifs Securities Ltd.* 348 ITR 302 (SC). Besides, the Court also noted the relevant Financial Reporting Standard i.e., No. 10 and the Accounting Standard issued by the Chartered Accountants of India. Therefore, the Court concluded that the excess consideration paid over and above the value of the net tangible asset, was none other than the value of the goodwill.

7. The ITAT, in the present case, negated the ruling of the CIT(A), which had concluded that the slump sale reported by the assessee here was not genuine. It was apprised of its previous ruling, in the buyer's case which had, in effect, rejected the Revenue's contention that the agreement was a device or a "sham transaction". The ITAT was made aware of the judgment of this Court in Triune's case (*supra*), however, it held as follows:-

"29. We, however, find that in the meanwhile the Coordinate Bench of the ITAT, Delhi in the case of purchaser i.e. Saipem Triune Engg. Pvt. Ltd. vs. DCIT (supra) has given its finding on the genuineness of the same agreement dated 22.9.2006 between STEP and the present assessee following the decision of Hon'ble jurisdictional High Court of Delhi in the case of Triune Energy Services Pvt. Ltd. vs. DCIT & Ors. (supra). We thus in the interest of justice set aside the matter to the file of the Assessing Officer to decide the issue afresh in view of the above submission of the assessee and the decisions cited above, after affording opportunity of being heard to the assessee, as the submissions of assessee before us meeting out the above objections raised by the Ld. CIT(A) reproduced in para no. 28 above, need factual verification in view of the above cited decisions to arrive at a just and proper conclusion on the issue. The ground No.2 of the appeal of the assessee is thus allowed for statistical purposes."

8. It is contended by the assessee that the question of remitting the matter, as was sought to be done by the impugned order, does not arise and that the previous ruling in Triune's case (*supra*) concludes the same entirely in its favour.

9. Learned counsel relied upon the operative portion of the judgment in that case and stated that a transaction held to be not a device or a sham, in the hands of one of the parties cannot transform itself to a suspect and a sham transaction in the hands of the other party. Accordingly, the Revenue highlighted that the remittance order should be upheld. He highlighted that there are certain other aspects which cannot be papered over; the principle one being that the entire undertaking was not transferred to the buyer. It was submitted that two assets i.e. one in the form of bad debt and another shown to be written off were retained by the seller. In the circumstances the entire “undertaking was not sold”. To satisfy the pre-requisites of a slump sale, as defined in Section 2(42C) of the Act, the undertaking had to be transferred as a whole.

10. At the outset, this Court is of the opinion that the ITAT entirely misdirected itself in its interpretation of the previous judgment in Triune’s case (supra). This Court had affirmed the decision of the ITAT to the effect that the transaction was not a sham or was not a colourable device. In these circumstances, unless there are exceptional facts to the contrary, the same finding has to be maintained in the case of the seller – which the assessee too was. So far as the Revenue’s contentions with respect to the retention of two assets that were not sold as a part of the going concern by the assessee is concerned, we find the argument is insubstantial. The sale transaction was reported for a total consideration of Rs.45.83 crores. The sale was for a going concern, which included ongoing service contracts, employment contracts and other tangible assets, and intangible assets such as technical know-how etc. To expect a purchaser to buy and pay value for defunct or superfluous assets flies in the face of commercial sense. Unfortunately, the Revenue’s understanding is that in a going concern the buyer is bound to pay good money, transact and purchase bad and irrecoverable debts. Not only does it fly in the face of common and commercial understanding, but it is not even a pre-condition, as is evident from the definition of “undertaking”, cited in Explanation (1) to Section 2 (19) (A) of the Act.

11. This definition of “undertaking” is what has been engrafted into by reference, under Section 2(42C) of the Act. Therefore, if certain assets or properties are left out because they would cause inconvenience or lead to some kind of a trouble for the purchasing party, it is well within its right to exclude it from the list of assets.

12. For these reasons, the revenue’s contentions are rejected.

13. For the foregoing reasons, the appeal has to succeed; question of law framed has to be answered in favour of the assessee and against the revenue. It is so answered. Accordingly, it is held that the slump sale qualifies for treatment under Section 50(B) of the Act.

14. The appeal is consequently allowed and CM No.26426/2016 stands disposed off.