

## **ITAT slams AO for reopening of assessment as alleged non-disclosures were duly reported in Form No. 3CEB**

**Summary – The Pune ITAT in a recent case of Sandvik System Development AB., (the Assessee) held that Where Assessing Officer on basis of reasons recorded in earlier Assessment year held that that assessee had received IT Support fees and Licence fees in relevant year, which had not been offered to tax, and thus, resorted to reassessment, but in computation of total income, a declaration had been made by assessee in respect of such receipts and it had pointed out that same did not fall within ambit of royalty or fees for technical services, reassessment was unjustified**

### **Facts**

- The assessee had filed his return for relevant year.
- The Assessing Officer noticed from the submissions made during the assessment for assessment year 2005-06 that the assessee had received IT support fees and licence fees from its AE in assessment year 2008-09, but the same were not offered for tax and, he had concluded that receipts under the head 'IT Support Fees' received by the assessee from AE were in the nature of royalty and fees for technical services and taxable as per article 12 of DTAA of India and Sweden as well as section 9(1)(vi) & 9(1)(vii). Consequently, the Assessing Officer issued notice under section 148.
- The assessee sought reasons for reopening the assessment and filed objections. The objections filed by the assessee were rejected by the Assessing Officer as there was no assessment under section 143(3)/147 and the Assessing Officer held that there was escapement of income on the basis of tangible material before him, and, thus, it was fit case for reopening the assessment.
- The DRP also upheld the action of the Assessing Officer.
- On appeal:

### **Held**

- The first and foremost basis for invoking section 147 is the 'reason to believe' of escapement of income and such reason to believe has to be based on tangible material or otherwise there has to be live link between the reason to believe and escapement of income' then only the proceedings under section 147 can be initiated. The proviso under section 147 provides that where assessment under section 143(3) has been made, then no action under the main section would be taken after expiry of four years from the end of relevant assessment year, unless escapement of income is by reason of failure on the part of assessee to make return under section 139 or in response to notice under section 142(1) or 148 to disclose fully and truly all material facts necessary for assessment for that assessment year. Undoubtedly, proviso is applicable in case of non-fulfilment of certain conditions laid down but before applying the provisions provided in the proviso to the section, the provisions of main section have to be seen, which clearly provides that there has to be reason to believe of

escapement of income and then only provisions of section 147 can be triggered. There is no merit in the reasoning of the revenue that where no assessment under section 143(3) has been completed and the assessment is only completed under section 143(1) since the assessee has failed to disclose fully and truly all material facts necessary for assessment, then action under section 147 can be taken.

- Now, coming to the facts of the present case, where there is finding in the case of the assessee itself though by the DRP that no tangible material was brought in the reasons recorded on the basis of which valid reason to believe could be formed.
- In the facts of the present case also the assessee in the computation of total income, a declaration had been made in respect of such receipts and had pointed out that the same do not fall within ambit of royalty or fees for technical services.
- Further, in Form No.3CEB, audited report, the assessee in clause 12 has given declaration in respect of international transactions with associated enterprises.
- In view of the above said declarations made by the assessee which has also been considered by the Tribunal in sister concern of the assessee, *i.e.*, Sandvik Information Technology AB, though for assessment year 2005-06, it was to be held that in the absence of any tangible material establishing escapement of income in the hands of assessee, there is no merit in the exercise of invoking of re-assessment proceedings under section 147. The reason to believe escapement of income should have a live link. There is no merit in the stand of authorities below that in the present case, where the assessment order was passed under section 143(1), then the Assessing Officer had no action to look at or to consider the same. Under the provisions of the Act, it is incumbent upon the Assessing Officer to come to finding on the basis of tangible material to establish his case of reason to believe of escapement of income; in the absence of which, re-assessment proceedings are invalid and bad in law. Accordingly, consequent order passed under section 143(3) read with section 147 does not stand.