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[2007] 288 ITR 0578- E. SANKARAN VS. UNION OF INDIA (KERALA HIGH COURT)

The authority competent to grant the reward for a tax informer is required to keep in mind the following circumstances : (a) the accuracy of the information given by the informant ; (b) the extent and nature of the help rendered by the informant ; (c) the risk and trouble undertaken and the expense and odium incurred by the informant in securing and furnishing the information and documents ; (d) the quantum of work involved in utilising the information furnished and in making the assessment ; (e) the quantum of extra taxes levied and actually realised or realisable which are directly attributable to the information and documents supplied by the informant : the quantum of extra taxes realisable will be determined only after all the assessments have become final and no appeal, etc., is pending or filed and the time for filing of appeal has expired ; (f) in cases where the information led to recovery of otherwise irrecoverable taxes, the facility with which such taxes could be recovered as a result of the information. Upon directions of the court the petitioner's case was considered and the reward given to him was Rs. 1,50,000. Held, that the entire case of the petitioner was considered and the various aspects on the basis of which reward was due were considered. The committee had taken a proper and just decision on the facts and circumstances. Moreover this was not a matter in which the High Court, in exercise of writ jurisdiction, was to adjudicate as if it were sitting in appeal against the said decision.

[2007] 288 ITR 0517- COMMISSIONER OF INCOME-TAX VS. THIRUMALAI FERTILISER AND CO. (MADRAS HIGH COURT)

Section 44AE provides for an estimate of presumptive income for transporters. Where the application of the provision to the facts of the assessee's case is a debatable one, rectification provisions could have no application as held in CIT v. Thirumalai Fertiliser and Co. [2007] 288 ITR 517 (Mad). The fact that the assessee acquiesced in such application in a previous year due to the smallness of the tax involved, would make no difference to this conclusion.

The assessment was made under section 143(3) of the Act and the Assessing Officer accepted the return of loss filed by the assessee. Further he estimated the income by way of addition of Rs. 48,000 from the lorries under section 44AE of the Act. From the records it was seen that the assessee maintained books of account and filed a profit and loss account, which was considered by the Assessing Officer in determining the income. Once the books of account were accepted, it

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was wrong on the part of the Assessing Officer to estimate income under section 44AE of the Act. Even though the Assessing Officer was wrong in estimating the lorry income, the assessee did not prefer an appeal against the assessment due to the smallness of the amount involved and also to purchase peace with the Department. The assessment under section 44AE by invoking the rectification proceeding under section 154 of the Act, was not justified.

[2007] 288 ITR 0278- BIMAL KUMAR ANANT KUMAR VS. COMMISSIONER OF INCOME-TAX (ALLAHABAD HIGH COURT)

Additional evidence can be filed along with an application stating the reason for filing such additional evidence. A party cannot file any additional document as a matter of right which was not before the authorities below. An application has to be filed seeking leave of the Tribunal to bring on record the additional evidence.

Apart from the fact that the stock register was not produced by the assessee, the profits were also low as compared to other assessees dealing in the same trade coupled with the fact that the assessee had voluntarily surrendered a sum of Rs. 30,000 appearing as deposit in the name of V in its books of account as it was not in a position to explain the same and, therefore, the trading result disclosed by the assessee had rightly not been accepted. The Tribunal was justified in sustaining the ad hoc addition of Rs. 13,000.

[2007] 288 ITR 0222- SANGRUR VANASPATI MILLS LTD. VS. COMMISSIONER OF INCOME-TAX (PUNJAB AND HARYANA HIGH COURT)

The expenditure incurred by the assessee on the cost of powerline for independent feeder, incurred prior to commencement of production, had to be treated as part of plant and machinery being necessary for commencement of production and had to be capitalized.

Expenditure incurred prior to the commencement of business would be on capital account. To the extent such expenditure has nexus with the assets, it would stand capitalised so that the value of such asset along with capitalised expenditure relating thereto, would be entitled to depreciation from the year the assets are put to use. This is the principle decided by the High Court in Sangrur Vanaspati Mills Ltd. v. CIT [2007] 288 ITR 222 (P&H). In this case, the claim related to the cost of temporary electric connection, power line and inspection fee relating thereto, treated as part and parcel of the plant and machinery, a treatment which was accepted by the High Court.

[2007] 288 ITR 0106- COMMISSIONER OF INCOME-TAX VS. U. P. UPBHOKTA SAHKARI SANGH LTD. (ALLAHABAD HIGH COURT)

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Whatever is received by an assessee need not necessarily belong to it. Where a co-operative society received a certain sum from the Government of Uttar Pradesh for disbursement to its bhandars (distribution centres) to meet expenses of salary of certain employees, through the society under an order of the U. P. Government, such amount cannot be treated as income of such co-operative society. Though the principle of diversion by overriding title was not referred to, it was found that the amount did not have the character of income in the hands of the assessee. The order of the Tribunal to this effect was upheld by the High Court in CIT v. U. P. Upbhokta Sahkari Sangh Ltd. [2007] 288 ITR 106 (All).

[2007] 288 ITR 0085- ELGIN MILLS CO. LTD. VS. COMMISSIONER OF INCOME-TAX (ALLAHABAD HIGH COURT)

Liability to contribute to expenditure of marriage of daughters of employees is a liability contingent in nature. Actual contribution in year alone deductible.

[2007] 288 ITR 0052- SONY INDIA P. LTD. VS. CENTRAL BOARD OF DIRECT TAXES (DELHI HIGH COURT)

The Central Board of Direct Taxes had issued instructions for computation of income from international transactions having regard to arm's length price by Instruction No. 3 of 2003 dated May 20, 2003, [2003] 261 ITR (St.) 51. This was challenged on the ground that the classification of assessees as those with such turnover below and above Rs. 5 crores was not within the powers of the Board under section 119. Further, the creation of a Transfer Pricing Officer, it was alleged, is unconstitutional, since it supplants and curtails the jurisdiction of the Assessing Officer. The High Court in Sony India P. Ltd. v. Central Board of Direct Taxes [2007] 288 ITR 52 (Delhi) considered the objections elaborately, while upholding the constitutionality of the Instruction. The High Court found that instructions are based on correct interpretation of relevant provisions of the Act, so as to guide the Assessing Officer. The classification is on a recognisable basis having nexus with the objectives of the provisions. As for the creation of the Transfer Pricing Officer, the intention is not to supplant the judicial discretion of the Assessing Officer, but to assist the Assessing Officer. It was also pointed out that circulars can be reviewed in the light of the working of the provisions, so that these are not final. The role of the Transfer Pricing Officer is to collect a data base of different cases, so that it will be a useful guide. The challenge was, therefore, found to be not sustainable for any of the reasons urged on behalf of the petitioner.

[2007] 288 ITR 0015- COMMISSIONER OF INCOME-TAX VS. SOUTHERN ROADWAYS LTD. (MADRAS HIGH COURT)

Computer is a capital asset, so that its cost is not admissible as a revenue expenditure. The assessee is only entitled to depreciation, but that does not mean that the cost of upgrading should

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be capital expenditure. The High Court in CIT v. Southern Roadways Ltd. [2007] 288 ITR 15 (Mad) made an apt reference to the observation in Alembic Chemical Works Co. Ltd. v. CIT [1989] 177 ITR 377 (SC) in the following words (page 17) :

“What is capital expenditure and what is revenue are not eternal verities but must needs be flexible so as to respond to the changing economic realities of business. The expression ‘asset or advantage of an enduring nature’ was evolved to emphasise the element of a sufficient degree of durability appropriate to the context.”

Upgradation is not an enduring benefit. The High Court, therefore, allowed the deduction following the rationale of its own earlier decision in CIT v. Janakiram Mills Ltd. [2005] 275 ITR 403 (Mad).

Another way of saying that upgradation of computers by changing certain parts thereby enhancing the configuration of the computers for improving their efficiency, but without making any structural alterations is not change of an enduring nature. The expenditure incurred by the assessee had therefore to be treated as revenue expenditure. Alembic Chemical Works Co. Ltd. v. CIT [1989] 177 ITR 377 (SC) applied.

[2007] 288 ITR 0001- S. A. BUILDERS LTD. VS. COMMISSIONER OF INCOME-TAX (APPEALS) (SUPREME COURT OF INDIA)

Where the assessee lends money without interest, there can be no inference of notional income based on reasonable interest, which the assessee might have charged for lending to relatives or sister concerns. But then, it is possible in such cases to disallow a proportionate part of interest paid on such borrowed capital, if any, to the extent that the borrowed funds are utilised for interest-free advances. The disallowance is on the ground, that it will not be eligible for deduction as expenditure incurred for purposes of business. If the assessee could, however, show that such interest-free advances have an element of commercial expediency, though not quid pro quo, it may not need disallowance as held by the Supreme Court in S. A. Builders Ltd. v. CIT (Appeals) [2007] 288 ITR 1. It deals with a case, where the assessee contested such disallowance relating to interest-free loans given to sister concerns. Notwithstanding the fact that the Tribunal had confirmed the disallowance and the High Court upheld the same, the Supreme Court found that the evidence suggested that the interest on borrowing should have been allowed. It was argued on behalf of the assessee, that the advance had been made out of a bank account, wherein both its own and borrowed funds were mixed up, so that there was no direct nexus between borrowing and the advances. It was further argued and accepted by the Supreme Court, that the loan to a sister company, which in this case was a subsidiary of the assessee company is one, which should be treated as prompted by commercial expediency, so that the amount was even otherwise allowable.

The Supreme Court, inter alia, endorsed the decision of the Delhi High Court in CIT v. Dalmia Cement (B.) Ltd. [2002] 254 ITR 377, that no businessman need be compelled to maximise his profit. The authorities should put themselves in the shoes of the assessee and consider what a prudent businessman would do. It is not the case of the Income-tax Department that the funds

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lent to the subsidiary company were used for non-business purposes. It was in this view, that the Supreme Court set aside the disallowance upheld by the High Court. The judgment, though in line with the established principles of the law on the subject, would indicate that the authorities had ignored the special relationship between the holding and subsidiary company, both in business, so that such advance should be taken as prompted by commercial expediency, so as to be deductible under section 37, if not under section 36(1)(iii) of the Act.

[2007] 288 ITR (A.T.) 0106- JOINT COMMISSIONER OF INCOME-TAX VS. INVESTMENT TRUST OF INDIA LTD. (PRESENTLY KNOWN AS HFCL INFOTEL LTD.) (INCOME-TAX APPELLATE TRIBUNAL--CHENNAI)

Sale and lease back transactions have been suspect. In fact, the amended Accounting Standards on the one hand and the depreciation rule, which binds the purchaser to the written down value of the seller on the other would take away the tax advantage of sale and lease back transactions. Controversies continue in respect of earlier transactions. Genuine sale and lease back transactions cannot be dismissed as mere financial transactions by ignoring the legal effect of such finance lease. It is also not necessary that the lessee should have put the asset to use because the very fact that it is leased out in the course of business would be sufficient to satisfy the condition of use for depreciation purposes.

The decision of the Tribunal in Joint CIT v. Investment Trust of India Ltd. [2007] 288 ITR (AT) 106 (Chennai) is consistent with the law on the subject. It is a third member case, where there had been differences on every issue, with the third member agreeing with one or the other. The majority decided that in a genuine case, depreciation is admissible.

One of the issues related to an objection to depreciation on the boiler ammonia plant embedded to earth on the ground, that it would be immovable property, which cannot be transferred without a registered instrument. The Tribunal found that a plant, merely because it is installed in the earth, does not cease to be movable property. In respect of one of the other transactions in the group of three cases dealt with, the matter was remanded for further enquiry.

[2007] 288 ITR (A.T.) 0063- JOINT COMMISSIONER OF INCOME-TAX VS. USHA MARTIN INDUSTRIES LTD. (INCOME-TAX APPELLATE TRIBUNAL--CALCUTTA)

A mere provision for bad debt is not an admissible deduction in computation of taxable income. The same rule need not have application in computation of book profits under section 115JA or section 115JB. Even so, the provision to be deductible should be for an ascertained liability. Provision for bad and doubtful debt stands on a different footing from other provisions. It is not really a liability, but a diminution in value of the asset, which in this case, is a quantum of aggregate debts. Whether such provision is ascertained or unascertained, this should be allowable. But at the same time, if such provision is excessive, it may well have to be treated as reserve. It is in the light of the above understanding of the provision of law that the Special Bench of the Tribunal in Joint CIT v. Usha Martin Industries Ltd. [2007] 288 ITR (AT) 63 (Kol) decided that, clause (c) of the Explanation to section 115JA would have no application for

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provision for bad and doubtful debts since it is only for probable diminution in value of the assets. The question whether it is a provision for an ascertained or unascertained liability could not, therefore, arise in such a case. But all the same, it could be in excess of requirements. Such excess may have to be treated under Explanation (c). Where the auditors do not qualify the accounts on the ground that the provision is excessive, no disallowance need be made.

It was also found in this case that the provision for wealth-tax cannot be disallowed in the absence of any provision for such disallowance.

This decision was rendered by the Special Bench after elaborate review of the case law on the subject and is, therefore, a useful precedent for other cases. The conclusion that provision for bad and doubtful debts is different from other provisions for liability is a welcome one and is consistent with the accounting perceptions.

[2007] 289 ITR 0369- R. & B. FALCON (A) PTY. LTD IN RE VS. (AUTHORITY FOR ADVANCE RULING)

The Authority for Advance Rulings in R. & B. Falcon (A) Pty. Ltd., In re [2007] 289 ITR 369 has ruled that the expenses incurred in transport of offshore crew, who were mostly non-residents provided for mobile offshore drilling rig along with equipment were liable for fringe benefits tax (FBT), because such transport cost would either fall under the head “Conveyance” or “Tour and travel (including foreign travel)” under section 115WB(2)(F) and (Q) respectively.

It was argued on behalf of the assessee, that Circular No. 8 of 2005 dated August 29, 2005—[2005] 277 ITR (St.) 20 precluded transportation of employees from the purview of liability to FBT. The circular, no doubt, makes a non-resident liable to tax in respect of business in India, but then, it does appear that the transport under such circumstances along with equipment could not ordinarily be treated as “conveyance” or “travel”, especially since the transport was admittedly not from the residence to the airport of home country, but from the airport to the helicopter base and then to the rig. If one were to consider the objective of the levy, which should be a guiding factor in such cases of doubt, there could be no element of any benefit, which escapes tax in the hands of the employees, so as to be made liable for tax in the hands of the employer as FBT. The answer to question 104 relating to free or subsidised transport is that, it would be liable for FBT leaving out only the transport cost from the place of residence, but then, it would appear from the question and answer that there should be an element of subsidy. The Authority for Advance Rulings considered that the terms conveyance and transport are often interchangeable and that they may include transportation by helicopter, etc., from one place to another. The decision is controversial.

[2007] 289 ITR 0355- CARGO COMMUNITY NETWORK PTE. LTD. IN RE VS. (AUTHORITY FOR ADVANCE RULING)

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The Authority for Advance Rulings in Cargo Community Network Pte. Ltd., In re [2007] 289 ITR 355 has ruled that the payment for access to internet based air cargo portals outside India would be royalty, because it is not merely for getting access to data, but use of the portal for booking cargo, besides training of subscribers and rendering help connected therewith.

The mere right to use technical equipment does not mean that technology gets transferred or that it constitutes a payment for royalty. What is obtained is just information, it had been held, and there could be no element of royalty, in CIT v. HEG Ltd. [2003] 263 ITR 230 (MP). The provision of cellular mobile telephone services was held to be a service, which did not have the character of technical service in Skycell Communications Ltd. v. Deputy CIT [2001] 251 ITR 53 (Mad). The Tribunal in Wipro Ltd. v. ITO [2005] 278 ITR (AT) 57 (Bang) had held that payment to a foreign publishing house for access to certain data could not amount to royalty, as it was a case of payment for mere information. The Authority for Advance Rulings in taking the view in Cargo Community Network's case (supra), that the payment is taxable as royalty and fees for technical service distinguished these cases by pointing out that it was not a case of provision of mere internet access to information, but use of the portal for booking cargo with airlines, training subscribers and rendering connected help. Even so, it would appear that these services are in the nature of business rendered abroad, so that this ruling could have been different.

[2007] 289 ITR 0312- HOECHST GMBH, IN RE VS. (AUTHORITY FOR ADVANCE RULING)

In the context of the holding company of an Indian subsidiary itself getting amalgamated with another foreign company, there is transfer of the shares in the Indian company as an asset located in India, but such transfer is not regarded as transfer under section 47(via), so that there is no liability as held by the Authority for Advance Rulings in Hoechst GmbH, In re [2007] 289 ITR 312. Where the holding company, which is a foreign company amalgamates with another foreign company, the exemption under section 47(via) is subject to two conditions, that there should be 25 per cent. identity of shareholding of the amalgamating company in the amalgamated company and that there should be no liability for capital gains tax in the country where the amalgamating company is incorporated. The first condition was easily satisfied, because amalgamation abroad was as between the holding company and the wholly owned subsidiary. It was, however, understood to be an impossible condition, so as not to be applicable in the view that the company cannot be its own shareholder. As for the second condition, that there should be no liability for capital gains in the country of transferor, that is also satisfied, since article 13(5) of the Double Tax Avoidance Agreement between India and Germany provides for tax in the country where the alienator is a resident. Instead of amalgamation, if there had been transfer of shares of the Indian company, capital gains would have been taxable in India under article 13(4) of the Agreement.

[2007] 289 ITR 0310- COMMISSIONER OF INCOME-TAX VS. SMT. COMILLA

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MOHAN (ALLAHABAD HIGH COURT)

The assessee created two trusts for the first son of V and the first son of H by transferring 60,000 equity shares. The Department took the view that these two trusts were not validly created as the sole beneficiary of each of the two trusts was neither in existence nor identifiable at the time of creation of these trusts and in action under section 147(a)/148 of the Income-tax Act, 1961, added the dividend income on these shares in the hands of the assessee. The Commissioner (Appeals) deleted the dividend income from the assessment made in the assessee's hands. This was confirmed by the Tribunal. On a reference Held, that the two trusts were validly created though the sole beneficiary of each of the trusts was neither in existence nor identifiable at the time of creation of the trusts. The income on the shares / debentures could not be included in the hands of the assessee.

[2007] 289 ITR 0226- SMT. LILA CHOUDHURY VS. COMMISSIONER OF INCOME-TAX (GAUHATI HIGH COURT)

The power conferred by section 263 of the Income-tax Act, 1961, to interfere with an assessment made can be exercised only if the Commissioner is of the opinion that such assessment order is erroneous and prejudicial to the interests of the Revenue. An erroneous order does not mean a wrong order ; it does not mean an order with which the Commissioner is unable to agree. An erroneous order would be an order which suffers from a patent lack of jurisdiction ; the error must be with reference to jurisdiction. Prejudicial to the interests of the Revenue would mean an erroneous order which goes against the interests of the revenue collection. Both the conditions must pre-exist to enable the Commissioner to exercise the power under section 263. There has to be an opinion that the assessment which has been set aside is, indeed, erroneous and prejudicial to the interests of the Revenue. Furthermore, the power under section 263 being quasi-judicial, such conclusion must be reached after hearing the assessee which is mandated by the statute itself and after recording the reasons for the conclusions reached.

[2007] 289 ITR (A.T.) 0105- SHIVALIKA CO-OPERATIVE GROUP HOUSING SOCIETY LTD. VS. INCOME-TAX OFFICER (INCOME-TAX APPELLATE TRIBUNAL--DELHI)

The assessee a co-operative housing society filed its return, declaring nil income. Refund was granted to the assessee on the basis of the return. Subsequently the Assessing Officer found that the assessee had derived interest income on bank deposits which had escaped assessment. The Assessing Officer, therefore, proceeded to initiate assessment proceedings under the provisions of section 147, after issuing notice under section 148.

(i) that on the reasons recorded it was apparent that the Assessing Officer entertained an honest belief that the assessee's income chargeable to tax had escaped assessment. The belief was based on application of mind to relevant facts. The notice was valid.

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(ii) That there is a marked distinction in law between want of inherent jurisdiction and irregular exercise or assumption of jurisdiction. As far as the provisions of the Income-tax Act are concerned, there is no express provision for an interim order on the assessee's objections to initiation of proceedings under section 147 before completion of the assessment order under section 143(3) read with section 147. The Supreme Court have held that in a case where initiation of proceedings is objected to by an assessee, the Assessing Officer must dispose of the objections by passing a speaking order. It, therefore, follows that in a case where this course is not adopted by the Assessing Officer, the Assessing Officer is required to be directed to decide the preliminary objections of the assessee to the notice under section 147 and pass a speaking order.

(iii) That interest income earned by an assessee on surplus funds of a mutual society deposited with a banking institution is covered by the principle of mutuality. The additions made in the orders under section 147 read with section 143(3) for the assessment years 1997-98 and 1998-99 were not justified.

[2007] 290 ITR 0643- ASSISTANT COMMISSIONER OF INCOME-TAX VS. OFFICIAL LIQUIDATOR OF MINAL OIL AND INDUSTRIES LTD. (GUJARAT HIGH COURT)

An important decision was rendered in the context of priority of the Government dues over other creditors. Preferential payments in favour of secured creditors and workmen have priority over the claim of the Income-tax Department as was held in ACIT v. Official Liquidator of Minal Oil and Industries Ltd. [2007] 290 ITR 643 (Guj) on consideration of the provisions of section 178(3) of the Income-tax Act, 1961 and section 529A of the Companies Act, 1956. The demand related to a company under liquidation and the issue related to priority of claim over the sale proceeds of company's assets. The liquidator had held that there was a prior claim from the Export-Import Bank of India, besides workers' dues, which were to rank pari passu with secured creditors'. The Revenue relied upon the decision of the Supreme Court in Imperial Chit Funds (P) Ltd. v. ITO [1996] 219 ITR 498 and ITO v. Official Liquidator [1975] 101 ITR 470 (AP). The High Court found that the reliance was misconceived, since the decision of the Supreme Court related to the claim of creditors under section 530 of the Companies Act, so that the right of the secured creditors under section 529A was not under consideration. It was pointed out that the court had understood the decision of the Supreme Court accordingly in Syndicate Bank v. Official Liquidator, Wester Works Engineers Ltd. [1999] 98 Comp Cas 487 (Bom) and Venad Pharmaceuticals and Chemicals Ltd. (In liquidation), In re [2003] 114 Comp Cas 185 (Ker). The High Court further considered section 178(2) of the Income-tax Act and found that the claim that whatever is intimated as amount due should be accepted by the liquidator is not correct. Such an interpretation would be contrary to sub-section (3) of section 178 itself which only requires that the amount so claimed should be set apart and not parted with. Sections 529A and 530 of the Companies Act would be required to be followed by the liquidator. While the State dues would have precedence, they need not have precedence over prior claims of secured creditors or workmen.

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[2007] 290 ITR 0522- COMMISSIONER OF WEALTH-TAX VS. CHIKMAGALUR CLUB (KARNATAKA HIGH COURT)

An association of persons cannot be taxed under section 3 of the Wealth-tax Act, 1957. That is why an amendment was made by the Finance Act, 1981, with effect from April 1, 1981, whereby an association of persons can be subjected to wealth-tax, when the individual shares of the members of the association in the income or assets or both of the association on the date of its formation or any time thereafter are indeterminate or unknown. (21AA)

The assessee, a club registered under the provisions of the Karnataka Societies Registration Act, 1960, had declared nil wealth on the ground that it was not susceptible to the provisions of the Wealth-tax Act, 1957, since it was only an association of persons providing recreation facilities to its members. The Assessing Officer rejecting the claim of the assessee, assessed the wealth of the assessee in the status of an individual and charged wealth-tax.

Held, that the finding was that the assessee was an association of persons, the members were the owners of the assets and the individual shares of the members as the owners of the assets and the individual shares of the members in the income or assets or both of the association on the date of formation or any time thereafter were indeterminate or unknown. Accordingly, the assessee was exigible to wealth-tax as per 21AA.

[2007] 290 ITR 0449- RAJIV AGRAWAL OR HIS SUCCESSOR IN OFFICE VS. STATE OF GUJARAT (GUJARAT HIGH COURT)

Cash amounting to Rs. 20 lakhs was seized by the police from two persons. The police informed the Income-tax Department about the seizure. On the basis of the information, enquiry was made under section 131 of the Income-tax Act, 1961. The Income-tax Department found that no satisfactory explanation was given regarding the amount by the two persons. Respondent No. 2 submitted an application under section 451 of the Code of Criminal Procedure and prayed that the cash amount of Rs. 20 lakhs seized by Athawa police be handed over to him as it was seized from his possession and police had not made any report that the amount was received through illegal activities. The Deputy Director of Income-tax also made a claim for the seized amount not only pending the conclusion of the criminal trial of the case but also in connection with the income-tax proceedings. The magistrate ordered that Rs. 14 lakhs should be handed over to the second respondent and the remaining Rs. 6 lakhs be handed over to the Deputy Director of Income-tax and he imposed certain conditions. Held, that the lower court had ignored the provisions of the Income-tax Act. Hence, the order passed by the judge was required to be set aside. [The police authority was ordered to hand over the amount of Rs. 20 lakhs to the applicant forthwith.]

[2007] 290 ITR 0419- COMMISSIONER OF INCOME-TAX VS. DISTILLERS CO. LTD. (SUPREME COURT OF INDIA)

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The additional amount paid as fee for permission for bottling arrack without having such arrack matured in wooden vats for at least fifteen days and the amount paid for not affixing labels on bottles are not payments in connection with manufacture of excisable articles. It is also not an amount payable under the statute. It is fixed only by the Commissioner of Excise. In the context of the fact that there is no time-limit fixed for blending and the regulations issued by the Commissioner of Excise are not a matter decided with concern for public health, there is no element of penalty on these amounts, which are paid in pursuance of trade regulations. They cannot be characterised either as penalty or additional excise duty, so as to require payment before deduction under section 43B. It was so decided by the Supreme Court in CIT v. Distillers Co. Ltd. [2007] 290 ITR 419 following the decision in Commissioner of Central Excise v. Indian Aluminium Co. Ltd. [2006] 10 Scale 34 ; [2006] 7 RC 517. The reasoning of the Supreme Court for understanding tax, additional tax and penalty should serve as a precedent for decision on similar issues.

[2007] 290 ITR 0389- COMMISSIONER OF INCOME-TAX VS. MICRO INDIA LTD. (GAUHATI HIGH COURT)

Section 43(5) defines “speculative transaction” as a transaction in which a contract for the purchase or sale of any commodity, including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips. Explanation 2 to section 28 of the Act provides that where speculative transactions carried on by an assessee are of such a nature as to constitute a business, the business, i.e., the speculation business shall be deemed to be distinct and separate from any other business. Section 73(1) provides that any loss, computed in respect of a speculation business carried on by the assessee, shall not be set off except against profits and gains, if any, of another speculation business. The Explanation to section 73 of the Act further clarifies that where any part of the business of the company consists in the purchase and sale of shares of other companies, such company shall, for the purposes of this section, be deemed to be carrying on a speculation business to the extent to which the business consists of the purchase and sale of such shares. However, there is an exception given in the Explanation, which stipulates that a company whose gross total income consists mainly of income which is chargeable under the heads Interest on securities, Income from house property, Capital gains and Income from other sources or a company the principal business of which is the business of banking or the granting of loans and advances will not be covered within the purview of the section 73.

Held, that to come within the exception stipulated in the Explanation to section 73, the assessee-company had to prove that it was either a company whose gross total income consisted mainly of income which was chargeable under the heads “Interest on securities”, “Income from house property”, “Capital gains” and “Income from other sources” or a company the principal business of which is the banking or the granting of loans and advances. The Tribunal without discussing whether the assessee-company could prove that its principal business was of granting loans and advances and thus came within the scope of the exception stipulated in the Explanation to section

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73, had held that section 73 was not applicable in the case of the assessee-company, by simply relying on the submission made by the assessee. The order of the Tribunal had to be set aside.

[2007] 290 ITR 0377- PIAGGIO VEHICLES P. LTD. VS. DEPUTY COMMISSIONER OF INCOME-TAX (BOMBAY HIGH COURT)

Reassessment beyond the four year time limit is possible only when there is a failure to disclose material facts. In *Piaggio Vehicles P. Ltd. v. Deputy CIT* [2007] 290 ITR 377 (Bom), the assessment was made after enquiry allowing depreciation on goodwill in respect of a business purchased by the assessee as a going concern. There was hardly any doubt, that the deduction by way of depreciation on goodwill, was not admissible even as found by the High Court. The reasoning of the Assessing Officer for issue of notice was on the ground that there was a contradiction between the return of income regarding the date of acquisition of goodwill and the information available from the tax audit report. It was on the basis of this contradiction, that suppression of material facts was inferred. The specified transfer date was March 31, 1998, but subject to the condition precedent that if the conditions are not satisfied, it would be shifted to April 30, 1998. There was no suppression on the part of the assessee, since the tax audit report signed by the auditor was also furnished. The difference in dates was also explained as was evident from the information recorded during the original assessment. It was, therefore, held that the notice for invoking reassessment jurisdiction beyond the four-year time limit was not consistent with the law, which prescribes rigid requirements for reopening the assessment, which is completed after scrutiny as in this case. The Assessing Officer even called for details regarding the goodwill acquired by the assessee and these were furnished before he allowed depreciation by treating it as a commercial right of intangible nature eligible for deduction from April 1, 1998.

[2007] 290 ITR 0353- DEPUTY COMMISSIONER OF INCOME-TAX VS. YELLAMMA DASAPPA HOSPITAL (KARNATAKA HIGH COURT)

Depreciation on an asset is available only subject to the conditions of ownership as well as use. No doubt, the asset should have been actually used. But then, the law is well-established, that the use for the purposes of depreciation is not physical use in every case. A stand-by plant for example may not be actually used, but all the same, it is ready for use. Spare engines have the same character. It was in this context, it has been held in a number of cases, that passive use is sufficient, and that, active use is not necessary in every case. There may also be occasion, when the assessee may not be able to use the machinery due to lock-out in the factory. The courts have, therefore, understood the word “used” to cover “available for use” and “ready for use”. Such an inference is reasonable, since assets depreciate in value even when they are idle. This is the preponderant view taken in *CIT v. Viswanath Bhaskar Sathe* [1937] 5 ITR 621 (Bom) ; *CIT v. Dalmia Cement Ltd.* [1945] 13 ITR 415 (Patna) *Forest Industries Travancore Ltd. v. CIT* [1964] 51 ITR 329 (Ker) ; *Whittle Anderson v. CIT* [1971] 79 ITR 613 (Bom) ; *Capital Bus Service Pvt. Ltd. v. CIT* [1980] 123 ITR 404 (Delhi) ; *CIT v. Vayithri Plantations Ltd.* (1981) 128 ITR 675

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(Mad) ; CIT v. O. P. Khanna and Sons [1983] 140 ITR 558 (P&H) ; CIT v. Kanoria General Dealers (P) Ltd. [1986] 159 ITR 524 (Cal) ; CIT v. Refrigeration and Allied Industries Ltd. [2001] 247 ITR 12 (Delhi) ; Asst. CIT v. Ashima Syntex Ltd. [2001] 251 ITR 133 (Guj) and CIT v. Vindiyachal Distilleries Pvt. Ltd. [2005] 272 ITR 583 (MP).

However, a different view was taken in Dineshkumar Gulabchand Agrawal v. CIT [2004] 267 ITR 768 (Bom), where it was found that section 32 as presently worded has used the word “used” in the past tense, so that the earlier decisions would have no application and that it should have been actually used. It is rather odd that notwithstanding the preponderant view taken by the other High Courts, the special leave petition against this decision was dismissed by the Supreme Court in [2004] 266 ITR (St.) 106.

The issue, now is revived by the decision of the Karnataka High Court in Deputy CIT v. Yellamma Dasappa Hospital [2007] 290 ITR 353, where the High Court has chosen to follow the odd decision in Dineshkumar Gulabchand Agrawal’s case (supra) for its conclusion that the asset should have been physically used earlier. But the Karnataka High Court in this case also presumed that the Calcutta and Madhya Pradesh Courts have also taken the same view. The Calcutta High Court’s decision in CIT v. Oriental Coal Co. Ltd. [1994] 206 ITR 682, related to a case of a company, which remained under a lock-out for two years. It did not dissent from the other cases, but distinguished them. Reference to the Madhya Pradesh High Court’s decision is, however, not available. After the concept of block of assets has come into vogue, what is relevant is that, it enters the block on being brought to use. Since it is not possible to go by use of item-wise machinery, the inclusion in the block leads to the inference that it is brought to use. As otherwise, the stand-by generator or an asset which is ready for use would lose the benefit of depreciation, which is a charge on the profits. The controversy would require to be settled by the Supreme Court or by a Board Circular confirming the reasonable inference to avoid litigation.

[2007] 290 ITR 0300- SUBHASH CHANDER SEKHRI VS. DEPUTY COMMISSIONER OF INCOME-TAX (PUNJAB AND HARYANA HIGH COURT)

The burden of proving that a gift is genuine having been received on account of natural love and affection, is on the taxpayer. In two decisions, the Punjab and Haryana High Court in Subash Chander Sekhri v. Deputy CIT [2007] 290 ITR 300 and Jaspal Singh v. CIT [2007] 290 ITR 306 (P&H) has upheld the finding of the Tribunal, that the gifts under consideration were not proved to be genuine and that this inference being one of fact, the High Court did not interfere.

[2007] 290 ITR 0295- COMMISSIONER OF INCOME-TAX VS. IDEAL SHEET METAL STAMPINGS AND PRESSING P. LTD. (GUJARAT HIGH COURT)

Where disputed excise duty is collected from customers and kept in a separate account, it cannot be claimed that it is not to be included and that at any rate, it could be allowed as a deduction,

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merely because it is kept in a separate account. The contention was found unacceptable, since the collection being a trading receipt was liable to be included as income and that the tax amount, not having been paid, is bound to be disallowed. It was so decided in CIT v. Ideal Sheet Metal Stampings and Pressing P. Ltd. [2007] 290 ITR 295 (Guj).

[2007] 290 ITR 0282- MUGAT DYEING AND PRINTING MILLS VS. ASSISTANT COMMISSIONER OF INCOME-TAX (GUJARAT HIGH COURT)

Section 43B would bar deduction, where the listed items covered by the section have not been actually paid during the year. Notwithstanding the fact that the assessee may be maintaining accounts under the mercantile system of accounting, payment for this purpose cannot include furnishing a bank guarantee. Bank guarantee is not equivalent to payment till it is invoked by the party entitled to it. For coming to the decision, the High Court in Mugat Dyeing and Printing Mills v. Asst. CIT [2007] 290 ITR 282 (Guj) accepted Board Circular No. 372, dated December 8, 1983, [1984] 146 ITR (St.) 9 and applied the decision of the Supreme Court in Somaiya Organics (India) Ltd. v. State of U. P. [2001] 251 ITR 20, which was decided in the context of arrears of tax covered by bank guarantee. Reference was also made to Assistant Collector of Central Excise v. Dunlop India Ltd. [1985] 154 ITR 172 (SC), where it was pointed out that Governments do not run on mere bank guarantees and that it is nothing more than security for payment, so that it cannot be treated as payment itself.

[2007] 290 ITR 0090- COMMISSIONER OF INCOME-TAX VS. V. PRADEEP KUMAR (MADRAS HIGH COURT)

Section 54F of the Income-tax Act, 1961, was inserted by the Finance Act of 1982, with effect from April 1, 1983. The conditions precedent for getting exemption are transfer of any long-term capital assets not being a residential house and purchase within a period of one year before or two years after the date on which the transfer took place or construction within a period of three years after the date of transfer, of any residential house. The burden is on the assessee to prove that he had actually constructed a new residential house for purpose of the exemption under section 54F. Section 54F emphasises construction of residential house. The construction must be a real one. It should not be a symbolic construction. Mere construction by way of extension of the old existing house would not mean constructing a residential house as contemplated under section 54F.

[2007] 290 ITR (A.T.) 0379- ASSISTANT COMMISSIONER OF INCOME-TAX VS. SUCHAM FINANCE AND INVESTMENTS (I) LTD. (INCOME-TAX APPELLATE TRIBUNAL--MUMBAI)

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The Income-tax Department would subject loss on share dealings as not genuine in view of the practice of some assesseees to purchase loss in collusion with share brokers. In such cases of abuse of law, the Revenue usually resorts to a remedy which is sometimes worse than the disease inasmuch as it hits genuine cases. The Explanation to section 73 is one such draconian provision intended to curb this practice. The result is often genuine losses on sale of shares held as investments for any number of years, which are subject to delivery both at the time of purchase or sale are deemed to be speculation loss, depriving assesseees of the right to set off such loss against the income of the year, so that the assessee is assessed on a larger income than it has made during the year. It is also discriminatory in the sense that it is applicable only to companies with exceptions only for investment companies or those in money lending business.

The provision in Explanation to section 73 was rightly understood by a Third Member in Deputy CIT v. Jindal Exports Ltd. [2006] 287 ITR (AT) 172 (Delhi), when it was held that the loss on sale of shares held as investments will not be covered by the Explanation, a decision which has not yet been formally accepted by the Revenue. A decision which aggravates the agony on wrong application of this provision has been rendered by the Tribunal in ACIT v. Sucham Finance and Investments (I) Ltd. [2007] 290 ITR (AT) 379 (Mum). In this case, the only business of the assessee was dealing in shares. It had made a loss of Rs. 63,67,946 after netting a profit on trading in shares, where delivery was taken, to the extent of Rs. 5,32,963. The Assessing Officer, following the definition of speculation under section 43(5) of the Act, split up the transactions as between those where deliveries were taken and those where deliveries were not taken by the assessee, so that the amount of Rs. 5,32,963, where delivery was taken, was brought to tax as non-speculative income and the balance carried forward as speculation loss. The Commissioner (Appeals) should have understood the provision correctly as applicable both for speculation under section 43(5) and deemed speculation loss under the Explanation to section 73, but he allowed the appeal on the ground that the Explanation to section 73 would have no application, where the sole business was one of dealing with investments. In effect, he treated it as an investment company, which had been excepted by the Explanation, so that his decision was even otherwise supportable. The further arguments of the case went on the rails laid by the Commissioner (Appeals). The reasoning of the Commissioner (Appeals) that the Explanation to section 73 had no application was no doubt accepted in Swamini Leasing and Investment P. Ltd. in I. T. A. No. 2150 (Mum) of 2000, on which the assessee relied. The Tribunal, therefore, had either to follow the same or refer the matter to a Special Bench. But it had its reasons for not adopting this course, since it understood the decision in CIT v. Arvind Investments Ltd. [1991] 192 ITR 365 (Cal) as having rejected this view. If the loss was loss from sale of shares as defined under section 43(5) not involving delivery of shares, such loss will be loss from speculation business, so as to be unavailable for set off even without the assistance of the Explanation to section 73. This is what was decided by the High Court. The issue as to whether a distinction could be made in the case of a company having both speculation business within the meaning of section 43(5) and income/losses from ready business in shares was not the issue. In fact, the Tribunal in Jindal Exports Ltd's case (supra) has understood the decision in Arvind Investments Ltd. case (supra) as under :

“It is important to bear in mind that the Explanation employs the expression ‘any part’. Thus,

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even if the purchase and sale of shares constitute a minuscule activity, it would be hit by the provisions of the Explanation to section 73. This aspect has been considered by the hon'ble Calcutta High Court in CIT v. Arvind Investments Ltd. [1991] 192 ITR 365. The word 'any' should be given a meaning as wide as possible in the context. We, therefore, hold that in the case of a company where loss is incurred on purchase and sale of shares of another company, it would ordinarily fall to be caught in the mischief of the Explanation to section 73."

Where delivery is taken by a sharebroker on behalf of his client as per rules of the stock exchange, when badla trade was not permitted, such transactions would not be speculative transactions even under section 43(5). But such an argument was not taken. Irrespective of availability or otherwise of such argument, the role of the Explanation to section 73 is to treat all transactions in share dealings by a company, which is not an investment company or a money lending company, on par, so that section 43(5) would have no application. This aspect of law was not appreciated by the Tribunal in Sucham Finance and Investments' case. After all, the loss in such deemed speculation is permitted to be set off against the profits in a later year. If it could be so done, it cannot be that such loss cannot be set off against the profits in the same category of transactions falling under the Explanation to section 73 in the same year. In other words, the loss should have been a netted one. In the decision of the Tribunal, apart from oversight of this point, there is confusion between the definition of speculative transaction in section 43(5) and deemed speculation under the Explanation to section 73. These could not have been mixed up. The Explanation to section 73 is much wider than the definition of speculation under section 43(5).

The Tribunal had gone by its understanding of the assessee's case as solely dependant upon the argument that where share dealing is the only business of the assessee, the Explanation to section 73 has no application. In fact, it has application on the assessee's facts and it was on such application that the assessee is entitled to succeed. It is also possible that the assessee had a case as an investment company excepted by the Explanation even as indicated by the name of the company.

[2007] 290 ITR (A.T.) 0306- DAVINDER SINGH VS. ASSISTANT COMMISSIONER OF INCOME-TAX (INCOME-TAX APPELLATE TRIBUNAL--AMRITSAR)

There is nothing in section 68 of the Income-tax Act, 1961, that books of account must be rejected before making an addition under this section. This is an independent and deeming provision and will apply if the assessee fails to offer an explanation of the source of a particular receipt/credit appearing in the books of account or if the explanation given by the assessee is found to be not satisfactory by the Assessing Officer.

Cash credits are generally understood as amounts credited in the books of the assessee in the names of third parties as creditors. Since unaccounted income has tendency to surface as borrowings or investments, the law would reckon such unexplained credits, payments and investments as income. Cash credits under section 68 were understood to include all amounts met for payments found in the assessee's books and not merely for cash receipts as loans : Davinder Singh v. Asst. CIT [2007] 290 ITR (AT) 306 (Amristar). In this case, the assessee was

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a katcha arhatia, a commission agent, for sale of agricultural produce like cotton and narma. The purchases were made through the marketing committee. Local enquiry by the inspector indicated that two sellers denied sale to the assessee. It was in this context, an amount of Rs. 60,87,926 standing to the credit of 51 sellers was treated as income. But the issue was remanded to the Tribunal after the finding that the assessee is responsible to prove the nature and source of the same. Such remand was necessary as the assessee had no opportunity. Though the amount under consideration was treated as covered by section 68, the issue in this case was verification of purchases made on behalf of the clients of the assessee. The issue as regards application of section 68 had arisen possibly because the Assessing Officer made the addition with reference to section 68. Even before the provisions of sections 68 to 69D were brought on the statute, the burden of proof was understood as on the assessee in all such cases to prove the source of amounts credited or invested.

There was no written agreement between the assessee and its sister concerns to whom seventy-five per cent. of the commission had been paid and therefore the assessee had to establish with documentary and cogent evidence that such expenditure was incurred for the purpose of the assessee's business. No evidence was produced about the nature of services rendered by the two sister concerns. Nothing was on record to show that the increase in the dami receipts was due to the efforts made by the assessee's two sister concerns. Thus, the assessee had not discharged the onus to prove that the commission was paid wholly and exclusively for the purpose of his business. Therefore the authorities below were justified in disallowing the claim.

[2007] 290 ITR (A.T.) 0183- IBM INDIA LTD. VS. COMMISSIONER OF INCOME-TAX (APPEALS) (INCOME-TAX APPELLATE TRIBUNAL--BANGALORE)

(i) that the liability to pay for warranty claims arises no sooner the sales are effected. The assessee had provided for liability on the basis of sales made during the year. The amount set apart to meet the liability was deductible.

(ii) That the concept of payment made once and for all and of "enduring benefit" must respond to the changing economic realities of the business. It was clear that the amount was paid for application software and not system software. The application software enables the assessee to carry out its business operation efficiently and smoothly. However, such software itself does not work on a stand alone basis. It has to be fitted to a computer system to work. Such software enhances the efficiency of the operation. It is an aid in the manufacturing process rather than the tool itself. Thus, by payment for such application software, though there is an enduring benefit, it does not result in acquisition of any capital asset. It merely enhances the productivity or efficiency and hence has to be treated as revenue expenditure.

(iii) That the assessee had received a sum of Rs. 18.4 crores being consideration for the value which inheres in the human resources by reason of training, skill, practical experience and work culture for transfer of the personnel. To facilitate such transfer, the amount was paid. Undisputedly, the training, skills and experience as well as work culture was imparted by the assessee. Acquisition of such training, skill, experience and work culture was at the cost of the assessee-company. Thus, it could be connected with the office or occupation which the assessee

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carried on. The amount was income of the assessee.

(iv) That while computing the book profit, one has to refer the provision of the Companies Act, 1956. As per the definition of provision in Part III of Schedule VI to the Companies Act the provision can be for diminution in value of asset or for meeting any liability. Under clause (c) of the Explanation to section 115JA, the amount to be increased is “the amount set aside to provision made for meeting liabilities other than ascertained liabilities”. The amount being provision made for bad and doubtful debts cannot be considered as provision for meeting any liability which is not an ascertained liability and hence the book profit is not to be increased by such amount provided for.

Kwality Biscuits Ltd. v. CIT [2000] 243 ITR 519 (Karn) followed.

[2007] 290 ITR (A.T.) 0163- JAYAKUMAR B. PATIL VS. DEPUTY COMMISSIONER OF INCOME-TAX (INCOME-TAX APPELLATE TRIBUNAL--PUNE)

A revocable gift is excluded for wealth-tax. But where the gift is revoked and then sold, how is the cost of the previous owner ascertained ? It was held by the Tribunal in Jayakumar B. Patil v. Deputy CIT [2007] 290 ITR (AT) 163 (Pune), that section 55(3) permitting adoption of the cost of the predecessor would have no application, because the cost to the previous owner before revocation was nil and in computation of short-term capital gains in the hands of the assessee from the date of revocation, no cost is deductible. The decision does not appear to be consistent with law. If it were acquired without cost, there may be no liability at all. But consistent with the wealth-tax provision, it may be reasonable to infer that the property continued to belong to the assessee, so that the cost could have been allowed. The Tribunal found that in its view, cost would be nil, but since the cost was allowed by the Department, which was not appealed against, it did not disturb the computation. The assessee's contention was that he had paid gift tax and that there was no reason why the assessee's cost of Rs. 10 per share could not be allowed and that there should probably be no objections to allow the indexed cost in computation of capital gains shorn of all technicalities.

In other words, assessee purchased shares at par and gifted to associations of persons with option to revoke gift after 74 months. Subsequent revocation of gift and sale thereafter. Cost of acquisition is cost to previous owner, i.e., association of persons, ascertainable at nil. section 55(3) does not apply.

[2007] 290 ITR (A.T.) 0061- FATEH INTERNATIONAL VS. DEPUTY COMMISSIONER OF INCOME-TAX (INCOME-TAX APPELLATE TRIBUNAL--MUMBAI)

Where a notice under section 143(2) is issued, the assessment is expected to be completed within the time limit set for such completion. Having failed to complete the assessment within such time, it is not open to the Assessing Officer to issue fresh notice under section 148 by giving himself extra time for such completion. The Tribunal in Fateh International v. Deputy CIT

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[2007] 290 ITR (AT) 61 (Mum) found that reassessment proceedings so completed beyond the time limit with reference to first notice were invalid ab initio and required to be cancelled. It, inter alia, relied upon the decision of the Calcutta High Court in Mohindra Mohan Sirkar v. ITO [1978] 112 ITR 47 and CIT v. Rajendra G. Shah [2001] 247 ITR 772 (Bom). In the latter case, the Assessing Officer lost sight of all the pending proceedings and issued a fresh notice. Since the assessment was not completed within time with reference to the initial notice, the assessment was found to be bad in law.

[2007] 290 ITR (A.T.) 0027- DEPUTY COMMISSIONER OF INCOME-TAX VS. DHANALAKSHMI PAPER MILLS LTD. (INCOME-TAX APPELLATE TRIBUNAL--CHENNAI)

Tax on distributed dividend under section 115-O is also income-tax, so that it cannot be allowed as a deduction from book profits. It has, therefore, to be treated as part of taxable book profits as was held by the Tribunal in Deputy CIT v. Dhanalakshmi Paper Mills Ltd. [2007] 290 ITR (AT) 27 (Chennai).

[2007] 291 ITR 0455- COMMISSIONER OF INCOME-TAX VS. REEBOK INDIA COMPANY (DELHI HIGH COURT)

On the perusal of the lease agreement showed that the sum of Rs. 1,50,24,000 paid by the assessee to ABCO was in the nature of “advance rent” and not a security deposit as according to this clause “such security deposit shall stand reduced every six months when the rent becomes due and payable.” If it had been a security amount, then, firstly, it would have been in the nature of “refundable amount” at the time of the termination of the lease. Secondly, there would have been no reduction in the security amount, after every six months and thirdly, as per clause 14 of the lease agreement, the assessee was “obliged to refund the unadjusted portion, if any, of advance/security deposit,” which meant that this amount was adjustable against rent and was adjusted also, and thus this amount was in the nature of advance rent. The assessee was required to deduct tax at source from the payment of such advance rent.

Tax is required to be deducted at source from rent. Rent paid in advance, no doubt, similarly requires tax deduction. Should the deposit described as security deposit also require tax deduction ? This was the issue in CIT v. Reebok India Company [2007] 291 ITR 455 (Delhi). The High Court found from the rent agreement, that though the amount was described as security deposit, it was in the nature of advance rent, since it was required to be adjusted every six months as and when the rent becomes due and payable. If it had been a matter of deposit, it would have been made refundable only at the time of termination of the lease. The periodical adjustment and the requirement of only unadjusted amount in the case of termination of lease would, it was held, indicate that it was only an advance rent requiring tax deduction at source.

The Assessing Officers have often been taking the view that all deposits would be in the nature of advance rent. Explanation (i) to section 194-I defining rent would cover “any payment” and

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also uses the expression “by whatever name called”. Circular No. 715 dated August 8, 1995, in answer to Q. No. 22 would require tax deduction from non-refundable deposit to be treated as rent. It also adds that “if the deposit is adjustable against future rent, the deposit is in the nature of advance rent, subject to TDS”. The normal rule is that, the rent can be treated as paid only as and when it is adjusted, but then the High Court has endorsed the Departmental view in the circular.

[2007] 291 ITR 0278- COMMISSIONER OF INCOME-TAX VS. P. MOHANAKALA (SUPREME COURT OF INDIA)

A bare reading of section 68, suggests that (i) there has to be credit of amounts in the books maintained by the assessee ; (ii) such credit has to be a sum of money during the previous year ; and (iii) either (a) the assessee offers no explanation about the nature and source of such credits found in the books or (b) the explanation offered by the assessee, in the opinion of the Assessing Officer, is not satisfactory. It is only then that the sum so credited may be charged to income-tax as the income of the assessee of that previous year. The expression “the assessee offers no explanation” means the assessee offers no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by the assessee. The opinion of the Assessing Officer for not accepting the explanation offered by the assessee as not satisfactory is required to be based on proper appreciation of material and other attending circumstances available on the record. The opinion of the Assessing Officer is required to be formed objectively with reference to the material on record. Application of mind is the sine qua non for forming the opinion.

[2007] 291 ITR 0258- COMMISSIONER OF INCOME-TAX VS. CHENSING VENTURES (MADRAS HIGH COURT)

During the course of survey under section 133A it was noticed that the assessee made certain cash payments to the bank out of which Rs. 28.50 lakhs could not be explained. The sum was surrendered voluntarily for taxation. Later, the assessee filed a return of income declaring a business loss of Rs. 11.95 lakhs. The Assessing Officer determined the business loss at Rs. 8,20,384 and did not allow the set off of the loss against the undisclosed income of Rs. 28.50 lakhs. The Commissioner of Income-tax (Appeals) and the Tribunal held that the loss had to be set off against the income of Rs. 28.50 lakhs. On appeal :

Held, dismissing the appeal, that no reasons were given by the Assessing Officer to deny the benefit under section 71 (set off) . The Assessing Officer had made an addition of Rs. 28,50,000 as undisclosed income under section 69 of the Act. Once the loss was determined, the same should be set off against the income determined under any other head of income. The assessee was entitled to the set off.

[2007] 291 ITR 0178- A. RAJENDRAN VS. ASSISTANT COMMISSIONER OF INCOME-TAX (MADRAS HIGH COURT)

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Foreign gifts introduced in the assessee's books are in the nature of cash credits covered by section 68 of the Act requiring the assessee to prove the identity of the creditor (donor in this case) and the nature and source of the amount. In view of the wide-spread practice of money laundering through foreign gifts, authorities have natural suspicion as to the genuineness of such gifts, especially when they are not from close relatives. It is for this reason, that gifts from non-relatives are now subjected to tax by deeming them as income irrespective of their genuineness by an amendment to section 56 with effect from the assessment year 2005-06.

[2007] 291 ITR 0107- DEPUTY COMMISSIONER OF INCOME-TAX VS. MCDOWELL AND CO. LTD. (KARNATAKA HIGH COURT)

Payment of non-compete fee to the extent of Rs. 1 crore to a company, while acquiring its distillery was found deductible in Deputy CIT v. McDowell and Co. Ltd. [2007] 291 ITR 107 (Karn). In coming to the conclusion, the decision of the Madras High Court in CIT v. G. D. Naidu [1987] 165 ITR 63 was followed.

[2007] 291 ITR 0055- COMMISSIONER OF INCOME-TAX VS. REGENCY EXPRESS BUILDERS P. LTD. (DELHI HIGH COURT)

No assessment can be made without a notice under section 143(2) served within the specified time. In what manner the notice should be worded is not important as long as such notice in substance is given before assessment giving opportunity to the assessee to prove the income returned by him. It was the view taken by the High Court in CIT v. Regency Express Builders P. Ltd. [2007] 291 ITR 55 (Delhi), where a formal notice under section 143(2) was served on someone named Gunanand, who, according to the assessee was not its representative, but all the same the assessee's authorised representative, a chartered accountant, did attend the hearing on the date specified in the notice and responded to the other requirement of the Assessing Officer by furnishing various information. During the next hearing also, a chartered accountant accompanied by the assessee's employee did attend and ask for adjournment. It was finally heard in the presence of the assessee's representative and the order was passed under section 143(3). It is under these circumstances, the Tribunal was faulted by the High Court for having cancelled the assessment merely on the ground that the original service of notice on Gunanand was invalid ignoring the subsequent development. Further, there was no assertion at any stage that Gunanand was not an employee or was a fictitious person. The High Court, therefore, sent the matter back to the Tribunal for entertaining the appeal on the merits.

[2007] 291 ITR 0001- COMMISSIONER OF INCOME-TAX VS. GLEN VIEW RUBBER CO. P. LTD. (KERALA HIGH COURT)

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When a water treatment plant is installed permanently in compliance with the statutory requirement the same would attain the character of capital expenditure. A water treatment plant of permanent nature had come into existence with enduring advantage to the assessee. A water treatment plant is a chargeable asset installed to prevent pollution. The question as to whether by installation of this plant, production of centrifuged latex had been increased or not was immaterial. Failure to comply with the statutory requirements of installation of water treatment plant would lead to closure of the factory and hence there was no question of any increase in the manufacture or production in the plant. The water treatment plant installed by the assessee consisted of various chambers namely equalisation tank, primary settling tank, mixing channel, aeration tank, secondary settling tank and drying bed. The plant installed was a permanent tangible asset of enduring advantage to the assessee, of a pollution free atmosphere and environment. The benefit/advantage derived by the assessee was not only for the year under consideration but for all succeeding assessment years. Expenditure spent for its operating and maintenance costs may be revenue, but the expenditure spent for installation of the plant was capital expenditure.

CIT v. Steel Complex Ltd. [1999] 238 ITR 1054 (Ker) commented upon and held confined to facts of the case.

[2007] 291 ITR (A.T.) 0249- JOINT COMMISSIONER OF INCOME-TAX VS. MUKUND LTD. (INCOME-TAX APPELLATE TRIBUNAL--MUMBAI)

All the essential ingredients for treating the amount of Rs. 2.04 crores paid by the assessee for acquisition of leasehold rights for 99 years in the land as capital in nature were present. The lease was for a period of 99 years, which was as good as a perpetual lease in favour of the assessee. The benefit conferred on the assessee of lease rights for 99 years against the lump sum payment of Rs. 2.04 crores was of enduring nature. There was no material on record to suggest that the amount of Rs. 2.04 crores was an advance payment of rent to the MIDC for the period of lease paid in lump sum by the assessee-company. The terms of the agreement entered into between the assessee and the MIDC clearly mentioned that a sum of Rs. 2.04 crores was the amount of deposit to be adjusted towards “premium” payable by the licensee for the allotment of 50 acres of land in the industrial area. The agreement provided that in the case of termination of lease, the “premium” was non-refundable and in case the licensee failed to complete the said factory building within the time and in accordance with the stipulations provided therein, the MIDC without making any compensation or allowance or refund or repayment of the premium could resume the land in question. If the assessee terminated the lease agreement and handed over vacant possession of the land to MIDC prior to the expiry of the lease period of 99 years, it was not entitled to any refund out of the amount of Rs. 2.04 crore. Thus, the “premium” could not be considered advance payment of rent. There was also no material on record to show that the assessee had made the advance payment of rent for future years to secure any reduction in the rent payable for the future years or for any other business consideration. Considering the totality of the facts and circumstances of the case and the terms of the agreement as a whole, the consideration of Rs. 2.04 crores paid by the assessee-company for obtaining the leasehold rights

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from MIDC for a period of 99 years was capital in nature and therefore, not allowable as deduction to the assessee.

Expenses consequent on discounted issue of commercial papers is allowable as business expenditure as held in Joint CIT v. Mukund Ltd. [2007] 291 ITR (AT) 249 (Mum) (SB). In fact, it should have made no difference even if it were incurred for long-term debentures following the decisions of the Supreme Court in India Cements Ltd. v. CIT [1966] 60 ITR 52 and Madras Industrial Investment Corporation Ltd. v. CIT [1997] 225 ITR 802.

[2007] 291 ITR (A.T.) 0169- SALEEM FAZELBHOY VS. DEPUTY COMMISSIONER OF INCOME-TAX (INCOME-TAX APPELLATE TRIBUNAL--MUMBAI)

Circular No. 471, dated October 15, 1986*, makes it clear that the provisions of section 54F are incentive provisions intended to augment the investment in residential houses. It is the settled legal position that incentive provisions should be construed liberally in such a manner that the object of the statute is fulfilled. Hence investment in residential house would not only include the cost of purchase of the house but also the cost incurred in making the house inhabitable subject to the condition that the payment was made during the period specified in section 54F. The question whether the house purchased by the assessee was in an inhabitable condition or not would depend on the condition of the house at the time of purchase. Hence, this aspect would have to be kept in mind while adjudicating such issue. In the instant case the assessee was entitled to exemption under section 54F with reference to the expenditure incurred for making the house inhabitable. However, the factual matrix required examination. (The Assessing Officer was directed to re-adjudicate the issue in accordance with the guidelines given and after considering the entire material produced by the assessee before him).