

DIRECT TAX

NEW CASE LAWS

MAY 2016

1. Can capital contribution of the individual partners credited to their accounts in the books of the firm be taxed as cash credit *in the hands of the firm*, where the partners have admitted their capital contribution but failed to explain satisfactorily the source of receipt in their individual hands?

M.VENKATESWARA RAO

HIGH COURT OPINION - :

- Section 68 directs that if an assessee fails to explain the nature and source of credit entered in the books of account of any previous year, the same can be treated as income.
- In a way the amount so contributed by partners constitutes the very substratum (fund, asset) to the firm and **it is difficult to treat the pooling of such capital as credit.**
- **Where the firm explains that the partners have contributed capital, section 68 cannot be pressed into service.**
- The HC made reference to decision in the case of *ANUPAM UDYOG*, where it was held that if there are cash credits in the books of the firm in the accounts of individual partners and it is found as a fact that cash was received by the firm from its partner, then in the absence of any material to indicate that they are the profits of the firm, the cash credit cannot be assessed in the hand of the firm, though they may be assessed in the hands of individual partners.

HIGH COURT DECISION

The High Court, accordingly, held that the **view taken** by the Assessing Officer **that the partnership firm has to explain the source of income of the partners** as regards the amount contributed by them towards capital of the firm, **in the absence of which the same would be treated as the income of the firm, was not tenable.**

2. In a case where properties bequeathed(given, donated) to a trust could not be transferred to it due to ongoing court litigation and pendency of probate proceedings, can violation of the provisions of section 11(5) be attracted?

KHETRI TRUST

Observations

- The commissioner (appeals) **observed that, till the 'WILL' is probated and affirmed as genuine, the trust would not acquire the legal right on the property till for the purpose of IT ACT 1961.**
- Acquisition of shares by the trust is dependent upon the adjudication of the probate.
- Further with regard to advance give to entity, the commissioner (appeals) found that the said amount cannot be treated as an investment which was covered and regulated by section 11(5), since the intent and purpose behind the payment was not investment.

HC DECISION - Based on the above factual findings , HC held that there was no violation of section 11(5)

3. Is the approval of Civil Court mandatory for amendment of trust deed, even in a case where the settler has given power to the trustees to alter the trust deed?

RAMOJI FOUNDATION

HC OBSERVATIONS:

- The High Court observed that the power has been given to the trustees by the settler to amend the trust deed without approaching the Civil Court, provided all the conditions laid down by the settler are fulfilled.
- The sanction of Civil Court is required only when there is no such power.
- **When the power has been specifically given to the trustees by the settler, no further power from the Civil Court is required.**

HC DECISION - HC held that trust deed amended by the trustees can be relied upon by the revenue authorities

for the purpose of granting registration u/s 12AA.

PROFIT AND GAINS FROM BUSINESS OR PROFESSION

Under which head of income is franchise fee received by an assessee in tourism business, against special rights given to franchisees to undertake hotel business in assessee's property, taxable?

Tamil Nadu Tourism Development Corporation Ltd

HC OBSERVATION –

- The HC looked into the contract between the assessee and the franchisees and it observed that agreement contained various conditions ranging from obtaining of permits and licenses, maintenance of rooms, common area, garden maintenance, catering bar etc. with 33 clauses.
- The assessee had not simply leased the land and building **but had imposed further conditions as to how the business of franchisees should be conducted with regard to the hotels given on lease.**
- **The special condition stipulate that name of the assessee should be prominently indicated in the name board** and the name of the franchisee should be below the name of the assessee, thereby making clear that assessee continued to operate business through the franchisee
- The assessee received franchisee fee for giving a **special right to the franchisee to undertake tourism business** in the property.

HC DECISION - It held that income earned by the assessee by way of franchisee fee is in the nature of business income and not income from house property.

Is interest income on margin money deposited with bank for obtaining bank guarantee to carry on business , taxable as business income.

K AND CO.

HC Observations -

- The High Court noted that the interest income from the deposits made by the assessee is inextricably **linked to the business of the assessee**
- Therefore such income cannot be treated as income from other sources.
- The margin money was essential for obtaining the bank guarantee which was necessary for the contract between state govt of Sikkim and the assessee.
- If the assessee had not furnished bank guarantee, it would not have got the contract for running the said lottery.

HC DECISION - HC held that interest income received on fund kept as margin money for obtaining the bank guarantee would be taxable under the head 'PGBP'.

Is the expenditure on replacement of dies and moulds, being parts of plant and machinery, deductible as current repairs ?

TVS MOTORS LIMITED.

HC OBSERVATIONS – HC observed that as long as there was ***no change in the performance of the machinery*** and the ***parts*** that were replaced were **performing precisely the same function**, the expenditure has to be considered as current repairs of plant and machinery.

HC also referred to its decision in the case of 'MACHADO SONS' holding that when the object of the expenditure was not for bringing into existence a new asset or to obtain a new advantage, the said expenditure qualifies as 'Current Repairs' u/s 31.

HC DECISION – **HC held that moulds and dies are not independent of plant and machinery but are parts of plant and machinery.**

Is guarantee commission paid by company to its employee director deductible as its business expenditure, where such guarantee given by the employee directors to the bank for enabling credit facility to the company?

CONTROL AND SWITCHGEAR CONTRACTORS LTD.

HC Observations and Decision

- The assessee company passed a resolution resolving that the directors be paid commission for providing their personal guarantees for the financial assistance availed by the assessee-company from the bank.
- This **act of providing personal guarantee was clearly beyond the scope of their services as employees of the company.**
- The assessee-company in its commercial wisdom, had agreed to pay commission for furnishing of such guarantees by the director employees, which cannot be faulted.
- The **payment of commission, cannot be taken as payment of dividend, since payment of dividend would result in payment to all the shareholders and not to select shareholders.**

Is interest paid by the holding company as guarantor for the amount borrowed by the subsidiary company deductible u/s 36(1)(iii)?

JK SYNTHETICS LTD.

HC OPINION -

- To claim deduction u/s 36(1)(iii), the following conditions are to be satisfied**
- i) Interest should have been payable ii) There should be a borrowing iii) capital must have been borrowed or taken for business purposes**
- ii) The HC observed that if the capital borrowed is not utilized for the purposes of the business, the assessee will not be entitled to deduction under the clause.
- iii) The HC made reference to the apex court ruling in *MADHAV PRASAD JUTIA* , where the expression , for the purpose of business occurring in section 36(1)(iii) was held as wider in scope than the expression , for the purpose of earning income, profits or gains.
- iv) The apex court observed that where a holding company has a deep interest in its subsidiary and advances money to subsidiary and the same is used by subsidiary for its business purposes , the lending holding company would be entitled to deduction of interest on its borrowed loans.

HC DECISION - The HC observed that assessee had deep interest in the existence of subsidiary and therefore , repaid installments of loans to financial institutions. Such loans were given for the purpose of business. The HC thus held that the claim for deduction of interest by assessee-holding company is allowable.

- 1. Can employees contribution to PF AND ESI be allowed as deduction where the assessee employer had not remitted the same on or before the "due-date" under the relevant act but remitted the same on or before due date for filing ROI u/s 139(1).**

GUJARAT STATE ROAD TRANSPORT CORPORATION

HC OBSERVATIONS -

- i) The HC noted that section **43B(b) pertaining to EMPLOYERS contribution** cannot be applied with respect to EMPLOYEES contribution which is governed by section 36(1)(va).
- ii) There is no provision for applying the extended time limit provided u/s 43B for remittance of employees contribution.
- iii) The remittance of such contribution within the due date specified in explanation to section 36(1)(va) makes it eligible for deduction.
- iv) Employees contribution recovered by the employer is not eligible for extended time limit upto the due date of filing of return, which is available u/s 43B in the case of employers own contribution.

HC DECISION – HC held that delayed remittance of employees contribution beyond the due date _____ prescribed in section 36(1)(va) is not deductible while computing the business income, even though such remittance has been made before the due date of filing of ROI U/S 139(1)

Note – A contrary view was expressed by HC in the case of AIMIL LTD and Kichha Sugar Co.Ltd.

2. Is expenditure incurred for construction of transmission lines by the assessee for supply of power to UPPCL by the assessee deductible as revenue expenditure?

Dharmpur sugar mill private limited

HC OBSERVATIONS

- i) HC made reference to the Rajasthan HC ruling in **Hindustan Zinc Ltd.** Wherein it was observed that the erection of power lines by the assessee was **for facilitating its routine operations** and smooth functioning of its business.
- ii) The power line remained the property of the Electricity Board.
- iii) The HC therefore held that the assessee had **not acquired a capital asset** or **any enduring benefit** or advantage.

HC DECISION – HC held that the expenditure which was incurred by the assessee in the laying of transmission lines was clearly on the revenue account.

The expenditure which was incurred by the assessee was for aiding efficient conduct of its business since the assessee had to supply electricity to its sole consumer UPPCL

This was not an advantage of capital nature.

3. **Where the assessee company came into existence on bifurcation of JVC, can the amount paid by it to the JVC for use of customer database and transfer of trained personnel be claimed as revenue expenditure.**

IBI GLOBAL SERVICES INDIA P LTD.

HC OBSERVATIONS AND DECISION –

- i) HC observed that the expenditure incurred for use of customer database **did not result in acquisition of any capital asset.**
- ii) The assessee got the right to use the database and **the company which provided the database was not precluded from using such database.**
- iii) **Therefore the expenditure incurred was for use of database and not for acquisition of such database and hence, is deductible as revenue expenditure.**

As regards payment for obtaining trained and skilled employees

- i) It was held that the joint venture company spent a lot of money to give training to employees who were transferred to the assessee-company.
- ii) In effect, the payment made by the assessee-company was towards expenditure incurred for their training and recruitment.
- iii) Such expenditure was in the revenue field.
- iv) Expenditure cannot be termed as capital in nature though the benefit may be of enduring nature.

The HC, thus, held that both the expenditures claimed were allowable as revenue expenditure.

INCOME FROM OTHER SOURCES

1. Can repair and renovation expenses incurred by a company in respect of premises leased out by a shareholder having substantial interest in the company, be treated as deemed dividend?

VIR VIKRAM VAID

High court's observations –

- i) The High Court observed that **no money had been paid by way of advance or loan to the shareholder** who has substantial interest in the company.
- ii) Further, the amount spent was towards repairs and renovation of the **premises owned by the assessee but occupied by the company as lessee.**
- iii) The High Court observed that the expenditure incurred by virtue of repairs and renovation on the premises cannot be brought within the definition of advance or loan given to the shareholder having substantial interest in the company, though he is the owner of the premises.
- iv) It cannot be treated as payment by the company on behalf of the shareholder or for the individual benefit of such shareholder. If

held in such manner, it is a mere assumption not tenable in law.

HC DECISION –

HC held that repair and renovation expenses in respect of premises occupied by the company cannot be treated as deemed dividend in the hands of shareholders being the owner of the building.

ASSESSMENT OF VARIOUS ENTITIES

1. **Where land inherited by three brothers is compulsorily acquired by the State Government, whether the resultant capital gain would be assessed in the status of “Association of Persons” (AOP) or in their individual status?**

GOVINDBHAI MAMAIYA

SC OBSERVATIONS

- i) The Apex Court noted that “Association of Persons” means an association in which two or more persons join in a common purpose or common action.
- ii) In this case, the property in question came to the assessee’s possession through inheritance i.e., by operation of law.
- iii) It is not a case where any „association of persons” was formed by volition of the parties.
- iv) Further, even the income earned in the form of interest is not because of any business venture of the three assesseees, but is the result of the act of the Government in compulsorily acquiring the said land.
- v) Thus, the basic test to be satisfied for making an assessment in the status of AOP is absent in this case.

SC DECISION – It held that income from asset inherited by the legal heirs is taxable in their individual hands and not in the status of AOP.

2. **Would the ancestral property received by the assessee after the death of his father , be considered as HUF property or as his individual property, where the assessee’s father had received such property as his share when he went out of the joint family under a release deed?**

D. L. NANDAGOPALA REDDY.

HC OBSERVATIONS

- i) The High Court observed that the property originally belonged to Hindu Undivided Family (HUF)
- ii) One of the members of the family (i.e., the assessee's father) went out of the joint family under a release deed and the remaining members continued to be the members of joint family.
- iii) After the death of assessee's father and mother, the assessee, being the adopted son, became the sole surviving co- parcener. When such property came to the hands of the assessee it was not his individual property; it was the property of his Hindu Undivided Family.

HC DECISION -

The HC HELD THAT WHEN THE PROPERTY CAME TO THE HANDS OF THE ASSESSEE, IT WAS NOT HIS SELF-ACQUIRED PROPERTY; IT WAS PROPERTY BELONG TO HUF.

THE ASSESSEE HAD GIVEN A PORTION OF THE PROPERTY TO HIS WIFE WITHOUT A REGISTERED DOCUMENT, WHICH IS POSSIBLE ONLY IF THE PROPERTY IS HUF PROPERTY.

IF SUCH PROPERTY IS TREATED AS SELF ACQUIRED PROPERTY THEN THE ASSESSEE WOULD HAVE BEEN ABLE TO GIVE PORTION OF HIS PROPERTY TO HIS WIFE ONLY BY REG.DOCUMENT.

INCOME TAX AUTHORITIES.

1. Can the assessee's application, for adjustment of tax liability on income surrendered during search by sale of seized gold bars, be entertained, where assessment has not been completed?

HEMANT KUMAR SINDHI AND ANOTHER.

HC OBSERVATIONS

- i) The High Court observed that section 132B(1)(i) uses the expression “**the amount of any existing liability**” and “**the amount of the liability determined**”.
- ii) The words “existing liability” postulates (claims) a liability that is crystallized by adjudication;
- iii) Likewise, “a liability is determined” only on completion of the assessment. **Until the assessment is complete, it cannot be postulated that a liability has been crystallized.**
- iv) As per the first proviso to section 132B(1)(i), the assessee may make an application to the Assessing Officer for release of the assets seized.
- v) However, he has to explain the nature and source of acquisition of the asset to the satisfaction of the Assessing Officer.

HC DECISION – The HC accordingly held that AO is justified in his conclusion that it is **only when the liability is determined on the completion of assessment that it would stand crystalized** and in pursuance of which a demand can be raised and recovery can be initiated.

Therefore in the present case first proviso to section 132(1)(i) would not be attracted. The HC thus dismissed the writ petition.

ASSESSMENT PROCEDURES

- **Can the Assessing Officer reassess issues other than the issues in respect of which proceedings were initiated under section 147 when the original “reason to believe” on the basis of which the notice was issued ceased to exist?**

RANBAXY LABORATORIES LTD.

Issue: The issue under consideration is whether the Assessing Officer can make an assessment on the basis of an issue which came to his notice during the course of assessment, where the issues, which originally formed the basis of issue of notice under section 148, were dropped in its entirety.

High Court's Observations:

The assessment or reassessment must be in respect of the income, in respect of which the assessing officer has formed a reason to believe that the same has escaped assessment and also in respect of any other income which comes to his notice subsequently during the course of the proceedings as having escaped assessment.

HC DECISION - If the income, the escapement of which was the basis of the formation of the 'reason to believed' is not assessed or reassessed, it would not be open to the AO to independently assess only that income which comes to his notice subsequently in the course of the proceedings under the section having escaped assessment. If he intends to do so, a fresh notice u/s 148 would be necessary.

MEHAK FINVEST P LTD.

- **Facts of the case:** In the present case, reassessment proceedings were initiated against the assessee on the reason that various finance companies managed and controlled by certain persons were engaged in accommodation entries and the assessee-company was one among them. However, during the reassessment proceedings, the Assessing Officer noticed that fresh share application money amounting to `47 lakhs could not be explained by the assessee and hence invoked section 68 to bring to tax such sum. There was no addition on the basis of the original reason for which reassessment proceedings were initiated.

Issue: The issue under consideration is whether an addition can be made in reassessment when the original reasons on the basis of which notice for reassessment was issued did not survive.

High Court's Observations:

- The High Court noted that *Explanation 3 to section 147* nowhere postulates or contemplates that the Assessing Officer cannot make any additions on any other ground_unless some addition is made on the basis of the original ground for which reassessment proceeding was initiated.
- It cited the dismissal of special leave petition (SLP) against the High Court ruling in *Majinder Singh Kang*'s case by the Supreme Court

on 19.08.2011 as the binding precedent.

High Court's Decision:

The High Court, accordingly, held that even though no addition is made on the original grounds which formed the basis of initiation of reassessment proceedings, the Assessing Officer is empowered to make additions on another ground for which reassessment notice might not have been issued but which came to his notice subsequently during the course of proceedings for reassessment.

- **Does the finding or direction in an appellate order that income relates to a different assessment year empower reopening of assessment for that assessment year, irrespective of the expiry of the six year time limit?**

PP ENGINEERING WORK.

Facts of the case: The Tribunal, in its order, directed that the cash credit of Rs.32 lakhs found credited in the books of the assessee in the financial year 1999-2000 is chargeable to tax in the assessment year 2000-01 as against the assessment made by taxing the said amount in the assessment year 2001-02. In short, the Tribunal gave a finding that the cash credit under section 68 was assessable in a different assessment year than the assessment year in respect of which it heard the appeal. This prompted the Assessing Officer to issue a notice under section 148 in February, 2009 for reopening the proceedings for the A.Y. 2000-01. The issue is validity of notice issued after a lapse of 6 years from the end of the relevant assessment year.

The Commissioner (Appeals) held that the reassessment is barred by time limitation and the Tribunal also upheld the order of the Commissioner (Appeals) without making reference to section 150 read with *Explanation 2* to section 153.

High Court's Opinion:

- i) The High Court made reference to section 150 which overrides the time limitation specified in section 149.
- ii) Also, *Explanation 2* to section 153 makes it clear that when an order in appeal, revision or reference is made whereby any **income is excluded from the total income** of an assessee **for an assessment year**, an assessment of such income for another assessment year shall be deemed to be one made in consequence of or to give effect to any finding or direction contained in

the said order for the purposes of section 150 and section 153.

- i) **High Court's Decision:** The High Court observed that in view of the order of the Tribunal that the credit entries related to the earlier assessment year i.e., A.Y.2000 -01, the Assessing Officer initiated reassessment proceedings under section 147 by issue of notice under section 148 for the year and passed an order dated 29/12/2009 making an addition of Rs.32 lakhs.
- ii) The High Court held that by virtue of section 150 read with *Explanation 2* to section 153, the said order was not barred by limitation.

Other notes

- *Under section 149(1)(b), the time limit for issue of notice under section 148 is six years from the end of the relevant assessment year, where the income chargeable to tax which has escaped assessment amounts to or is likely to amount to Rs.1 lakh or more for that year*
- *Section 150(1) states that notwithstanding anything contained in section 149, notice under section 148 may be issued at any time for the purpose of making an assessment or reassessment or recomputation in consequence of or to give effect to any finding or direction contained in an appellate or revisionary order.*
- *Explanation 2 to section 153 provides that where by an order referred to in section 250, 254, 260, 262, 263 or 264, any income is excluded from the total income of the assessee for an assessment year, then, an assessment of such income for another assessment year shall, for the purposes of section 150 and section 153, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order.*
- **Is initiation of reassessment beyond a period of 4 years on the basis of subsequent Tribunal and High Court ruling valid, if there is no failure on the part of the assessee to disclose fully and truly all material facts?**

ALLANASONS LTD

Facts of the case: The assessee-company filed its return of income in which a claim for deduction under Chapter VI-A was made.

The case was subjected to scrutiny assessment and order under section 143(3) was passed reducing the claim for deduction under Chapter VI-A. After 4 years from the end of the assessment year, a notice under section 148 was issued describing reasons such as subsequent tribunal and other court decisions which show that the deduction was excessively allowed in this case. The assessee challenged the reassessment proceedings by means of a writ before the court, contending that it is a settled position in law that the decision rendered by court subsequent to the assessment order does not by itself amount to failure on the part of the assessee to fully and truly disclose all material facts necessary for assessment.

High Court's Opinion:

- The High Court observed that it is well settled in terms of the proviso to section 147, that where any assessment is sought to be opened beyond a period of four years from the end of the relevant assessment year, **two conditions have to be fulfilled cumulatively.**
- The first condition is that **there must be reason to believe** that income chargeable to tax has escaped assessment.
- The second condition is that such **escapement of income should have arisen due to failure on the assessee's part** to fully and truly disclose all material facts required for the assessment.
- Even a **subsequent change of law cannot be taken as income escaping assessment** for triggering reassessment provisions beyond 4 years from the end of the assessment year **unless there was a failure on the part of the assessee** to disclose fully and truly all material facts necessary for assessment.

HC DECISION –

The High Court, accordingly, held that a **subsequent decision** of Tribunal or High Court by itself is **not adequate for reopening** the assessment completed earlier under section 143(3) **unless there is a failure on the part of the assessee to disclose complete facts**

- **Is recording of satisfaction and quantification of escaped income a pre-condition for issuing notice under section 148 after 4 years from the end of the relevant assessment year?**

AMARNATH AGARWAL

Facts of the case: The assessee along with four others had obtained a lease of land and was in possession of the same from 1953. Subsequently, the State Government introduced a policy for conversion of lease-hold to free-hold. The assessee applied for conversion before the District Magistrate in 1997 and a sale deed was executed. The assessee deposited the necessary charges as demanded by the State Government and a freehold sale deed dated 25th March, 1998 was executed. The assessee sold a portion of the land during the F.Y. 1999-2000 and admitted the same as long-term capital gain taking into account the lease hold period also. In the assessment, the admission of income as long-term capital gain was accepted. However, after the expiry of four years from the end of the relevant assessment year, proceeding for reassessment of such income as short-term capital gains was resorted to by the Revenue on the ground that the lease hold period should not be considered for determining the period of holding of freehold land transferred. The assessee filed a writ challenging the validity of notice issued under section 148 stating that the requirements of section 149 read with section 151 were not considered by the Revenue.

High Court's Opinion and Decision:

- The High Court observed that **two distinct conditions must be satisfied** for assuming jurisdiction to issue a notice under section 148 after a period of 4 years viz. **(i) escapement of income; and (ii) omission or failure on the part of the assessee to disclose** fully and truly all material facts necessary for his assessment.
- Under section 149(1)(b), it is imperative for the Assessing Officer, in his reasons, to state that the escaped income is likely to be Rs.1 lakh or more.
- This is an essential ingredient for seeking approval and the basis on which satisfaction is to be recorded by the competent authority under section 151.
- If the condition precedent to substantiate the satisfaction of escapement of income is not made, the issuance of notice would be invalid.

- In this case, since no reasons were recorded that the escaped income is likely to be Rs.1 lakh or more so that the Chief Commissioner or Commissioner may record his satisfaction under section 151, the initiation of reassessment proceedings after four years was barred by time.
- The High Court observed that the property was held for more than 3 years and the conversion from leasehold to freehold being an improvement of the title did not have any effect on the taxability of profits.
- The reasons recorded by the Assessing Officer did not indicate any failure on the part of the assessee to disclose fully and truly all material facts at the time of assessment; it also not indicate that the quantum of escapement of income exceeds 1 lakh. Accordingly, the HC held that, in this case the issue of notice u/s 148 after the four year time period was not valid.

APPEALS AND REVISION

- **Should the four year time limit for rectification of order by the Tribunal under section 254(2) be reckoned from the date of its order or from the date of receipt of order by the assessee?**

PETERPLAST SYNTHETICS P LTD

Issue: The issue under consideration before the High Court is regarding the date to be reckoned for computing the period of limitation of four years under section 254(2) - whether the date of the Tribunal's order or the actual date of receipt of order by the assessee?

High Court's Observations:

The High Court observed that the expression „order“ means an order, of which the affected party has actual or constructive notice. The right to make an application for revision is given to an assessee against an order, and that right can only be effectively exercised if the party affected had knowledge, either actual or constructive, of that order.

HC noted that if the order means a unilateral arriving at a decision by the appellate authority, the appellate authority may make

the order, put it in a drawer, forget about it and if a year has passed after it, the right of the assessee to go for revision would be barred. Such contention is entirely untenable.

High Court further observed that the effective right to appeal against the order or to seek rectification of the order could be exercised only when the affected party gets to know of the order.

Thus, the right of appeal could be exercised only when the party affected by such order has knowledge of the order and hence, the limitation would start only from that date.

High Court's Decision:

High Court held that the period of limitation has to be reckoned **from the date of receipt of order by the assessee** and not from the date of order.

Therefore, the Tribunal had erred in dismissing the rectification application on the ground that it was barred by limitation by computing the time limit from the date of order instead of from the date of receipt of order by the assessee.

- **Should time limit under section 263 to be reckoned with reference to the date of assessment order or the date of reassessment order, where the revision is in relation to an item which was not the subject matter of reassessment?**

LARK CHEMICALS LTD

Facts of the case: The assessee-company, for the assessment year 2002-03, filed its return of income declaring a total income of ₹30.98 lakhs. This was accepted and the return was processed under section 143(1). Subsequently, it was reopened by issue of notice under section 148 and the order of reassessment was passed in June, 2006. The Commissioner assumed jurisdiction for revision of order by invoking section 263 in March, 2009. The subject matter of revision, however, was not related to any of the issues dealt with in the reassessment.

Issue under consideration: The issue before the High Court was whether the revision under section 263 is barred by limitation in view of the fact that the issues dealt with therein were not the subject matter of reassessment.

High Court's Opinion:

- The High Court observed that if the revision happened to be in relation to issues dealt with in the reassessment proceedings, then, it would not be barred by limitation as the time limit would expire only on 31st March, 2009 i.e., two years from the end of the financial year

in which the intimation was issued under section 143(1).

- However, in this case, the revision proposed under section 263 was in respect of issues, other than the issues dealt with in the order of reassessment.
- The issues on which the Commissioner sought to exercise jurisdiction under section 263 were concluded by virtue of intimation issued under section 143(1). The time period for revision under section 263 is two years from the end of the financial year in which order sought to be revised was passed [i.e., two years from the end of the financial year in which the intimation was issued under section 143(1)] and that time period has expired long ago.

High Court's Decision:

The High Court, thus, held that the jurisdiction under section 263 could not be assumed on issues which were not the subject matter of issues dealt with in the order of reassessment but were part of the original assessment, for which the period of limitation expired long ago.

PENALTIES

- **Is concealment penalty leviable when the High Court admits the quantum appeal as involving substantial question of law?**

NAYAN BUILDERS AND DEVELOPERS

Facts of the case: In the assessment under section 143(3), the Assessing Officer made additions of (i) `104.76 lakhs towards income from a specified person; (ii) `10.79 lakhs towards disallowance of brokerage; and (iii) `2 lakhs towards disallowance of legal fee. The Tribunal upheld these additions in quantum proceedings. The Assessing Officer imposed penalty under section 271(1)(c) which was also confirmed by Commissioner (Appeals). The Tribunal was informed that the High Court had admitted substantial question of law with regard to those additions. Consequently, the Tribunal held that penalty was not leviable under section 271(1)(c).

Issue under consideration: The issue before the High Court was whether the Tribunal was correct in deleting the penalty under section 271(1)(C).

High Court's Opinion & Decision:

- The High Court observed that the issue of quantum addition was admitted by the High Court since it involved substantial question of law.
- When the High Court admits substantial question of law on an addition, **it becomes apparent that the addition is certainly debatable**. In such circumstances, penalty cannot be levied under section 271(1)(c).
- Thus, the High Court held that when the quantum proceeding is admitted by the High Court, it amounts to a debatable issue and hence, concealment penalty is not leviable.

1. Is penalty under section 271D imposable for cash loans/deposits received from partners?

MUTHOOT FINANCIERS

Facts of the case: The assessee-firm, engaged in business of banking and money lending, had received huge amounts from the partners in the assessment years 1996-97 and 1998-99 by way of cash. The Assessing Officer levied penalty under section 271D. The Commissioner (Appeals) upheld the levy of penalty. The Tribunal observed that the advance made to the firm by the partners cannot be regarded as loan accepted by the firm. It held that the amount advanced and accepted is capital of the firm and not loans which cannot be subjected to penalty under section 271D. The Revenue filed an appeal before High Court.

The assessee contended before the High Court that the amount advanced by the partners cannot be regarded as loan but is a capital of the firm. As the partnership firm has no separate legal entity, nor is there a separate identification between the firm and the partners, there is no violation of section 269SS in this case.

High Court's Opinion & Decision:

The High Court referred to the case *CIT v. R.M. Chidambaram Pillai*, where the Apex Court was of the view that the **firm is not a legal person** even though it has some of the attributes of a personality.

It also referred to *CIT v. Sivakumar.*, where the High Court upheld the conclusion of the Tribunal to hold that **there is no separate legal entity for the partnership firm** and the partner is entitled to use the funds of the firm.

In *CIT v. Lokhpat Film Exchange (Cinema)*, it was held that a partnership **firm not being a juristic person**, the *inter se* **transaction between the firm and partners are not governed by the provisions of sections 269SS and 269T.**

The High Court observed that the position that emerges is that there are **three different Courts**, which **have held that section 269SS would not be violative when money is exchanged** *inter se* between the partners and the firm.

The High Court held that the issue being a debatable one, there was reasonable cause for not levying penalty.

HC DECISION -

The High Court further observed that, in this case, there was no dispute as regards the money brought in by the partners of the assessee-firm.

The transaction was bona fide and not aimed to avoid any tax liability.

The credit worthiness of the partners and genuineness of the transactions coupled with relationship between the „two persons“ and two different legal interpretations put forward, could constitute a reasonable cause in a given case for not invoking sections 271D / 271E read with section 273B.

MISCELLANEOUS PROVISIONS

- 1. Can the Assessing Officer *suo moto* assume jurisdiction to declare sale of property as void under section 281?**

DR MANOJ KABRA

High Court's Observation:

The High Court observed that the issue in this case was squarely covered by Apex Court decision in the case of **TRO V. Gangadhar**

Vishwanath Ranade where it was held that provision of section 281 of the IT Act, 1961 is only a declaratory in nature and not an adjudicatory provision entitling the income-tax authority to declare a document as a void document.

In order to declare a transfer as fraudulent under section 281, an **appropriate proceeding in accordance with law was required to be taken under section 53 of the Transfer of Property Act, 1882.**

The Assessing Officer is required to file a suit for declaration to the effect that the transaction of transfer was void under section 281 of the Income-tax Act; but he himself cannot assume jurisdiction to declare the sale deed as void.

High Court's Decision: Applying the rationale of the Apex Court ruling, the High Court held that the Assessing Officer has no jurisdiction under section 281 to *suomot* declare the sale as void.

TDS

1. Is section 194A applicable in respect of interest on fixed deposits in the name of Registrar General of High Court?

UCO BANK

High Court's Opinion and Decision:

- The High Court opined that **in the normal course, the bank is obliged** to deduct tax at source in respect of any credit or payment of interest on deposits made with it.
- However, in this case, the **actual payee is not ascertainable** and **credit of interest is not a credit to the account of a person who is liable to pay tax.**
- The deposits kept with the bank under the orders of the court were, essentially, funds which were funds in the custody of the court. The **interest** on that account – **although credited in the name of the Registrar General** – was **also part of funds under the custody of the Court.**

The Registrar General is not the recipient of the income represented by interest that accrues on the deposits made in his name.
The credit of interest is not a credit to the account of a person who is liable to be assessed to tax.

HC DECISION –

- The High Court observed that **in the absence of a payee**, the machinery **provisions for deduction of tax to his credit are ineffective.**
 - The **expression “payee”** under section 194A would **mean the recipient of income whose account is maintained by the person paying interest.**
 - The Registrar General is **neither** recipient of the amount credited to his account **nor** to interest accruing thereon.
 - Therefore, he **cannot be considered as a „payee“ for the purposes of section 194A.**
 - The credit by the bank in the name of the Registrar General would, thus, not attract the provisions of section 194A
1. **Can incentives given to stockists and distributors by a manufacturing company be treated as “commission” to attract –**
(i) the provisions for tax deduction at source under section 194H; and
(ii) consequent disallowance under section 40(a)(ia) for failure to deduct tax at source?

INTERVET INDIA P LTD.

High Court’s Observations:

- The High Court observed that the assessee had **undertaken sales promotion** by way of product discount scheme under which it offered incentive to the stockists / distributors and dealers.
- **The relationship between the assessee and the distributors / stockists was that of principal to principal.**
- The products were firstly sold to distributors / stockists who in turn resold the goods in the market.

- **No service was offered by the assessee to them except a discount** under the product discount scheme/product campaign scheme to buy the assessee's product.

High Court's Decision:

- The High Court, accordingly, held that the **stockists and distributors were not acting on behalf of the assessee** and most of the credit was by way of goods on meeting the sales target which could not be said to be a commission within the meaning of the *Explanation (i)* to section 194H.
- Accordingly, the High Court affirmed the order of the Tribunal which held that such payment does not attract deduction of tax at source. Consequently, disallowance under section 40(a)(ia) would not be attracted.

2. Is payment made for use of passive infrastructure facility such as mobile towers subject to tax deduction under section 194C or section 194 - I?

INDUST TOWERS LTD.

Facts of the case: The assessee **owned a network of telecom towers** and infrastructure services which were let out to major telecom operators in the country.

High Court's Observations:

- The High Court observed that **it was the intention of the parties to use the** technical and specialized **equipment maintained by** the assessee. The **infrastructure was given** for the use of mobile operators.
- The towers were the neutral platform without which the mobile operators could not operate.
- The **dominant intention was the use of equipment or plant** or machinery and the use of premises was only incidental.

High Court's Decision:

- The High Court held that the submission of the assessee that the transaction is not “renting” is incorrect. Also, the Revenue’s contention that the transaction is primarily “renting of land” is also incorrect.
- The underlying **object of the arrangement was the use of machinery, plant** or equipment i.e., the passive infrastructure. It directed that tax deduction be made at 2% as per section 194-I(a), the rate applicable for payment made for use of plant and machinery.

3. Is payment made to an overseas agent, who did not perform any service in India, liable for tax deduction at source?

WIZCRAFT INTERNATIONAL ENTERTAINMENT P LTD.

Issue: The issue under consideration before the High Court was with regard to deduction of tax on commission paid to overseas agent who never took part in the events organized in India and amount paid as reimbursement of expenses incurred on travelling of artistes.

High court’s Observations:

- The High Court observed that the assessee has deducted tax on the payments made to artistes for the services rendered in India.
- In so far as **reimbursement of expenses is concerned**, it has been verified with supporting documents that **it was towards their air travel** on which no tax was required to be deducted.
- With regard to the payment of commission, **the agent did not act as a performing artist or entertainer**. He was **concerned only with the services rendered outside** India.
- Agent only contacted the artistes and negotiated with them for performance in India in terms of the authority given by the assessee. Hence, the commission paid to the overseas agent was not liable to tax in India. Consequently, there was no obligation for deducting tax at source at the time of making payment to the overseas agent.

High Court’s Decision: The High Court, therefore, affirmed the decision of the Tribunal and Commissioner (Appeals) holding that the

service rendered by the agent was outside India and hence, was not chargeable to tax in India. Thus, the requirement for deducting tax at source under section 195 on such payment does not arise.

4. **Can the Tax Recovery Officer (TRO) adjudicate disputes regarding quantum of liability between the garnishee (petitioner company, in this case) and the defaulting company, by exercising his powers under section 226(3)?**

UTTARPRADESH CARBON AND CHEMICALS LTD

High Court's Observations:

- The High Court observed that section 226(3) covers **not only any sum of money due to the defaulting company** being subjected to attachment **but also any sum of money which may become due subsequently to the defaulting company** being eligible for recovery by means of attachment.
- Thus, the **provision covers not only persons owing but also those who may owe later** to the defaulting company for the purpose of recovery of tax due.
- Further, **since the petitioner has participated in the proceedings subsequently**, the invalidity of the notice was cured and the defect, if any, was removed.
- However, **when the garnishee** (i.e. debtor of the defaulting company) **makes a statement on oath that the sum demanded or part thereof is not due from him** or that it does not hold any money for or an account of the defaulting company, no further proceeding for recovery can be made.
- The High Court observed that the **powers under section 226(3) could not be invoked** for effecting a recovery of a claim which is disputed.
- The condition precedent for exercising the power under section 226(3) is that the money is due and payable by the person concerned to the assessee.

- The High Court opined that **section 226(3) does not give any power to the Assessing Officer or the TRO to adjudicate disputes** relating to the quantum of liability between the garnishee and the defaulting company, which is a matter within the purview of the Civil Courts.

High Court's Decision:

Thus, the High Court directed that the order of the TRO treating the petitioner as an assessee in default for the amount alleged to be owed by it to the defaulting company, cannot be sustained.