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DIRECT TAX

SELECTED CASE LAWS

MAY 2016

1 BASIC CONCEPTS

SAURASHTRA CEMENT LTD - SC

What is the nature of liquidated damages received by a company from the supplier of plant for failure to supply machinery to the company within the stipulated time a capital receipt or a revenue receipt?

SC DECISION –

- The damages were directly and intimately linked with the procurement of a capital asset i.e., the cement plant, which lead to delay in coming into existence of the profit-making apparatus.
- It was not a receipt in the course of profit earning process.
- Therefore, the amount received by the assessee towards compensation for sterilization of the profit earning source, is not in the ordinary course of business, hence it is a capital receipt in the hands of the assessee.

2 INCOME WHICH DO NOT FORM PART OF TOTAL INCOME

KRIBHCO – HC

Whether section 14A is applicable in respect of deductions, which are permissible and allowed under Chapter VI-A?

HC OBSERVATIONS –

- Section 14A is applicable only if an income is not included in the total income as per the provisions of Chapter III of the IT ACT 1961.
- Deductions under chapter VIA are different from the exclusions/exemptions provided under chapter III.
- The word 'do not form part of total income under this act' used in section 14A are significant and important.
- Income which qualifies for deductions under section 80C to 80U has to be first included in the total income of the assessee and then allowed as deduction.

- However, income referred to in chapter II do not form part of the total income and therefore, as per section 14A ,no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to such income which does not form part of the total income.

DECISION - No disallowance can be made under section 14A in respect of income included in total income in respect of which deduction is allowable u/s 80C to 80U .

KARIMANGALAM ONRIYA PENGAL SEMIPU AMAIPU LTD

In a case where the application for registration of a charitable trust is not disposed of within the period of 6 months as required under section 12AA(2), can the trust be deemed to have been registered as per provisions of section 12AA?

HC OBSERVATIONS –

- The nature of statutory provision, mandatory or directory, has to be ascertained not only from the wording of the statute, but also from the nature and design of the statute and the purpose sought to be achieved.
- Further, since the consequences for non-adherence of the time limit of six months is not spelt out in the statute, it cannot be said that passing the order within such time limit is mandatory in nature.

HC DECISION - High Court held that the time frame mentioned in section 12AA(2) is only directory in nature and non-consideration of the registration application within the said time frame of six months would not amount to 'deemed registration'.

MEEKAKSHI AMMA ENDOWMENT TRUST.

Where a charitable trust applied for issuance of registration under section 12A within a short time span (nine months, in this case) after its formation, can registration be denied by the concerned authority on the ground that no charitable activity has been commenced by the trust?

HC OBSERVATIONS & DECISION –

- The money available with the trust, it cannot be expected to carry out activity of charity immediately. Consequently, in such a case, it cannot be concluded that the trust has not intended to do any activity of charity.
- In such a situation, the objects of the trust as mentioned in the trust deed have to be taken into consideration by the authorities for satisfying themselves about the genuineness of the trust and not the activities carried on by it.

- Later on, if it is found from the subsequent returns filed by the trust, that it is not carrying on any charitable activity, it would be open to the concerned authorities to withdraw the registration granted or cancel the registration as per the provisions of section 12AA(3).

3 INCOME FROM SALARIES

SHANKAR KRISHNAN:

Can notional interest on security deposit given to the landlord in respect of residential premises taken on rent by the employer and provided to the employee, be included in the perquisite value of rent-free accommodation given to the employee?

HC DECISION –

- Assessing Officer is not right in adding the notional interest on the security deposit given by the employer to the landlord in valuing the perquisite of rent-free accommodation.
- Since the perquisite value has to be computed as per Rule 3 and Rule 3 does not require addition of such notional interest.
- Thus, the perquisite value of the residential accommodation provided by the employer would be the actual amount of lease rental paid or payable by the employer, since the same was lower than 10% (now 15%) of salary.

DELHI PUBLIC SCHOOL

Can the limit of Rs. 1,000 per month per child be allowed as standard deduction, while computing the perquisite value of free or concessional education facility provided to the employee by the employer?

DECISION –

- The value of perquisite for free/concessional educational facility arising to an employee **exceeds Rs. 1,000 per month per child, the whole perquisite shall be taxable** in the hands of the employee and no standard deduction of Rs. 1,000 per month per child can be provided from the same.
- It is only in case the perquisite value is less than Rs. 1,000 per month per child, the perquisite value shall be nil. Therefore, Rs. 1,000 per month per child is not a standard deduction to be provided while calculating such a perquisite.

4. INCOME FROM HOUSE PROPERTY

1. NEW DELHI HOTELS LTD – HC

Whether the rental income derived from the unsold flats which are shown as stock-in-trade in the books of the assessee would be taxable under the head 'Profits and gains from business or profession' or under the head 'Income from house property', in a case where the actual rent receipts formed the basis of computation of income?

DECISION –

- *should be assessed under the head "Income from house property. I*
- *Irrespective of whether it is deemed rent or actual rent which forms the basis of computing income from unsold flats held as stock-in-trade , the head under which the income is taxable would be IOH.*

2. AZIMGANJ ESTATE PRIVATE LIMITED – HC

Can the rental income from the unsold flats of a builder be treated as its business income merely because the assessee has, in its wealth tax return, claimed that the unsold flats were stock-in-trade of its business?

DECISION –

- *The rental income from the unsold flats of a builder shall be taxable as "Income from house property" as provided under section 22 and since it specifically falls under this head, it cannot be taxed under the head "Profit and gains from business or profession.*
- *Therefore, the assessee would be entitled to claim statutory deduction of 30% from such rental income as per section 24.*
- *The fact that the said flats have been claimed as not chargeable to wealth-tax, treating the same as stock-in-trade, will not affect the computation of income under the Income-tax Act, 1961.*

3. HARIPRASAD BHOJNAGARWALA – HC

Can benefit of self-occupation of house property under section 23(2) be denied to a HUF on the ground that it, being a fictional entity, cannot occupy a house property?

DECISION - HC held that the HUF is entitled to claim benefit of self-occupation of house property U/s 23(2)

Observation –

- HUF is a group of individuals related to each other i.e family comprising of a group of natural persons.
- The said family can reside in the house, which belongs to HUF. Since a HUF cannot consist of artificial persons, it cannot be said to be a fictional entity. Also it is observed that since singular includes plural, the word 'owner would include 'owners'.

4. JOSEPH GEORGE AND CO. – HC

Can an assessee engaged in letting out of rooms in lodging house also treat the income from renting of a building to a bank on long term lease as business income.?

DECISION –

HC held that, while lodging is a business, however, letting out of building to the bank on long-term lease could not be treated as business. Therefore, the rental income from bank has to be assessed as income from house property.

5. ASIAN HOTELS LTD – HC

Can notional interest on interest-free deposit received by an assessee in respect of a shop let out on rent be brought to tax as business income or income from house property?

DECISION – HC held that the notional interest is neither assessable as business income not as income from house property.

Observation –

- The HC observed that **section 28(iv)** is concerned with the business income and brings to tax the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession.

- **Section 28(iv)** can be invoked only where the benefit or amenity or perquisite is otherwise than by way of cash.
- **Section 23(1)** provides that the expected rent is deemed to be the sum for which the property might reasonably be expected to be let out from year to year.

5. PROFITS AND GAINS FROM BUSINESS OR PROFESSION

1. I.C.D.S LTD – SC

Can depreciation on leased vehicles be denied to the lessor on the ground that the vehicles are registered in the name of the lessee and that the lessor is not the actual user of the vehicles?

Observations –

- SC observed that **section 32** imposes a twin requirement of 'Ownership' and 'Usage for businesses' as condition for claim of depreciation thereunder.
- Further, SC observed that asset must be used in the course of business.
- Section 32 does not mandate actual usage by the assessee itself.
- In this case the assessee did use the vehicles in the course of its leasing business. Provisions of lease agreements are noteworthy –
 - The assessee is the exclusive owner of the vehicle at all points of time.
 - The assessee is empowered to repossess the vehicle, in case the lessee committed default.
 - The assessee had a right of inspection of the vehicle at all times.
 - At the end of the lease period, the lessee was obliged to return the vehicle to the assessee.

It can be seen that the proof of ownership lies in the lease agreement itself, which clearly points in favour of the assessee.

DECISION – The assessee was entitled to claim depreciation in respect of vehicles leased out since it has satisfied both the requirements of section 32

2. BSES YAMUNA POWERS LTD – HC

What is the eligible rate of depreciation in respect of computer accessories and peripherals under the Income-tax Act, 1961?

DECISION –

- Computer accessories and peripherals such as printers, scanners and server etc. form an integral part of the computer system and they cannot be used without the computer.
- Consequently, the High Court held that since they are part of the computer system, they would be eligible for depreciation at the higher rate of 60% applicable to computers including computer software.

3. M.M.FORGINGS LTD

Can the second proviso to section 32(1) be applied to restrict the additional depreciation under section 32(1)(iia) to 50%, if the new plant and machinery was put to use for less than 180 days during the previous year?

Decision and Observations

Since there is a statutory stipulation restricting the allowability of depreciation to 50% where the asset is put to use for less than 180 days, the amount of depreciation allowable has to be restricted to 50% of the amount computed u/s 32(1)(iia).

4. AREVA T and D India Ltd. – HC

Can business contracts, business information, etc., acquired by the assessee as part of the slump sale and described as 'goodwill', be classified as an intangible asset to be entitled for depreciation under section 32(1)(ii)?

OBSERVATION –

HC observed that in the absence of intangible assets (business contracts, business information), the assessee would have had to commence business from scratch and go through the gestation period whereas by acquiring the aforesaid business rights along with tangible assets the assessee has got a running business.

DECISION –

HC held that the specified intangible assets acquired under the slump sale are in the nature of intangible asset under the category 'other business or commercial rights of similar nature' specified in section 32(1)(ii) and accordingly eligible for depreciation u/s 32(1)(ii).

5. SMIFS SECURITIES LTD - SC

Is the assessee entitled to depreciation on the value of goodwill considering it as an asset within the meaning of *Explanation 3(b)* to Section 32(1)?

OBSERVATIONS – SC observed that explanation 3 to section 32(1) states that the expression ‘asset’ shall mean an intangible asset, being know how, patents, copyrights, trademarks, licenses, franchises or any other business or commercial rights of similar nature.

DECISION –

A reading of the words ‘any other business or commercial rights of similar nature’ indicates that goodwill would fall under the said expression. It was held that ‘Goodwill’ is an asset U/s 32(1) and depreciation thereon is allowable under the said section.

6. B. Raveendran Pilai – HC

Is the assessee entitled to depreciation on value of goodwill considering it as “other business or commercial rights of similar nature” within the meaning of an intangible asset?

DECISION –

When goodwill paid was for ensuring retention and continued business in the hospital, it was for acquiring a business and commercial right and it was comparable with trade mark, franchise, copyright etc.

7. FEDERAL BANK LTD – HC

HC held that the rate of depreciation of 60% is available to computers and there is no ground to treat the communication equipment as computers. HENCE , EPABX and mobile phones are not computers and therefore, are not entitled to higher depreciation at 60%.

8. SMT . A.SIVAKAMI AND ANOTHER

Would beneficial ownership of assets suffice for claim of depreciation on such assets?

Facts - The assessee, running a proprietary concern, claimed depreciation on three buses, even though she was not the registered owner of the same. Insurance, road tax paid by her.

Observations –

- HC Observed that in the context of the income tax act 1961 to tax the income, the owner is a person who is entitled to receive income from the property in his own right.
- The SC in Podar Cement P Ltd. Observed that the **owner need not necessarily be the lawful owner** entitled to pass on the title of the property to another.

DECISION –

Assessee has made available all the documents relating to the business and also established before the authorities that she is the beneficial owner the HC held that she was entitled to claim depreciation even though she was not the legal owner of the buses .

9. ORIENT CERAMICS AND INDUSTRIES LTD.- HC

What is the nature of expenditure incurred on glow-sign boards displayed at dealer outlets - capital or revenue?

Observations – HC noted the following observation while holding that such expenditure was revenue in nature –

- The expenditure incurred by the assessee on glow sign boards **does not bring into existence an asset or advantage** for the enduring benefit of the business, which is attributable to the capital.
- The glow sign board is **not an asset of permanent nature**. It has a short life.
- The materials used in the glow sign boards **decay with the effect of weather**. Therefore, it **requires frequent replacement**. Consequently, the assessee has to incur expenditure on glow sign boards regularly in almost each year.
- The assessee incurred expenditure on the glow sign boards with the **object of facilitating the business operation and not with the object of acquiring asset** of enduring nature.

DECISION- HC held that expenditure on glow sign boards displayed at dealer outlets was revenue in nature.

10. ITC Hotels Ltd – HC

Would the expenditure incurred on issue and collection of convertible debentures be treated as revenue expenditure or capital expenditure?

OBSERVATIONS AND DECISION –

The expenditure incurred on the issue and collection of debentures shall be treated as revenue expenditure even in case of convertible debentures, i.e. the debentures which had to be converted into shares at a later date.

11. PRIYA VILLAGE ROADSHOWS LTD – HC

Would expenditure incurred on feasibility study conducted for examining proposals for technological advancement relating to the existing business be classified as a revenue expenditure, where the project was abandoned without creating a new asset?

OBSERVATIONS AND DECISION –

- HC observed that whether or not a new business/asset comes into existence would become a relevant factor.
- If there is **no creation of new asset**, then the expenditure incurred would be of **revenue nature**.
- The HC held that since the feasibility studies were conducted by the assessee for the existing business with a common administration and common fund and the studies were abandoned without creation a new asset, this expenses were of revenue nature.

12. HINDUSTAN ZINC LTD – HC

Can expenditure incurred on alteration of a dam to ensure adequate supply of water for the smelter plant owned by the assessee be allowed as revenue expenditure?

OBSERVATIONS AND DECISION –

- The expenditure incurred by the assessee for commercial expediency relates to carrying on of business.
- The expenditure is of such nature which a prudent businessman may incur for the purpose of his business.
- The operational expenses incurred by the assessee solely intended for the furtherance of the enterprise can by no means be treated as expenditure of capital nature.

13. Confederation of Indian Pharmaceutical Industry - HC

Is Circular No. 5/2012 dated 01.08.2012 disallowing the expenditure incurred on freebies provided by pharmaceutical companies to medical practitioners, in line with *Explanation* to section 37(1), which disallows expenditure which is prohibited by law?

Observations –

- HC observed that Indian medical council regulations, 2002 every medical practitioner and his professional associate is prohibited from accepting any gift, travel facility, hospitality, cash or monetary grant from pharmaceutical and allied health sector industries.
- This is salutary regulation in the interest of the patients and the public.
- The **CBDT**, considering the fact that the claim of any expenses incurred in providing freebies to medical practitioners is in violation of the provisions of Indian medical council regulations, 2002 has clarified that the expenditure so incurred shall be inadmissible **U/s 37(1)**.

Decision – The HC opined that the contention of the assessee that the above mentioned circular goes beyond section 37(1) was not acceptable. The circular is total in line with the explanation to section 37(1).

14. Kap Scan and Diagnostic Centre P. Ltd. – HC

Can the commission paid to doctors by a diagnostic centre for referring patients for diagnosis be allowed as a business expenditure under section 37 or would it be treated as illegal and against public policy to attract disallowance?

Observation –

HC observed that as per Indian medical council regulations, 2002, no person shall give, solicit, receive or offer to give, solicit, or receive any gift, gratuity, commission or bonus in consideration of a return for referring any patient for medical treatment.

DECISION –

- The demanding as well as paying of such commission is bad in law. It is not fair practice and is opposed to public policy and should be discouraged.
- Thus HC held that commission paid to doctors for referring patients for diagnosis is not allowable as a business expenditure.

15. Echjay Forgings Ltd - HC

Can expenditure incurred by a company on higher studies of the director's son abroad be claimed as business expenditure under section 37 on the contention that he was appointed as a trainee in the company under "apprentice training", where there was no proof of existence of such scheme?

Observations –

- It was observed that there was no evidence on record to show that any other person at any point of time was appointed as trainee or sent abroad for higher education.
- Further, the appointment letter to the director's son neither had any reference number nor was it backed by any previous application by him.
- There was no evidence that he was recruited as trainee by some open competitive exam or regular selection process.

DECISION – The HC held that there was no nexus between the education expenditure incurred abroad for the director's son and the business of the assessee company. Therefore the aforesaid expenditure was not deductible.

16. SHANTI BHUSHAN – HC

Can the expenditure incurred on heart surgery of an assessee, being a lawyer by profession, be allowed as business expenditure under section 31, by treating it as current repairs considering heart as plant and machinery, or under section 37, by treating it as expenditure incurred wholly and exclusively for the purpose of business or profession?

Observations –

- Though the definition of 'plant' as per section 43(3) is inclusive in nature, such plant must have been used as a business tool which is not true in case of heart.
- According to section 37(1) the said expenditure must be incurred wholly and exclusively for the purposes of the assessee's profession.

DECISION –

- No direct nexus between the expenses incurred by the assessee on the heart surgery and his efficiency in the professional field.

- Therefore, the claim for allowing the said expenditure under section 37 is also not tenable. Hence, the heart surgery expenses shall not be allowed as a business expenditure of the assessee under the Income tax act, 1961.

17. Neelavathi & Others – HC

Can payment to police personnel and gundas to keep away from the cinema theatres run by the assessee be allowed as deduction?

OBSERVATIONS AND DECISION–

- If the assessee had incurred expenditure for the purpose of security, the same would have been allowed as deduction.
- But any payment made to the police illegally amounts to bribe and such illegal gratification cannot be considered as an allowable deduction.
- Similarly any payment to gunda as a precautionary measures so that he shall not cause any disturbance in the theatre is an illegal payment for which no deduction is allowable under the act.

18. Millennia Developers (P) Ltd – HC

Is the amount paid by a construction company as regularization fee for violating building bye-laws allowable as deduction?

DECISION–

- The amount paid to compound an offence is obviously a penalty and hence, does not qualify for deduction under section 37.
- Merely describing the payment as a compounding fee would not alter the character of the payment.

19. Great City Manufacturing Company.

Can remuneration paid to working partners as per the partnership deed be considered as unreasonable and excessive for attracting disallowance under section 40A(2)(a) even though the same is within the statutory limit prescribed under section 40(b)(v)?

Observations –

- HC observed that **section 40(b)(v)** prescribes the limit of remuneration to working partners, and deduction is allowable up to such limit while computing the business income.
- If remuneration paid is within the ceiling limit provide u/s 40(b)(v) ,then recourse to provisions of **section 40A(2)(a)** cannot be taken.
- If the conditions mentioned in section 40(b)(v) are complied with then the assessing office cannot disallow any part of the remuneration on the ground that it is excessive.

DECISION –

HC held that remuneration paid to working partners within the limits specified under section 40(b)(v) cannot be disallowed by invoking the provisions of section 40A(2)(a)

20. Andhra Ferro Alloys P. Ltd. – HC

Can unpaid electricity charges be treated as “fees” to attract disallowance under ***section 43B?***

DECISION –

The provisions of section 43B do not incorporate electricity charges. Therefore, non-payment of electricity charges would not attract disallowance under section 43B since such charges cannot be termed as “fees”

6. CAPITAL GAINS

1. PVS Raju – HC

What are the factors determining the nature of income arising on sale of shares i.e. whether the income is taxable as capital gains or business income?

DECISION –

The question whether the shares were held as an investment to give rise to capital gain on its sale or as a trading asset to give rise to business income is not a pure question of law but essentially one of fact.

Note – The facts that may be considered while determining the same are the magnitude and **frequency of buying and selling of shares** by the assessee, the **period of holding of shares, ratio of sales to purchases and the total holdings**, etc. Mere classification of shares in the books of accounts of the assessee is not relevant for determining the nature of income for income-tax purposes.

2. SMT. RAMA RANI KALIA – HC – MAY -15

Where a leasehold property is purchased and subsequently converted into freehold property and then sold, should the period of holding be reckoned from the date of purchase or from the date of conversion for determining whether the resultant capital gains is short-term or long-term?

OBSERVATIONS –

The HC observed that the difference between 'short-term capital asset' and 'long-term capital asset' is the period over which the property has been held by the assessee and not the nature of title over the property.

DECISION – HC held that conversion of the rights of the lessee from leasehold to freehold is only by way of improvement of her rights over the property, which she enjoyed.

- It would not have any effect on the taxability of gain from such property, which is related to the period over which the property is held.
- Since, in this case, the period of holding is more than 36 months, the resultant capital gains would be long-term.

3. P.P.MENON – HC

In determining the period of holding of a capital asset received by a partner on dissolution of firm, can the period of holding of the capital asset by the firm be taken into account?

DECISION –

- HC held that the benefit of including the period of holding of the previous owner u/s 2(42A) read with section 49(1)(iii)(b) can be availed only if the dissolution of the firm had taken place at any time before 1st April 1987
- In this case, the firm was dissolved on April 15, 2001 and therefore the benefit of these would not be available to the assessee.
- Therefore, the period of holding of the asset received by the assessee partner on dissolution of the firm has to be reckoned only from the date of dissolution of the firm.

4. NAVIN JINDAL – SC

What would be the period of holding to determine whether the capital gains on renunciation of right to subscribe for additional shares is short-term or long-term?

OBSERVATIONS –

- SC observed that the right to subscribed for additional offer of shares on rights basis, on the strength of existing shareholding in a company, **comes into existence when the company decides to come out with the rights offer.**
- Prior to that date, the right, though embedded in the original shareholding, remains inchoate. (Undeveloped). It crystalizes only when the rights offer is announce by the company.

DECISION – SC held that period of holding would be from the date on which such right to subscribe for additional shares comes into existence up to the date of renunciation of such right.

5. MANJULA SHAH – HC

Whether indexation benefit in respect of the gifted asset shall apply from the year in which the asset was first held by the assessee or from the year in which the same was first acquired by the previous owner?

Observation – HC observed that ‘deemed holding period fiction’ created by the statute, the assessee is deemed to have held the capital asset from the year the asset was held by the previous owner and accordingly the asset is LTCA in the hands of the assessee.

DECISION – The indexed cost of acquisition in case of gifted asset has to be computed with reference to the year in which the previous owner first held the asset and not the year in which the assessee became the owner of the asset.

6. GITA DUGGAL – HC

Where a building, comprising of several floors, has been developed and re-constructed, would exemption under section 54/54F be available in respect of the cost of construction of - (i) the new residential house (i.e., all independent floors handed over to the assessee); or (ii) a single residential unit (i.e., only one independent floor)?

Observations –

- The HC observed that Section 54 and 54F use the expression ‘residential house’ and not ‘residential unit’.
- **Section 54 and 54F** require the assessee to acquire a ‘residential house’.
- There is nothing in this section which requires the residential house to be constructed in a particular manner.
- The only requirement is that it should be for residential use and not for commercial use.

DECISION –

- The fact that the residential house consists of several independent units cannot be permitted to act as an impediment to the allowance of the deduction under section 54 or section 54F.

- It is neither expressly nor by necessary implication prohibited.
- Therefore, the assessee is entitled to exemption of capital gains in respect of investment in the residential house, comprising of independent residential units handed over to the assessee.

7. SYED ALI ADIL – HC

Would an assessee be entitled to exemption under section 54 in respect of purchase of two flats, adjacent to each other and having a common meeting point?

DECISION - The assessee was entitled to investment in both the flats purchased by him, since they were adjacent to each other and had a common meeting point, thus, making it a single residential unit. (Similar viewed in K.G Rukminiamma and Ananda Basappa)

IMPORTANT NOTE –

- SECTION 54 & 54F HAVE BEEN AMENDED BY F.A 2014 TO CLARIFY THAT THE EXEMPTION AVAILABLE THEREUNDER WOULD BE IN RESPECT OF INVESTMENT IN ONE RESIDENTIAL HOUSE **IN INDIA**.
- IT APPEARS THAT EVENT AFTER THE AMENDMENT BY THE F.A – 2014, THE ABOVE RULINGS WILL CONTINUE TO HOLD GOOD, SINCE THE RESTRICTION IS REGARDING INVESTMENT BEING MADE IN ONE RESIDENTIAL HOUSE, AND NOT IN ONE UNIT OF A RESIDENTIAL HOUSE.

8. GURNAM SINGH – HC

Can exemption under section 54B be denied solely on the ground that the new agricultural land purchased is not wholly owned by the assessee, as the assessee's son is a co-owner as per the sale deed?

DECISION

- Merely because the assessee's son was shown in the sale deed as co-owner, it did not make any difference.

- It was not the case of the Revenue that the land in question was exclusively used by the son. Therefore, the assessee was entitled to deduction under section 54B.

9. KAMAL WAHAL – HC

Can exemption under section 54F be denied solely on the ground that the new residential house is purchased by the assessee exclusively in the name of his wife?

Observations –

- The HC observed that for the purpose of section 54F, a new residential house need not necessarily be purchased exclusively in his name nor is it necessarily that it should be purchased exclusively in his name.
- Further, HC observed that the assessee had not purchased the new house in the name of a stranger or somebody who is unconnected with him, but had purchased it in the name of his wife.
- The entire investment for purchase of new residential house had come out of the sale proceeds of the capital asset and there was no contribution from his wife.

DECISION – Hence the HC held that the assessee is entitled to claim exemption under section 54F in respect of utilization of sale proceeds of capital asset for investment in residential house property in the name of his wife.

10. RAVINDER KUMAR ARORA - HC

In case of a house property registered in joint names, whether the exemption under section 54F can be allowed fully to the co-owner who has paid whole of the purchase consideration of the house property or will it be restricted to his share in the house property?

OBSERVATIONS AND DECISION –

- The assessee was the real owner of the residential house in question and mere inclusion of his wife's name in the sale deed would not make any difference.
- The High Court also observed that section 54F mandates that the house should be purchased by the assessee but it does not stipulate that the house should be purchased only in the name of the assessee.
- In this case, the house was purchased by the assessee in his name and his wife's name was also included additionally.
- Therefore, the conditions stipulated in section 54F stand fulfilled and the entire exemption claimed in respect of the purchase price of the house property shall be allowed to the assessee.

11. SAMBANDAM UDAYKUMAR – HC

Can exemption under section 54F be denied to an assessee in respect of investment made in construction of a residential house, on the ground that the construction was not completed within three years after the date on which transfer took place, on account of pendency of certain finishing work like flooring, electrical fittings, fittings of door shutter, etc?

OBSERVATIONS – HC observed that condition for claiming the benefit u/s 54F is that capital gains realized from sale of capital asset should have been invested either in purchasing a residential house or in constructing a residential house within the stipulated period. Merely because the construction was not completed in all respects and possession could not be taken within the stipulated period, would not disentitle the assessee from claiming exemption under section 54F.

DECISION – The HC held that assessee would be entitled to exemption u/s 54F in respect of the amount invested in construction within the prescribed period.

12. RAJIV SHUKLA –HC

Can the assessee claim exemption under section 54F, on account of capital gain arising on transfer of depreciable assets held for more than 36 months i.e. a long-term capital asset, though the same is deemed as capital gain arising on transfer of short-term capital asset by virtue of section 50?

HC DECISION –

- The deeming fiction created by **section 50** that the capital gain arising on transfer of a depreciable asset shall be treated as capital gain arising on transfer of short-term capital asset is only for the purpose of **sections 48 and 49** and not for the purpose of any other section.
- **Section 54F** being an independent section will not be bound by the provisions of section 50.
- The depreciable asset if held for more than 36 months shall be a long-term capital asset as per the provisions of **section 2(29A)**.
- Therefore, the exemption under section 54F on transfer of depreciable asset held for more than 36 months cannot be denied on account of fiction created by section 50

13. GOULI MAHADEVAPPAV-HC

Where the stamp duty value under section 50C has been adopted as the full value of consideration, can the reinvestment made in acquiring a residential property, which is in excess of the actual net sale consideration, be considered for the purpose of computation of exemption under section 54F, irrespective of the source of funds for such reinvestment?

FACTS – Assessee sold a plot of land for Rs. 20 lakhs and reinvested the sale consideration of Rs.20 lakhs together with agriculture income of Rs. 4 lakhs, in construction of residential house.

DECISION –

When capital gain is assessed on notional basis as per the provisions of section 50C, and the higher value i.e., the stamp duty value of Rs.36 lakhs under section 50C has been adopted as the full value of consideration, the entire amount of Rs. 24 lakhs reinvested in the residential house within the prescribed period should be considered for the purpose of exemption under section 54F, irrespective of the source of funds for such reinvestment.

14. HINDUSTAN UNILEVER LTD – HC

Can exemption under section 54EC be denied on account of the bonds being issued after six months of the date of transfer even though the payment for the bonds was made by the assessee within the six month period?

DECISION –

- The purpose of the provisions of section 54EC, the date of investment by the assessee must be regarded as the date on which payment is made.
- The High Court, therefore, held that if such payment is within a period of six months from the date of transfer, the assessee would be eligible to claim exemption under section 54EC.

15. YATISH TRADING COMPANY – HC

In the case of an assessee, being a dealer in shares and securities, whose portfolio comprises of shares held as stock-in-trade as well as shares held as investment, is it permissible under law to convert a portion of his stock-in-trade into investment and if so, what would be the tax treatment on subsequent sale of such investment?

FACTS – The profits and gains up to the date of conversion was offered as business income and profits and gains arising after conversion up to the date of sale was offered as capital gain.

DECISION –

The gains arising on sale of those shares held as investments by the dealer-assessee (i.e., the difference between the sale price and the fair market value on the date of conversion) were to be assessed under the head "Capital gains" and not under the head "Profits and gains of business or profession"

7. INCOME FROM OTHER SOURCES

1. PARLE PLASTICS LTD – HC

What are the tests for determining “substantial part of business” of lending company for the purpose of application of exclusion provision under section 2(22)?

HC OBSERVATIONS –

- U/s 2(22), “dividend” does not include, any advance or loan made to shareholder by a company in the ordinary course of its business where the lending of money is a substantial part of the business of the company.
- Sometimes **a portion which constitutes a substantial part of the turnover, though it contributes a relatively small portion of the profit**, would be termed as a substantial part of the business.
- Similarly, **a portion which is relatively small as compared to the total turnover, but generates a large portion, say more than 50% of the total profit of the company** would also be a substantial part of its business.
- The **capital employed for a specific division of a company in comparison to total capital employed would also be relevant** to determine whether the part of the business constitutes a substantial part.

2. PRADIP KUMAR MALHOTRA – HC

Can the loan or advance given to a shareholder by the company, in return of an advantage conferred on the company by the shareholder, be deemed as dividend under section 2(22)(e) in the hands of the shareholder?

HC OBSERVATIONS –

- **HC** observed that the phrase ‘by way of advance or loan’ appearing in section 2(22)(e) must be construed to mean those advances or loans which a shareholder enjoys simply on account of being a person who is the beneficial owner of shares holding not less than 10% of the voting power.
- In case such loan or advance is given to such shareholders as consequences of any further consideration which is beneficial to the company received from such a shareholder, such advance or loan cannot be said to a deemed dividend within the meaning of the Act.

- Thus, gratuitous loan or advance given by a company to a shareholder, who is the beneficial owner of shares holding not less than 10% of the voting power, would come within the purview of section 2(22)(e) but not to the cases where the loan or advance is given in return to an advantage conferred upon the company by such holder.

Decision – Therefore, the said advance cannot be treated as deemed dividend in the hands of the shareholder U/s 2(22)(e).

3. AMBASSADOR TRAVELS (P) LTD

Would the provisions of deemed dividend under section 2(22)(e) be attracted in respect of financial transactions entered into in the normal course of business?

HC OBSERVATIONS AND DECISION –

- HC observed that the assessee was involved in booking of resorts for the customers of these companies and entered into normal business transactions as a part of its day-to-day business activities.
- The High Court, therefore, held that such financial transactions cannot under any circumstances be treated as loans or advances received by the assessee from these concerns for the purpose of application of section 2(22)(e).

4. MANJOO AND CO.

Can winnings of prize money on unsold lottery tickets held by the distributor of lottery tickets be assessed as business income and be subject to normal rates of tax instead of the rates prescribed under section 115BB?

HC OBSERVATIONS -

- HC observed that the receipt of the prize money is not in his capacity as a lottery distributor but as a holder of the lottery ticket which won the prize.
- Further, winning from lotteries are assessable under the special provisions of section 115BB, irrespective of the head under which such income falls.

Decisions - The rate of 30% prescribed under section 115BB is applicable in respect of winnings from lottery received by the distributor.

8. SET-OFF AND CARRY FORWARD OF LOSSES

1. PRAMOD MITTAL

Can the loss suffered by an erstwhile partnership firm, which was dissolved, be carried forward for set-off by the individual partner who took over the business of the firm as a sole proprietor, considering the succession as a succession by inheritance?

FACTS – Assessee was previously a partner in a firm. He took over the entire business of the partnership firm in his individual capacity. The assessee claimed the set-off of the losses suffered by the erstwhile partnership firm against his income earned as an individual proprietor.

HC OBSERVATIONS –

- HC observed that the partnership firm and the proprietorship concern are two separate and distinct units for the purpose of assessment.
- **Sections 78(2)** deals with the carry forward of losses in case of succession of business. It provides that only the person who has incurred the losses, and no one else, would be entitled to carry forward the same and set it off.
- **An exception provided thereunder is in case of succession by inheritance.**
- The exception given in section 78(2) , permitting c/f of losses by the successor in case of inheritance, is not applicable in the present case **since the partnership firm was dissolved and ceased to continue.**
- **Taking over of business by a partner cannot be considered as a case of inheritance due to death as per the law of succession.**

DECISION -

- The loss suffered by the erstwhile partnership firm before dissolution of the firm cannot be carried forward by the successor sole-proprietor, since it is not a case of succession by inheritance.
- The assessee sole-proprietor is, therefore, not entitled to set-off the loss of the erstwhile partnership firm against his income.

9. DEDUCTIONS FROM GROSS TOTAL INCOME

1. SWARNAGIRI WIRE INSULATIONS PVT LTD.

Can unabsorbed depreciation of a business of an industrial undertaking eligible for deduction under section 80-IA be set off against income of another non-eligible business of the assessee?

HC OBSERVATIONS & DECISION

- It is a generally accepted principle that deeming provision of a particular section cannot be breathed into another section.
 - Therefore, the deeming provision contained in **section 80-IA(5) cannot override** the provisions of **section 70(1)**.
 - The assessee had incurred loss in eligible business after claiming depreciation.
 - Hence, section 80-IA becomes insignificant, since there is no profit from which this deduction can be claimed.
 - It is thereafter that section 70(1) comes into play, whereby the assessee is entitled to set off the losses from one source against income from another source under the same head of income.
 - The Court, therefore, held that the assessee was entitled to the benefit of set off of loss of eligible business against the profits of non-eligible business.
-
- However, once set-off is allowed under section 70(1) against income from another source under the same head, a deduction to such extent is not possible in any subsequent assessment year i.e., the loss (arising on account of balance depreciation of eligible business) so set-off under section 70(1) has to be first deducted while computing profits eligible for deduction under section 80-IA in the subsequent year.

EXAMPLE –

A company X LTD having two units, UNIT A and UNIT B. If A engaged in eligible business (say, power generation) has a profit of Rs.100 lacs in A.Y 2015-16, before claiming depreciation of Rs.120 lacs and Unit B engaged in non-eligible business (say, manufacture of wires) has a profit of Rs.70 lacs, then, as per the above decision, the loss of Rs.20 lacs (representing balance

depreciation not set-off) pertaining to UNIT A can be set-off against profit of Rs.70 lacs of UNIT B carrying on non-eligible business.

Therefore, the net profit of Rs.50 lacs would be taxable in the A.Y 2015-16. If in the next year, i. e A.Y 2016-17 the net profits of UNIT A and UNIT B are Rs.200 lacs and Rs.80 lacs, respectively, then the eligible deduction under section 80IA for that year would be Rs.180 lacs (i.e Rs.200 lacs minus Rs.20 lacs, being loss (representing balance depreciation) set-off in the A.Y 2015-16 against other income.

2. KIRAN ENTERPRISES

Can freight subsidy arising out of the scheme of Central Government be treated as a “profit derived from the business” for the purposes of section 80-IA ?

DECISION - High Court held that the transport subsidy received by the assessee was not a profit derived from business since it was not an operational profit. The source was not the business of the assessee but the scheme of Central Government.

3. ORCHEV PHARMA PVT LTD

Can Duty Drawback be treated as profit derived from the business of the industrial undertaking to be eligible for deduction under section 80-IB?

DECISION – SC , following the decision in case of LIBERTY INDIA held that Duty Drawback Receipts cannot be said to be profits derived from the business of industrial undertaking for the purpose of computation of deduction under section 80-IB.

- In the case of LIBERTY INDIA, the SC observed that DEPB/Duty drawback are incentives which flow from the schemes framed by the CG .
- Section 80-IB provides for the allowing of deduction in respect of profits and gains derived from eligible business. However, incentive profits are not profits derived from eligible business.

4. MEGHALAYA STEELS LTD.

Would grant of transport subsidy, interest subsidy and refund of excise duty qualify for deduction under section 80-IB?

HC OBSERVATIONS –

- The Transport and Interest subsidies were **not directly relatable** to the industrial activity of the assessee.

- The subsidies had **no direct nexus** with the profits or gains derived by the assessee from its industrial activity and the benefit to the assessee was only to its industrial activity.
- Therefore, the subsidies could not be taken into account for the purpose of deduction under section 80-IB

DECISION –

- The ***payment*** of Central excise duty had a direct nexus with the manufacturing activity and **similarly, the *refund* of the Central excise duty also had a direct nexus** with the manufacturing activity, being a profit-linked incentive,
- since payment of the Central excise duty would not arise in the absence of any industrial activity. Therefore, the refund of excise duty had to be taken into account for purposes of section 80-IB.

5. JASWAND SONS

Does income derived from sale of export incentive qualify for deduction under section 80-IB?

DECISION - Income derived from sale of export incentive cannot be said to be income “derived from” the industrial undertaking and therefore, such income is not eligible for deduction under section 80-IB.

6. CHIRANJEEVI WIND ENERGY LTD.

Would the procurements of parts and assembling them to make windmill fall within the meaning of “manufacture” and “production” to be entitled to deduction under section 80-IB?

The SC in India Cine Agencies laid down that the test to determine whether a particular activity amounts to ‘manufacture’ or not is whether new and different goods emerge having distinctive name, use and character.

HC OBSERVATIONS & DECISION –

- In this case, HC observed that those different parts had distinctive names and only when assembled together, they got transformed into an ultimate product which was commercially known as a ‘windmill’.
- Thus such activity carried on by the assessee would amount to ‘manufacture’ and ‘production’

7. JYOTI PLASTIC WORKS PRIVATE LIMITED.

Can an industrial undertaking engaged in manufacturing or producing articles or things treat the persons employed by it through agency (including contractors) as “workers” to qualify for claim of deduction under section 80-IB?

HC Observations –

- The expression “worker” is neither defined u/s 2 of the income tax act,1961, nor under section 80IB(2)(iv).
- Therefore, it would be reasonable to hold that the expression “worker” in section 80IB(2)(iv) is referable to the persons employed by the assessee directly or by or through any agency (including a contractor) in the manufacturing activity carried on by the assessee.
- The employment of ten or more workers is what is relevant and not the mode and the manner in which the workers are employed by the assessee.

HC DECISION – HC held that the condition of section 80-IB(2)(iv) had been fulfilled and therefore, the deduction under section 80-IB is allowable.

8. NESTER PHARMACEUTICALS LTD

Does the period of exemption under section 80-IB commence from the year of trial production or year of commercial production? Would it make a difference if sale was effected from out of the trial production?

HC OBSERVATIONS -

- HC held that since the assessee had effected sale in March 1998, it had crossed the stage of trial production and the final saleable product had been manufactured and sold.
- The quantum of commercial sale and the purpose of sale (namely, to obtain registration of excise / sales-tax) is not material. With the sale of those articles, marketable quality was established.

DECISION - Therefore, the conditions stipulated in section 80-IB were fulfilled with the commercial sale of the two items in that assessment year, and hence the five year period has to be reckoned from A.Y.1998-99.

9. PRAVIN SONI

Can an assessee who has not claimed deduction under section 80-IB in the initial years, start claiming deduction thereunder for the remaining years during the period of eligibility, if the conditions are satisfied?

HC DECISION- The provisions of section 80-IB nowhere stipulated a condition that the claim for deduction under this section had to be made from the first year of qualification of deduction failing which the claim will not be allowed in the remaining years of eligibility.

Therefore, the deduction under section 80-IB should be allowed to the assessee for the remaining years up to the period for which his entitlement would accrue, provided the conditions mentioned under section 80-IB are fulfilled.

10. ASSESSMENT OF VARIOUS ENTITIES

1. **D.L.NANDAGOPALA REDDY**

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?

HC OBSRVATIONS – HC observed that the property originally belonged to HUF. When property came to the hands of the assessee it was not his individual property, it was the property of his HUF.

HC DECISION –

- The assessee had given a portion of the property to his wife without a registered document, which is possible only if the property is a HUF property.
- If such property is treated as a self-acquired property, then the assessee would have been able to give the portion of the property to his wife only by the registered document.

2. **SUDHIR NAGPAL**

Under which head of income is rental income from plinths inherited by individual co-owners from their ancestors taxable - “Income from house property” or “Income from other sources”? Further, would such income be assessable in the hands of the individual co-owners or in the hands of the Association of Persons?

HC OBSERVATIONS –

HC observed that it is the income from HP consisting of any building or land appurtenant thereto which is the income from property consisting of any building or land appurtenant thereto which is assessed under section 22 and not the income from renting out of open land or some kutcha plinth only,

DECISION – The court held that the income from letting out the plinth is assessable under section 56 as ‘income from other sources’.

SECOND ISSUE – Merely accruing of income jointly to more persons that one would not constitute them an AOP. Unless the members join in a common purpose, it cannot be held that they have formed themselves into an association of persons.

DECISION – There was nothing to show that they had acted as an AOP. Hence, income has to be assessed in the status of individual and not association of persons.

3. MADRAS GYMKHANA CLUB

Would the interest earned on surplus funds of a club deposited with institutional members satisfy the principle of mutuality to escape taxability?

HC Decisions – The HC held that interest earned from investment of surplus funds in the form of fixed deposits with institutional members does not satisfy the principle of mutuality and hence cannot be claimed as exempt on this ground.

4. SIND CO-OPERATIVE HOUSING SOCIETY

Can transfer fees received by a co-operative housing society from its incoming and outgoing members be exempt on the ground of principle of mutuality?

HC OBSERVATIONS – The HC observed that charging of transfer fees had not element of trading or commerciality. The amount paid was to be exclusively used for the benefit of the members as a class.

HC DECISION –

Transfer fees received is not liable to tax on the ground of principle of mutuality since the predominant activity of such co-operative society is maintenance of property of the society and there is not taint of commerciality, trade or business.

5. INDCOM – HC

Would non-resident match referees and umpires in the games played in India fall within the meaning of “sportsmen” to attract taxability under the provisions of section 115BBA, and consequently attract the TDS provisions under section 194E in the hands of the payer?

HC OBSERVATIONS –

- HC observed that, in order to attract the provision of section 194E, the person should be a non- residential sportsperson or non-resident sports association or institution whose income is taxable as per the provisions of section 115BBA.
- The umpires and the match referees can be described as professional or technical persons who render professional or technical services.

DECISION –

Although the payments made to non-resident umpires and the match referees are ‘ income’ which has accrued and arisen in India, the same are not taxable under the provision of section 115BBA, and thus the assessee is not liable to deduct tax u/s 194E.

Note – Since income has accrued and arisen in India to non-residents, the TDS provisions u/s 195 would be attracted and tax would be deductible at the rates in force.

6. ANIL HARDWARE – HC

In a case where the partnership deed does not specify the remuneration payable to each individual working partner but lays down the manner of fixing the remuneration, would the assessee-firm be entitled to deduction in respect of remuneration paid to partners?

HC DECISION –

- The manner of fixing the remuneration of the partners has been specified in the partnership deed.

- There is nothing which debars them from claiming the maximum amount of remuneration payable in terms of the partnership deed.
- The method of remuneration having been laid down, the assessee-firm is entitled to deduct the remuneration paid to the partners under section 40(b) (v).

7. ROLTA INDIA LTD

Can interest under sections 234B and 234C be levied where a company is assessed on the basis of book profits under section 115JB?

SC OBSERVATIONS AND DECISION –

- SC observe that there is specific provision in **section 115JB(5)** providing that all other provisions of the IT ACT,1961 shall apply to every assessee, being a company, mentioned in that section. Section 115JB is a self-contained code pertaining to MAT, and by virtue of subsection (5) thereof, the liability for payment of advance tax would be attracted.

Therefore, SC held that interest u/s 234B, C shall be payable on failure of the company to pay advance tax in respect of tax payable u/s 115JB.

8. N.J.JOSE AND CO. - HC

Can long-term capital gain exempted by virtue of section 54EC be included in the book profit computed under section 115JB?

DECISION – As long as LTCGs are part of the profits included in the Statement of Profit and Loss prepared in accordance with Part II of schedule III to the companies act,2013, capital gains cannot be excluded unless provided under the explanation to section 115J(1A).

11. INCOME TAX AUTHORITIES

1. KATHIROOR SERVICE CO-OPERATIVE BANK LTD – SC

Where no proceeding is pending against a person, can the Assessing Officer call for information under section 133(6), which is useful or relevant to any enquiry, with the permission of Director or Commissioner?

FACTS – The assessing officer , with the prior approval of the commissioner , issued notice u/s 133(6) to the assessee, a co-operative society engaged in banking business, calling for general information regarding details of all persons who had made a cash transactions of Rs.100000/-

SC OBSERVATIONS –

- The SC observed that the assessing officer has been empowered to call for information which will be useful for or **relevant to ANY ENQUIRY OR PROCEEDING** under the IT ACT 1961 in the case of any person.
- However IT authority below the rank of the Director or Commissioner can exercise this power **in respect of an enquiry in a case where no proceeding is pending**, only with the prior approval of the Director or the Commissioner.

SC DECISION –

It held that since notices have been issued after obtaining approval of the commissioner, the assessing authority had not erred in issuing the notices to assessee requiring them to furnish information regarding account holders.

2. SAHARA HOSPITALITY LTD – HC

Is the requirement to grant a reasonable opportunity of being heard, stipulated under section 127(1), mandatory in nature?

HC Observations –

The HC observed that the provisions of **section 127(1)** provides that the income tax authority mentioned therein **may** give an opportunity of being heard to the assessee, **wherever it is possible to do so**.

DECISION –

HC held that the word 'MAY' used in this section should be read as 'SHALL' and such income-tax authority has to mandatorily give a reasonable opportunity of being heard to the assessee, wherever possible to do so. Reasonable opportunity can only be dispensed with in a case where it is not possible to provide such opportunity. The authority cannot deny a reasonable opportunity of being heard to the assessee, wherever it is possible to do so.

3. LODHI PROPERTY COMPANY LTD –

Does the Central Board of Direct Taxes (CBDT) have the power under section 119(2)(b) to condone the delay in filing return of income?

DECISION – The HC held that the board has the power to condone the delay in filing return of income. If the delay is not condoned it would cause genuine hardship to the petitioner.

Note – Section 119(2)(b) empowers the CBDT to authorize any income tax authority to admit an application or claim for any exemption, deduction, refund or **any other relief under the act** after the expiry of the period specified under the act, to avoid genuine hardship in any case or class of cases. The claim for c/f of loss in case of loss return is relatable to a claim arising **under the category of any other relief available under the act.** Therefore the CBDT has the power to condone delay in filing of such loss return due to genuine reasons.

12. ASSESSMENT PROCEDURE

1. GOVIND NAGAR SUGAR LTD – HC

Can unabsorbed depreciation be allowed to be carried forward in case the return of income is not filed within the due date?

HC OBSERVATIONS –

HC observed that ,the provisions of section 80 and section 139(3) , requiring the return of income claiming loss to be filed within the due date, applies to **carry forward of business loss and not for the carry forward of unabsorbed depreciation.**

DECISION – Allowed.

2. ORISSA RURAL HOUSING DEVELOPMENT CORPORATION LTD.

Can an assessee revise the particulars filed in the original return of income by filing a revised statement of income?

HC DECISION –

- The HC observed that the assessee **can make a fresh claim before the assessing officer or make a change in the originally filed return of income only by filing revised return of income u/s 139(5).**
- There is **no provision under the IT ACT 1961**, to enable an assessee to revise his income by filing a revised statement of income. Therefore the filing of statement of income is of no value and will not be considered by the AO for assessment purpose.

3. KAWSALYA BAI – HC

Is a person having income below taxable limit, required to furnish his PAN to the deductor as per the provisions of section 206AA, even though he is not required to hold a PAN as per the provisions of section 139A?

HC DECISION –

- The HC HELD THAT, it may not be necessary for such persons whose income is below the maximum amount not chargeable to income-tax to obtain PAN and **in view of the specific provision of section 139A, section 206AA is not applicable to such persons.**
- Therefore, the banking and financial institutions shall not insist upon such persons to furnish PAN while filing declaration under section 197A.

4. AVENTIS PHARMA LTD – HC

Can the Assessing Officer reopen an assessment on the basis of merely a change of opinion?

HC OBSERVATIONS AND DECISION –

The power to reopen an assessment is conditional on the formation of a reason to be believed that income chargeable to tax has escaped assessment.

5. ICICI SECURITIES PRIMARY DEALERSHIP LTD

Is it permissible under section 147 to reopen the assessment of the assessee on the ground that income has escaped assessment, after a change of opinion as to a loss being a speculative loss and not a normal business loss, consequent to a mere re-look of accounts which were earlier furnished by the assessee during assessment under section 143(3)?

FACTS – After the lapse of four years from relevant assessment year, the AO had reopened the assessment of assessee u/s 147. It was noticed that the assessee company had incurred a loss in trading in share, which was a speculative one. Therefore, such loss can only be set off against speculative income.

SC DECISION –

- SC OBSERVED that the assessee had disclosed full details in the return of income in the matter of its dealing in stocks and shares.
- **There was not failure on the part of the assessee to disclose material facts as mentioned in proviso to section 147.**
- Further there is nothing new which has come to the notice of the AO. **The accounts had been furnished by the assessee when called upon.**
- Therefore, re-opening of the assessment by the assessing officer is clearly a change of opinion and therefore, the order of re-opening the assessment is not valid.

6. H.K.BUILDCON LTD. – HC

In case of change of incumbent of an office, can the successor Assessing Officer initiate reassessment proceedings on the ground of change of opinion in relation to an issue, which the predecessor Assessing Officer who framed the original assessment had already applied his mind and come to a conclusion?

HC DECISION –

- The reasons recorded indicated that the successor AO had merely recorded a different opinion in relation to an issue to which the AO, who had framed the original assessment, had already applied his mind and come to a conclusion.
- The notice of reassessment was, therefore not valid.

7. HARYANA STATE HANDLOOM AND HANDICRAFTS CORPORATION LTD

Can the Assessing Officer issue notice under section 154 to rectify a mistake apparent from record in the intimation under section 143(1), after issue of a valid notice under section 143(2)?

HC Observations –

It observed that rectification of an intimation cannot be made after issuance of notice u/s 143(2) and during the pendency of proceedings u/s 143(3)

HC DECISION –

- HC held that scope of proceeding u/s 143(2) is wider than the power of rectification of mistake apparent from record u/s 154.
- The notice u/s 143(2) is issued to ensure that the assessee has not understated the income or has not computed excessive loss or underpaid the tax.
- If issue of notice under section 154 is permitted to rectify the intimation issued u/s 143(1), then it would lead to duplication of work and wastage of time.
- Therefore it was concluded that proceedings u/s 154 for rectification of intimation u/s 143(1) cannot be initiated after issuance of notice u/s 143(2) by the AO to the assessee.

8. TONY ELECTRONICS – HC

Would the doctrine of merger apply for calculating the period of limitation under section 154(7)?

ISSUE – The issue under consideration is whether the time limit of 4 years as per section 154(7) would apply from the date of original assessment order or the order of the appellate authority.

HC DECISION –

- The HC held that once an appeal against the order passed by an authority is preferred and is decided by the appellate authority, **the order of the AO merges with the order of the appellate authority.**
- **After merger, the order of the original authority ceases to exist and the order of the appellate authority prevails.**
- Thus, the period of limitation of 4 years for the purpose of section 154(7) has to be counted from the date of the appellate authority.

13 Appeals and Revision

9. Samsung India electronic P. Ltd

Can an assessee, objecting to the reassessment notice issued under section 148, directly approach the High Court in the normal course contending that such reassessment proceedings are apparently unjustified and illegal?

FACTS – Samsung Electronics Co. Ltd was subjected to regular assessment for the assessment year 06-07. The assessment order was passed, pursuant to the direction u/s 144C(5) made by DRP. For the same A.Y 06-07, assessee was issued a reassessment notice dated march 30, 2013 u/s 148. Against this reassessment notice, assessee filed a writ petition before the HC

HC OBSERATIONS -

- HC observed that when a notice u/s 148 is issued, the proper course of action for the NOTICEE is to file a return of income and if he so desires, to seek reasons for issuing notices.
- The HC noted that the assessee has not filed objections before the AO and has directly approached the court by way of the writ petition.

DECISION -

- The High Court, thus, held that it will not be appropriate and proper in the facts of the present case to permit and allow the petitioner to bypass and forgo the procedure laid down by the Supreme Court in GKN Driveshafts (India) Ltd. by directly approaching to the High Court, since the procedure of assessment under section 147 has been almost universally followed.
- Thus assessee should first respond to the Assessing Officer by filing return of income and thereafter if the AO does not provide reason to believe he may approach to the court.

10. ICICI BANK LTD -HC

Would the period of limitation for an order passed under section 263 be reckoned from the original order passed by the Assessing Officer under section 143(3) or from the order of reassessment passed under section 147, where the subject matter of revision is different from the subject matter of reassessment under section 147?

FACTS – In the present case, an order of assessment was passed u/s 143(3) allowing the deduction u/s 36(1)(vii) and 36(1)(viii) and foreign exchange rate difference. Further two notices of reassessment were issued u/s 148 and an order of reassessment was passed u/s 147 which did not deal with the above deductions

Late the commissioner passed an order u/s 263 for disallowing the deduction u/s 36(1)(vii) and 36(1)(viii)

HC DECISION -

- **HC** held that the order of assessment under section 143(3) allowed deduction under section 36(1)(vii), 36(1)(viia) and in respect of foreign exchange rate difference.
- The order of reassessment, however, had not dealt with these issues.
- **Therefore, the doctrine of merger cannot be applied in this case.**
- The order under section 143(3) cannot stand merged with the order of reassessment in respect of those issues which did not form the subject matter of the reassessment.

Therefore, the period of limitation in respect of the order of the Commissioner under section 263 with regard to a matter which does not form the subject matter of reassessment shall be reckoned from the date of the original order under section 143(3) and not from the date of the reassessment order under section 147.

11. SANCHIT SOFTWARE AND SOLUTIONS PVT LTD

Can an assessee file a revision petition under section 264, if the revised return to correct an inadvertent error apparent from record in the original return, is filed after the time limit specified under section 139(5) on account of the error coming to the notice of the assessee after the specified time limit?

FACTS – The assessee- company had electronically filed its ROI. It committed a mistake by including dividend income (exempted u/s 10(34) and LTCG on sale of shares (exempt u/s 10(38) in its ROI, though the same was correctly disclosed in the schedule containing details of exempt income. The return was processed u/s 143(1) denying the exemption u/s 10(38) and 10(34).

HC Observations –

- The HC observed that the entire object of administration of tax is to secure the revenue for the development of the country and not to charge the assessee more tax than which is due and payable by the assessee.
- HC referred to the CBDT circular issued in 1955 directing the AO not to take advantage of the assessee's mistake.
- The HC observed that, in this case, the Commissioner of IT had committed a fundamental error in proceeding without considering that the assessee had specifically sought to exclude the same as is evident from the entries in the relevant schedule.

DECISION –

- The HC set aside the order of Commissioner and remanded the matter for fresh consideration.
- The High Court further directed the Assessing Officer to consider the rectification application filed by the assessee under section 154 as a fresh application received on the date of service of this order
- and dispose of the rectification application on its own merits, without awaiting the result of the revision proceedings before the Commissioner of Income-tax on remand, at the earliest.

12. PRUTHVI BROKERS & SHAREHOLDERS

Can an assessee make an additional/new claim **before an appellate authority**, which was not claimed by the assessee in the return of income (though he was legally entitled to), otherwise than by way of filing a revised return of income?

HC DECISION –

While considering the above mentioned issue, the HC observed the decision of SC in the case of **Jute Corporation of India Ltd** that an assessee is entitled to raise additional claims **before the appellate authorities** even otherwise than by way of filing ROI.

The SC in Goetze (India) Ltd, held that additional claim **before the AO** can be made only by way of filing revised return of income.

13. EARNEST EXPORST LTD

Does the Appellate Tribunal have the **power to review or re-appreciate the correctness of its earlier decision** under section 254(2)?

HC DECISION –

The HC observed that the power u/s 254(2) is limited to rectification of a mistake apparent on record and therefore, the tribunal must restrict itself within those parameters.

14. LACHMAN DASS BHATIA HINGWALA (P) LTD

Can the Tribunal exercise its power of rectification under section 254(2) to recall its order in entirety, where there is a mistake apparent from record?

HC DECISION - The Delhi High Court observed that the Tribunal, while exercising the power of rectification under section 254(2), can recall its order in entirety if it is satisfied that prejudice has resulted to the party which is attributable to the Tribunal's mistake, error or omission and the error committed is apparent.

15. DEEPAK KUMAR GARG

Does the High Court have an inherent power under the Income-tax Act, 1961 to review an earlier order passed on merits?

HC OBSERVATIONS AND DECISION –

- The power to review is not an inherent power and must be conferred by law specifically by express provision.

- The appellate jurisdiction of the HC carries with it statutory limitation under the statute, **unlike the extraordinary powers which are enjoyed by the court under article 226 of the constitution of india .**

It was observed that, keeping in view the provisions of section 260A(7), the power of re-admission/restoration of the appeal is always enjoyed by the High Court. However, such power to restore the appeal cannot be treated to be a power to review the earlier order passed on merits.

14. PENALTIES

----- 16A - MAK DATA PRIVATE LIMITED

Can an assessee who has surrendered his income in response to the specific information sought by the Assessing Officer in the course of survey, be absolved from the penal provisions under section 271(1)(c) for concealment of income?

APEX COURTS OBSERVATIONS –

- The apex court observed that the assessee had stated that the surrender of the additional sum was with a view to avoid litigation, to buy peace and to make friendly settlement with the IT Dpt.
- The court observed that these type of defenses are, however, not recognized under the statute.
- The court opined that had it been the intention of the assessee to make full and true disclosure of its income, it would have filed the return declaring an income inclusive of the amount which was surrendered later during the course of the assessment proceedings.

AC DECISION –

- The Apex Court was, therefore, of the view that surrender of income in this case is not voluntary, in the sense that the offer of surrender was made in view of detection made by the Assessing Officer in the survey conducted in the sister concern of the assessee.
- The Apex Court, therefore, concurred/agreed with the view of the High Court that levy of penalty is correct in law.

16. TRIUMPH INTERNATIONAL FINANCE (I) LTD.

Where an assessee repays a loan merely by passing adjustment entries in its books of account, can such repayment of loan by the assessee be taken as a contravention of the provisions of section 269T to attract penalty under section 271E?

HC OBSERVATION –

- HC observed that, the obligation to repay the loan or deposit by account payee cheque/bank draft as specified in section 269T is mandatory in nature. The contravention of the said section will attract penalty under section 271E.
- Section 269T merely puts a condition that in case a loan or deposit is repaid, it should be by way of an account payee cheque/draft.
- Therefore, in the present case the assessee had repaid a portion of loan in contravention of provision of section 269T.

HC DECISION –

- In effect, the assessee has violated the provisions of section 269T by repaying the loan amount by way of passing book entries and therefore, penalty under section 271E is applicable.
- However, since the transaction is bona fide in nature being a normal business transaction and has not been made with a view to avoid tax, it was held that the assessee has shown reasonable cause for the failure under section 269T,
- and therefore, as per the provisions of section 273B, no penalty under section 271E could be imposed on the assessee for contravening the provisions of section 269T.

17. RELIANCE PETRO PRODUCTS PVT LTD.

Would making an incorrect claim in the return of income *per se* amount to concealment of particulars or furnishing inaccurate particulars for attracting the penal provisions under section 271(1)(c), when no information given in the return is found to be incorrect?

SC OBSERVATIONS –

- SC Observed that in order to attract the penal provisions of section 271(1)(c) , **there has to be concealment of the particulars of income or furnishing inaccurate particulars of income.**
- Making an incorrect claim would not, by itself, tantamount to furnishing inaccurate particulars.

SC DECISION –

- The Apex Court, therefore, held that where there is no finding that any details supplied by the assessee in its return are incorrect or erroneous or false, there is no question of imposing penalty under section 271(1)(c).
- **A mere making of a claim, which is not sustainable in law, by itself,** will not amount to furnishing inaccurate particulars regarding the income of the assessee.

18. AMIT JAIN

Can reporting of income under a different head tantamount to furnishing of inaccurate particulars or suppression of facts to attract penalty under section 271(1)(c)?

FACTS – Assessee declared a particular income as STCG in his return. The AO, on an interpretation of the relevant provisions and having regard to the nature of transactions, assessed such income as income from business. He further levied penalty u/s 271(1)(c)

HC DECISION –

The HC after considering the decision of the SC in Reliance petro products private limited held that mere reporting of income under a different head would not characterized the particulars as 'inaccurate' to attract levy of penalty u/s 271(1)(c).

19. CELETRONIX POWER INDIA PRIVATE LIMITED.

Can penalty under section 271(1)(c) be imposed on the ground of disallowance of a certain deduction under Chapter VI-A owing to the subsequent decision of the Supreme Court?

FACTS – The assessee claimed deduction a particular section under chapter VI-A relying on a judgment of the Bombay HC. Subsequent to filing of its return, the above judgment was reversed by the SC and accordingly, the deduction was not allowed at the time of assessment and on account of disallowance, penalty was also imposed.

HC DECISION –

The HC Held that the additions made on account of disallowance were neither due to the failure on the part of the assessee to furnish accurate particulars nor on account of furnishing inaccurate particulars.

20. INDERSON LEATHER PVT LTD –

Can penalty under section 271(1) (c) for concealment of income be imposed in a case where the assessee has raised a debatable issue?

DECISION –

The High Court observed that, mere raising of a debatable issue would not amount to concealment of income or furnishing inaccurate particulars and therefore, penalty under section 271(1) (c) cannot be imposed.

15. OFFENCES AND PROSECUTION

21 . BAVECHA MACHINERY AND OTHERS. - HC

Would prosecution proceedings under section 276CC be attracted where the failure to furnish return in time was not willful?

HC DECISION AND OBSERVATIONS –

- The High Court observed that for the provisions of section 276CC to get attracted, **there should be a willful delay in filing return and not merely a failure to file return in time.**
- There should be clear, cogent and reliable evidence that the failure to file return in time was 'willful' and there should be no possible doubt of its being 'wilful'.
- The failure must be intentional, deliberate, calculated and conscious with complete knowledge of legal consequences flowing from them.

Therefore, prosecution proceedings under section 276CC are not attracted in such a case.

16. MISCELLANEOUS PROVISIONS

22. V.SIVAKUMAR – HC

Can loan, exceeding the specified limit, advanced by a partnership firm to the sole-proprietorship concern of its partner be viewed as a violation of section 269SS to attract levy of penalty?

FACTS – In the present case, the assessee was a partner in four firms and also had a sole-proprietary business. In the relevant previous year, the partnership firms had advanced loan to the assessee in cash exceeding the specified amount mentioned in section 269SS.

HC DECISION –

- **HC** held that **there is no separate identity for the partnership firm** and that the partner is entitled to use the funds of the firm.
- In the present case, the assessee has acted bona fide and that there was reasonable cause within the meaning of section 273B.
- Therefore transaction cannot be said to be in violation of section 269SS and no penalty is attracted in this case.

17. DEDUCTION ,COLLECTION AND RECOVERY OF TAX.

1. ITCLTD

Do the tips collected by hotel and disbursed to employees constitute salary to attract the provisions for tax deduction at source under section 192?

HC DECISION –

- The HC observed that by virtue of the employer-employee relationship, a vested right accrued to the employee to claim the tips.
- The HC held that the tips would constitute income within the meaning of section 2(24) and thus, taxable under section 15.
- It was obligatory on the company to deduct tax at source from such payments under section 1962.
- In this case, the assessee-company had not deducted tax at source on tips under a bona fide belief that was not deductible.
- HC Held that since no dishonest intention could be attributed to the assessee, they could not be made liable for levy of penalty as envisaged u/s 201.
- The HC however , observed that payment of interest under section 201(1A) is mandatory. The payment of interest under that provision is not penal. There was therefore, no question of waiver of such interest on the basis that the default was not intentional or on any other basis.

2. HINDUSTANT LEVER LTD

Where the assessee fails to deduct tax at source under section 194B in respect of the winnings, which are wholly in kind, can he be deemed as an assessee-in-default under section 201?

FACTS-

In the present case, the assessee is a company engaged in the business of manufacture and sale of various consumer goods/products. The assessee advertised the schemes wherein coupons were inserted in packs/containers of their products. Some of those coupons indicate that on purchase of the packs/containers, they would get prizes, as indicated in coupons. The prizes that were offered were santro car, Maruti car, gold chains silver coins etc. The total amount of prizes distributed was Rs.5473643/-

HC OBSERVATIONS -

- From bare perusal (examination) of section 194B, it is clear that the person responsible for paying to any person any income by way of winnings from any lottery in an amount exceeding ten thousand rupees shall, at the time of payment thereof, deduct income-tax thereon at the rates in force.
- A combined reading of section 194B and 201 shows that if any such persons fails to deduct or after deducting , fails to pay the tax , then such person shall be deemed to be an assessee in default in respect of such tax.
- Where the winnings are wholly in kind the question of deduction of any therefrom does not arise and in the eventuality, the only responsibility, as cast under section 194B is to ensure that tax is paid by the winner of the prize before the prize or winnings is or are released in his favor.

HC DECISION –

- The HC observed that if the assessee fails to ensure that tax is paid before the winnings are released in favor of the winner,
- then section 271C empowers the Joint Commissioner to levy penalty equivalent to the amount of tax not paid and U/s 276Bm such non-payment of tax is an offence attracting rigorous ,imprisonment for a term which shall not be less than three months but which may extent to seven years and with fine.

However, the HC held that proceedings u/s 201 cannot be initiated against the assessee.

3. AJMER VIDUT VITRAN NIGAM LTD

Can the transmission, wheeling and State Load Dispatch Centre (SLDC) charges paid by a company engaged in distribution and supply of electricity, under a service contract, to the transmission company be treated as fees for technical services so as to attract TDS provisions under section 194J or in the alternative, under 194C?

AAR DECISION -

- **The AAR** considering the definition of fees for technical services under section 9(1)(Vii) and the process involved in proper transmission of electrical energy, **held that transmission and wheeling charges** paid by the applicant to the transmission company are in the **nature of fees for technical services**, in respect of which the applicant has to withhold tax thereon under section 194J.

- As regards **SDLC CHARGES**, the AAR opined that the main duty of the SDLC is to ensure integrated operation of the power system in the state **for optimum scheduling and dispatch of electricity within the state.**
- The SDLC charges paid **appeared to be more supervisory charge with a duty to ensure just and proper generation and distribution in the state as a whole.** Therefore, such services were **not in the nature of technical service** to the applicant to.
- **Resultantly, it does not attract TDS provision under section 194J or U/s 194C**

4. AHMEDABAD STAMP VENDORS ASSOCIATION

Can discount given to stamp vendors on purchase of stamp papers be treated as 'commission or brokerage' to attract the provisions for tax deduction under section 194H?

ISSUE - The principal issue in this case is whether stamp vendors are agents of the state government who are being paid commission or brokerage or whether the sale of stamp papers by the government to the licensed vendors is on "principal to principal" basis involving a 'contract of sale'

HC OBSERVATIONS –

- HC observed that stamp vendors are required to purchase the stamp papers **on payment of price less discount on 'principal to principal'** basis and there is not 'contract of agency' at any point of time.
- The definition of 'commission and brokerage' under section 194h indicates that the **payment should be received directly or indirectly by a person acting on behalf of another person** for services in the course of buying or selling goods.
- Therefore, the **element of agency is required** in case of all services and transactions contemplated by the definition of 'commission or brokerage'.
- When the licensed stamp vendors (i take delivery) of stamp papers on payment of full price less discount and they (ii sell such stamp papers) to the retail customers, **neither of the two activities can be termed as service** in the course of buying and selling of goods.
- HC held that discount on purchases of stamp papers does not fall within the expression 'commission or brokerage'

DECISION –

SC affirmed the above decision of HC holding that the given transaction is a sale and the discount given to stamp vendors for purchasing stamps in bulk quantity is in the nature of cash discount and consequently, section 194H has no application in this case.

5. BHARTI CELLULAR LTD

Can discount given on supply of SIM cards and pre-paid cards by a telecom company to its franchisee be treated as commission to attract the TDS provisions under section 194H?

HC DECISION –

The High Court held that there is an indirect payment of commission, in the form of discount, by the assessee-telecom company to the franchisee. Therefore, the assessee is liable to deduct tax at source on such commission as per the provisions of section 194H.

Note –

- Similar ruling was pronounced by the HC in Vodafone Essar Cellular Ltd. Wherein it was held that there was no sale of goods and the entire charges collected by the assessee from the distributors at the time of delivery of SIM cards or recharge coupons were ONLY FOR RENDERING SERVICES TO THE ULTIMATE SUBSCRIBERS.
- The assessee was accountable to the subscribers for failure to render prompt services pursuant to connections given by the distributor.
- Therefore, **the distributor only acted as a middlemen on behalf of the assessee for procuring and retaining customers and consequently ,the discount given to him was within the meaning of commission on which was deductible u/s 194H**

6. MOTHER DAIRY INDIA LTD.

Are TDS provisions under section 194H attracted in a case where an assessee, a dairy, makes an outright sale of milk to its concessionaires at a certain price (which is lower than the MRP fixed by the assessee-dairy) and the concessionaires make full payment for the purchases on delivery and bear all the risks of loss, damage, pilferage and wastage?

Facts - The assessee-dairy undertook activities in connection with procurement , processing, storage and marketing including retail sale of milk and other products.

HC OBSERVATIONS –

- The HC observed that the **relationship between the assessee and the concessionaire was on a principal to principal basis.**
- The dairy having given space, machinery, and equipment, to the concessionaire would naturally like to incorporate clauses in the agreement to ensure that its property is properly maintained by the concessionaire, especially because milk and other products are consumed in large quantities by the general public and unattended defect in the storage facilities can cause serious health hazards.
- The term included in the agreement only to ensure the smooth operation of the system.

- Therefore, merely due to existence of these clauses, it cannot be inferred that the relationship between the assessee and the concessionaire is that of principal and an agent.

HC DECISION –

- HC held that, the concessionaire became the owner of the milk and products on taking delivery of the same from the assessee-dairy.
- Therefore, the relationship between the assessee and the concessionaire is a principal to principal relationship.
- The HC held that the difference between the purchase price (price paid to the dairy) and the MRP is the concessionaire's income from business and cannot be categorized as commission to attract the provisions of section 194H.

7. QATAR AIRWAYS

Can the difference between the published price and the minimum fixed commercial price be treated as additional special commission in the hands of the agents of an airline company to attract TDS provisions under section 194H, where the airline company has no information about the exact rate at which tickets are ultimately sold by the agents?

HC OBSERVATIONS -

- **HC** observed that the difference between the published price and minimum fixed commercial price **cannot be taken as additional special commission in the hands of the agents,**
- since the published price was the maximum price and airline company had granted permission to the agents to sell the tickets at a price lower than the published price.
- **In order to deduct tax at source the exact income in the hands of the agents must necessarily be ascertainable by the airline company.**
- However, the airline **company would have no information about the exact rate at which the tickets were ultimately sold by its agents,** since the agents had been given discretion to sell the tickets at any rate between the minimum fixed commercial price and the published price.
- **It would be impracticable and unreasonable to expect the airline company to get a feedback from its numerous agents in respect of each ticket sold.**

HC Decision - Thus tax at source was not deductible , even though the amount earned by the agent over and above the minimum fixed commercial price would be taxable as income in his hands.

Note – Delhi HC in **Singapore Airlines Ltd** held that the *supplementary commission* in the hands of the agent was ascertainable by the airline company and hence the airline company was liable to deduct tax at source on the same u/s 194H.

8. SENIOR MANAGER , SBI

In respect of a co-owned property, would the threshold limit mentioned in section 194-I for non-deduction of tax at source apply for each co-owner separately or is it to be considered for the complete amount of rent paid to attract liability to deduct tax at source?

HC Decision –

HC held that , since the share of each co-owner is definite and ascertainable , they cannot be assessed as AOP.

The income from such property is to be assessed in the individual hands of the co-owners.

Threshold limit mentioned in section 194I has to be seen separately for each co-owner.

9. JAPAN AIRLINES LTD

What is the nature of landing and parking charges paid by an airline company to the Airports Authority of India and is tax required to be deducted at source in respect thereof?

HC observations –

- HC observed that **rent as defined to include any agreement or arrangement for use of land.**
- The court further observed that when the wheels of the aircraft coming into an airport touch the surface of the airfield , use of the land of the airport immediately begins.
- Similarly , for parking the aircraft in that airport, again, there is use of the land.

HC DECISION –

- Therefore , the landing and parking fee were definitely 'rent' within the meaning of the provisions of section 194-I as they were payments for the use of the land of the airport.

NOTE – However, the MADRAS HC in CIT VS **SINGAPORE AIRLINES LTD** expressed a contrary view on the said issue.

- The HC observed that **if the agreement or arrangement has the characteristics of lease or sub-lease or tenancy** systematic use of the land the charges levied would fall for consideration under the definition of 'rent' for the purpose of section 194-I

- The principal guiding the charges on landing and take-off shows that the **charges are with reference to the number of facilities provided by the Airport authority of india in compliance with the international protocols** and **charges are not made for any specified land usage or area allotted**.
- Depending on the traffic there is shared use of airfield by the airlines. Thus, the charges levied are in the nature of fee for the services offer.
- If the use of tarmac of airport could be characterized as use of land, the use of a road too would be a use of land.
- Thus going by the nature of services offered by the airport authority in respect of landing and parking charges , there is no ground to accept that the payment would fit in the definition of rent u/s 194I.
- **THEREFORE, THE CHARGES WOULD GET ATTRACTED UNDER THE PROVISIONS OF SECTION 194C.**

10. SHREE MAHALAXMI TRANSPORT COMPANY

Can the payment made by an assessee engaged in transportation of building material and transportation of goods to contractors for hiring dumpers, be treated as rent for machinery or equipment to attract provisions of tax deduction at source under section 194-I?

HC OBSERVATION –

- The HC observed that the **assessee had given contracts to the parties** for the transportation of goods and **had not** taken machinery and equipment on rent.
- The court observed that the transactions being in the nature of **contracts for shifting of goods from one place to another would , covered as works contract thereby attracting the provisions of section 194C.**

HC DECISION –

Since the **assessee had given sub-contracts** for transportation of goods **and not for the renting out of machinery or equipment** , such payment could not be termed as rent paid for the use of machinery and hence, the provision of section 194-I would not be applicable.

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.