CASE STUDY FOR CA FINAL (DIRECT TAXES)

FOR MAY 2010 EXAM.

COMPILED BY

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- S. 14A disallowance has to be made even if assessee has no tax-free income. {Cheminvest Ltd vs. ITO (ITAT Delhi Special Bench)}

The assessee had borrowed funds for the purpose of investing in shares. The shares were held for capital purposes as well as for investment purposes. In relevant assessment year, the assessee did not receive any dividend on the said shares and so there was no exempt income. The Special Bench had decided that **the interest expenditure incurred by the assessee on the said borrowings used for purposes of investment in shares could be disallowed u/s 14A even though the assessee had not received any tax-free income** in respect of the said shares.

In **Rajendra Prasad Moody** 115 ITR 522 the Supreme Court held that interest on monies borrowed for purchase of shares was allowable as a deduction u/s 57 (iii) irrespective of whether or not there is any yield of dividend to the assessee. It was held that the words "expenditure incurred for making or earning the income" in s. 57 (iii) did not mean that income actually had to be earned for the allowability of the expenditure. **The converse of this principle is now applicable. i.e. s. 14A disallows expenditure "in relation to income which does not form part of total income" and in order for the expenditure to be disallowed, actual income need not be earned**. The fact that the expenditure is allowable u/s 36 (1) (iii) / 57 is irrelevant because s. 14A has overriding effect and supercedes all other provisions. **The disallowance has to be of the entire amount of the expenditure** so related and cannot be reduced by the receipt of interest which has no relation to such expenditure.

- Non-owner can be "owner" under the Act. {Pallonji Mistry vs. CIT (Bombay High Court)}

Though it is the settled position under the common law that the term "owner" means a person who has valid title legally conveyed to him after complying with the requirements of law such as Transfer of Property Act, Registration Act, etc, a different view has to be taken in the context of S. 22 of the Act having regard to the ground realities and the object of the Act, namely, "to tax the income". **Accordingly, the term "owner" means a person who is entitled to receive income from the property in his own right.**" There is no requirement that there has to be a registered Deed of conveyance for a person to be treated as an owner for purposes of S. 22.

- Foreign Exchange fluctuation losses are allowable on accrual basis. { CIT vs. Woodward Governor India p. Limited.(Supreme Court) } **Important.**

Assessee had debited to its Profit & Loss Account a sum of Rs. 41 lakh, out of which a sum of Rs.29 lakh was the unrealized loss due to foreign exchange fluctuation on the last date of the accounting year. The Assessing Officer held that the liability as on the last date of the previous year under consideration was a contingent liability, it was not an ascertained liability and consequently it had to be added back to the total income of the assessee. Accordingly, he added back Rs. 29 lakh being the unrealized loss due to foreign exchange fluctuation. In other words, the debit to the P&L account was disallowed.

Supreme Court in his order stated that where the assessee carrying on the mercantile system of accounting then the additional liability arising on account of fluctuation in the rate of exchange in respect of loans taken for revenue purposes was allowable as deduction u/s 37(1) in the year of fluctuation in the rate of exchange and not in the year of repayment of such loans. The actual cost of imported assets acquired in foreign currency is entitled to be adjusted u/s 43A (prior to the amendment by the FA 2002) on account of fluctuation in the rate of exchange at each balance sheet date, pending actual payment of the varied liability.

The term "expenditure" in s. 37 covers an amount which is a "loss" even though the said amount has not gone out from the pocket of the assessee. The "loss" suffered by the assessee on account of the exchange difference as on the date of the balance sheet is an item of expenditure u/s 37(1).Profits and gains are required to be computed in accordance with **commercial principles** and accounting standards (AS-11). Accounts and the accounting method followed by an assessee continuously for a given period of time **needs to be presumed to be correct** till the AO comes to the conclusion for reasons to be given that the system does not reflect true and correct profits. The fact that the department taxed the gains on fluctuation on the basis of accrual while disallowing the loss is important and indicates the **double standards adopted by the Department**;

- Estimated expenditure towards warranty is allowable u/s 37 (1). { Rotork Controls vs. CIT (Supreme Court) Important}

The assessee sold valve actuators. At the time of sale, the assessee provided standard warranty that if the product was defective within the stated period, the product would be rectified or replaced free of charge. For relevant assessment year the assessee made a provision for warranty at Rs.10,18,800 at the rate of 1.5% of the turnover. As the actual expenditure was only Rs. 5,18,554, the excess provision of Rs.5,00,246 was reversed and only the net provision was claimed. The Tribunal allowed the claim on the basis that the provision had been consistently made and on a realistic manner. The High Court reversed the Tribunal on the basis that the liability was contingent and not allowable u/s 37 (1). Supreme Court, **reversing** the High Court and stated that :

" A provision is a liability which can be measured only by using a substantial degree of estimation. A provision is recognized when: (a) an enterprise has a present obligation as a result of a past event; (b) it is probable that an outflow of resources will be required to settle the obligation; and (c) a reliable estimate can be made of the amount of the obligation. If these conditions are not met, no provision can be recognized."

- Replacement expenditure is neither "current repairs" nor "revenue". { CIT vs. Sri Mangayarkarasi Mills (Supreme Court) }

The assessee incurred expenditure on replacement of machinery in a textile mill and claimed the same as revenue expenditure on the ground that it was merely for **replacement of spare parts** in the spinning mill system and did not give rise to a new asset. **In the books, the expenditure was capitalized**. The CIT (A), ITAT and High Court decided in favour of the assessee. Supreme Court reversing the order of all the lower authorities**.**

Each machine in a textile mill is a **separate and independent item** though it is a part of the **integrated process** of manufacture of yarn and is **integrally connected** to the other machines in the mill for production of the final product. The machine cannot be treated as a mere part of an entire composite machinery of the spinning mill.

To constitute "current repairs" u/s 31 the expenditure must be incurred to 'preserve and maintain' an already existing asset and not to bring a new asset into existence or to obtain a new advantage. For determination of 'current repairs' the question whether the expenditure is revenue or capital is not the proper test. However, as the machine was an independent entity, its' replacement brought into existence a new asset and was not current repairs.

The expenditure was also not "revenue" u/s 37 (1) as the replacement brought into existence a new asset and also gave rise to an enduring benefit. **Though accounting practices may not be the best guide in determining the nature of expenditure, the fact that the assessee treated the expenditure as an addition to the existing assets shows**

that the claim for deduction under the Act was made merely to diminish the tax burden and not under the belief that it was actually revenue expenditure.

- <u>Advances to sister concerns must be presumed to have come out of own funds and not borrowed funds.{ CIT vs. Reliance Utilities (Bombay High Court) }</u>

Where the assessee had its own funds as well as borrowed funds and it advanced funds to its sister concerns for allegedly non-business purposes and the question arose whether the AO was justified in disallowing the interest on the borrowed funds on the ground that they had been used for non-business purposes.

Hon'ble High Court stated that where an assessee has his own funds as well as borrowed funds, a presumption can be made that the advances for non-business purposes have been made out of the own funds and that the borrowed funds have not been used for this purpose. Accordingly, the disallowance of the interest on the borrowed funds is not justified.

- <u>Bad Debts. { DIT vs. Oman International Bank (Bombay High Court)}</u>

The decision of an assessee to treat a debt as a bad debt in his books has to be a business or commercial decision and not whimsical or fanciful and must be based on material that the debt is not recoverable. The decision must be bona fide.

The burden is **not** on the assessee to show the debt is "bad". In order to disallow, the Assessing Officer **must** show that the decision of the assessee was not bona fide.

- <u>Share broker is eligible to claim "bad debts" u/s 36 (1) (vii) / 36 (2). { CIT vs. DB (India) Securities (Delhi High Court) }</u>

The assessee, a broker, purchased shares of the value of Rs.1,06,10,247 on behalf of its sub-broker. The sub-broker made payment of Rs.64 lakhs. As the remaining amount of Rs.41,37,881 was not paid, the assessee did not deliver those shares to the client though it offered the brokerage to tax. Since the balance payment was not made even in the next year, the assessee claimed deduction of Rs. 41,37,881 as a "bad debt" u/s 36 (1) (vii). The Tribunal allowed the claim. On appeal by the Revenue to the High Court, HC stated that the contention of the Revenue that the said amount was not a "debt" u/s 36 (2) and, therefore, could not be treated as a "bad debt" was not acceptable because there was a valid transaction between the assessee and the sub-broker. The brokerage was offered to tax and assessed. The assessee had to make payment on behalf of the sub-broker and as he could not recover to the extent of Rs.41,37,881/-, that sum had to be treated as a "debt".

However, as the assessee had retained the shares, the "bad debt" would have to be reduced by the sale proceeds of the said shares. The balance was allowable.

- <u>Expenditure on convertible debentures is deductible. { CIT vs. Secure Meters (Rajashthan High Court)}</u>

The assessee incurred expenditure on issue of **convertible debentures**. The department claimed that convertible debentures were akin to shares and the expenditure was capital in nature. High Court rejecting the claim of the department by stating that **A debenture, when issued, is a loan. The fact that it is convertible does not militate against it being a loan**. In accordance with India Cement 60 ITR 52 (SC), expenditure on a loan is always revenue in nature even if the loan is taken for capital purposes. Consequently, **the expenditure on convertible debentures is admissible as revenue expenditure**.

- Explanation to s. 37 (1) does not apply to "penalty" which is not of the nature of illegal / unlawful expenditure. { Western Coalfields vs. ACIT (ITAT Nagpur) }

The assessee became liable to pay "**penalty**" for overloading wagons under the rules of the Railways. The question arose whether the said "penalty" was disallowable under the **Explanation to s. 37 (1)** which provides that "expenditure incurred for any purpose which is an offence or which is prohibited by law" shall not be allowable. Tribunal while deciding the matter stated that the substance of the matter had to be looked into and given preference over the form. **Though the amount was termed "penalty", it was essentially of a commercial nature and incurred in the normal course of business and was consequently allowable**.

- Expenditure incurred prior to set up of project office is allowable. { DDIT vs. Stork Engineers (ITAT Mumbai) }

The assessee was a foreign company. It was awarded a contract in India on 24.2.1998. The actual work of basic engineering etc started in March 1998 though the RBI's approval for setting up the project office was given in June 1998. The assessee incurred expenditure for the period 1.4.1998 to 16.6.1998

Tribunal held that When computing the income of the project as a whole including that part which relates to the period anterior to the setting up of the project office, there can be no question of not allowing such expenditure which is relatable to the period prior to the setting up of the project**.** If the expenditure is identifiable with the project, it has to be allowed as a deduction under the matching concept.

- Foreseeable losses are allowable as deduction. { Jacobs Engineering vs. ACIT (ITAT Mumbai) }

The assessee was engaged in the business of executing works contracts and was following the mercantile system of accounting and the "percentage completion method". It claimed a deduction for "foreseeable losses" on incomplete projects which was disallowed by the AO and CIT (A) on the basis that it was merely an anticipated loss based on an estimate. It was also held that as a major part of the work was not completed, the losses could not be properly anticipated. On appeal by the assessee, Hon'ble Mumbai Tribunal, allowing the appeal by giving following decesion:

*" Para 13.1 of Accounting Standard 7 (AS-7) mandates that a **foreseeable loss on the entire contract should be provided for in the financial statements irrespective of the amount of work done and the method of accounting followed**. The fact that AS-7 has not been notified by the Central Government as an accounting standard for purposes of s. 145 (2) is not relevant. **In principle, anticipated losses on incomplete projects are allowable as a deduction subject to their being calculated as per AS-7**."*

- Depreciation allowable even if asset not used at all for entire year. { CIT vs. G. R. Shipping (Bombay High Court) }

The assessee, engaged in shipping business, owned a barge which was included in the block of assets. The barge met with an accident and sank on 6.3.2000 (AY 2000-01). As efforts to retrieve the barge were uneconomical, the barge was sold on as-is-where-is in May 2001 (AY 2002-03). **As the barge was non-operational and not used for business at all in AY 2001-02, the AO denied depreciation**. The CIT (A) upheld the stand of the AO. On appeal by the assessee, the Tribunal took the view that after the insertion of the concept of "block of assets" by the T. L. (A) Act, 1988 w.e.f 1.4.1988 **individual**

assets had lost their identity and only the "block of assets" had to be considered. It was held that **the test of "user" had to be applied upon the block of assets as a whole and not on individual assets**. On appeal by the Revenue, the High Court **dismissed the appeal** holding that the issue was squarely covered in favour of the assessee by its earlier judgements in **Whittle Anderson** 79 ITR 613 and **G. N. Agrawal** 217 ITR 250.

- Depreciation is mandatory for Chapter VI-A deduction. { Plastiblends vs. ACIT (Bombay High Court Full Bench) }

The Assessee had disclaimed the depreciation for the purposes of regular assessment. High Court stated that though the assessee may have an option to disclaim current depreciation in computing total income under Ch. IV does not mean that the quantum of deduction allowable u/s 80 – IA is dependent upon the assessee claiming or not claiming current depreciation**.** Ch. VI-A is a Code by itself and the special deduction granted therein has to be computed on the gross total income determined after deducting all deductions allowable under ss. 30 to 43D and any device adopted to reduce or inflate the profits of eligible business has got to be rejected. **By not claiming current depreciation, the assessee seeks to inflate the profit linked incentives provided u/s 80-IA which is not permissible**.

- Stock Exchange card is NOT an intangible asset eligible for depreciation . { CIT vs. Techno Shares & Stocks (Bombay High Court) }

S. 32 (1), allows depreciation on "intangible assets" being, inter alia, "licenses … or any other business or commercial rights of similar nature". The Tribunal took the view that a BSE card was an "intangible asset" eligible for depreciation. On appeal by the Revenue, High court reversing the decision of Tribunal.

Though the term 'licences' is a very wide term and includes permission to carry on any trade, business, profession, etc, it is used in s. 32(1)(ii) in a **restricted sense**. S. 32 restricts depreciation to a class of tangible & intangible assets specifically enumerated therein. All intangible assets enumerated in s. 32(1)(ii) (except the term 'licences') belong to the class of intellectual properties. As the expression 'licences' in s. 32(1)(ii) is preceded by the expressions know-how, patents, copyrights, trade marks and succeeded by the expression 'franchises' which are all relatable to intellectual property rights, **the term 'licences' in s. 32(1)(ii) is, applying the principle of Noscitur a sociis, intended to be used restrictively and as applying only to licences relating to acquisition / user of intellectual property rights**;

A BSE card is also not a "business or commercial right" because what s. 32(1)(ii) contemplates is "business or commercial rights" **relating to intellectual properties** and not all categories of business or commercial rights. Since a BSE card is not a business or commercial right relating to intellectual property rights depreciation cannot be allowed on it;

- Share capital of the subsidiary need not be "held" in the name of the holding company. { CIT vs. Papilion Investments (Bombay High Court) }

S. 47 (v) provides that a transfer of a capital asset by a subsidiary company to its holding company shall not be regarded as a "transfer" if the whole of the share capital of the subsidiary company is **held** by the holding company. The assessee transferred shares to its holding co and claimed exemption from capital gains u/s 47 (v). The AO denied exemption on the ground that as two shares of the said subsidiary were held by a director of the assessee and not by the assessee itself, the shares were not "wholly held" by the holding company and s. 47 (v) did not apply. The Tribunal upheld the plea of the assessee. On appeal by the Revenue, the High Court upheld the order of the Tribunal and upheld the following findings:

Though s. 47 (v) refers to shares being "wholly held", a strict or mechanical interpretation should not be adopted*. A construction must be adopted which makes the statute effective rather than redundant. It must be construed having regard to the object and purpose which the legislature had in view in enacting the provision. Under the Companies Act it is not possible for a company to have less than two shareholders. The requirement of s. 47(v) that the whole of the share capital of the subsidiary company should be* ***held by the holding company*** *is certainly not the same thing as the whole of the share capital being* ***held in the name of the holding company****. If one proceeds on the basis that the entire share capital of the subsidiary company should be held* ***in the name of the holding company****, there cannot be any situation in which s. 47(v) can apply. That interpretation makes the statutory provision redundant. If the holding company has a beneficial ownership over the entire share capital, s. 47 (v) applies.*

- S. 54 relief allowable even if new house purchased from borrowed funds. { CIT vs. Dr. P. S. Pasricha (Bombay High Court) }

S. 54 provides that if an assessee has LTCG on transfer of a residential house and he purchases or constructs a residential house within the specified period then the amount appropriated towards the new house shall be deducted from the LTCG. The assessee sold a house and **used the sale proceeds to buy commercial property**. Subsequently (but within the specified period) **he borrowed funds and purchased a new house**. The AO denied deduction u/s 54 on the ground that the new house had been purchased out of borrowed funds and not out of the consideration received for the old house. On appeal, the Tribunal and High Court upheld the claim on the ground that **s. 54 merely required the purchase of the new house to be within the specified period. The source of funds for the purchase was irrelevant**.

- Non-residents are eligible for the benefit of second proviso to s. 112. { Chicago Pneumatic vs. DDIT (ITAT Mumbai) }

The assessee was a non-resident. It earned long-term capital gains on sale of shares. The Proviso to s. 112 provides that if the tax payable on LTCG exceeds 10% before indexation under the second proviso to s. 48, the excess shall be ignored. As non-residents who bought shares in foreign currency are not eligible to the benefit of indexation, the question arose whether the benefit of the proviso to s. 112 can be given to the assessee. HELD, upholding the assessee's stands that the proviso to s. 112 uses the words 'before giving effect to the second proviso to s. 48′ does not mean that the benefit of the lower rate can be given only to those cases eligible for the indexation benefit. **Even non-residents who are not eligible for indexation are eligible for the lower rate of 10%**.

- No "succession of business" u/s 170 even on 100% sale of shares. { CIT vs. Panchratan Hotels (HP High Court) } Important.

S. 170 provide that where there is a "succession of business", the predecessor has to be assessed in respect of the income upto the date of succession and the successor has to be assessed thereafter. 100% of the assessee's shares were sold by the existing shareholders to another person. The CIT in revision took the view that the result of the said transfer of shares was that there was a "succession" and that the loss incurred prior to the date of succession could not be allowed to the "successor" assessee. The assessee's appeal was allowed by the Tribunal. On appeal by the Revenue, HELD dismissing the appeal:

The term "succession" in s. 170 has a somewhat artificial meaning. The tests of change of ownership, integrity, identity and continuity of a business have to be satisfied before it can be said that a person "succeeded" to the business of another;

Even if it is accepted that by a transfer of shares u/s 2(47), there is a transfer in the right to use the capital assets of the company, still **s. 170 is not attracted because there is no "transfer of business"**. **A company is a juristic person and owns the business. The share holders are not the owners of the company. By a transfer of the shares, there is no transfer so far as the company is concerned**.

- <u>TDS on foreign salary is required even though assessee is not the payer. {CIT vs. Eli Lilly (Supreme Court) }</u>

Where the assessee-employer obtained expatriate-employees from a foreign company and the said employees, continuing to be employees of the foreign company, received salary and allowance in their home country in foreign currency and the question arose whether the assessee was obliged to deduct tax thereon at source u/s 192 and the High Court held that the assessee was not obliged to deduct tax at source on the ground that the payment was by the foreign company and not by the assessee, HELD, reversing the High Court that:

Though the payment of salary to the expatriate was made by the foreign company outside India, the TDS provisions did apply as the Act had extra-territorial operation as there was a nexus between the said salary and the rendering of services in India. U/s 9 (1) (ii), salary received abroad is deemed to arise in India if it is for services rendered in India. This charging provision has to be read with the machinery provision of s.192 and both are part of an integrated code. S. 192 requires the employer to deduct tax after "estimating" the salary payable to the employee. The act of "estimation" is akin to computation of income. In making the estimate, s. 9 (1) (ii) has to be taken into account. On facts, as it was found that the salary paid by the foreign company was for services in India the same was deemed to accrue in India u/s 9 (1) (ii) and the assessee ought to have deducted tax u/s 192 though it was not the payer.

- <u>TDS required even on commission retained by agent. { CIT vs. Singapore Airlines (Delhi High Court) }</u>

Where the assessee-airline supplied blank tickets to the travel agent, on terms that the same be sold at a minimum price and the difference between the said minimum price and the price at which the tickets were sold to the passenger was retained by the travel agent and the question arose whether the amount so retained by the agent was "commission" and whether the assessee was required to deduct tax thereon u/s 194-H of the Act, HELD, reversing the decision of the Tribunal i.e. against the assessee.

The relationship between the airline and the travel agent was that of a **principal and agent** as all the requirements of s. 182 of the Contract Act were fulfilled by the PSA. By the acts of the travel agent, a legal relationship was created between the airline and the passenger. The monies retained by the travel agent in the form of supplementary commission is not a "**discount**" because the travel agent never obtains proprietary rights to the tickets and has never paid a "price" for the same. Instead, the same is "**commission**" because it is received for services rendered on behalf of the assessee-airline and the airline ought to have deducted tax u/s 194-H.The argument that the assessee-airline is unable to deduct tax at source since it is unaware of the commission retained by the agent till a billing analysis is done is not acceptable because once an obligation is cast, it is for the assessee-airline to retrieve the necessary information from the travel agent and put itself in a position to deduct tax. **The assessee cannot take up the stand that the machinery for deduction of tax has failed**.

❖ Reasons for search action u/s 132 need not be given to the Assessee. { Genom Biotech vs. DIT (Bombay High Court) }

Search & seizure action u/s 132 was undertaken at the assessee's premises. Thereafter an order of provisional attachment u/s 281B was passed. The assessee filed a writ petition challenging the validity of the search and the provisional attachment. HELD dismissing the Petition by stating that Search action u/s 132 can be initiated only if the designated authority forms a reasonable belief on the basis of information that one of the three conditions of s. 132 exist. **However, it is not the mandate of s. 132 that the reasonable belief recorded by the designated authority must be disclosed to the assessee**.

❖ Non / belated issue of s. 143 (2) notice renders block assessment order void { CIT vs. Mudra Nanavati (Bombay High Court) }

S. 158BC provides that in determining the undisclosed income, the provisions of s. 143 (2) shall apply "so far as may be". S. 143 (2) provides that a notice shall not be issued after the expiry of 12 months from the end of the month in which the return is furnished. The question arose whether the non-issue or belated issue of s. 143 (2) notice renders the block assessment order void ab initio. Tribunal held that **the issue of the s. 143 (2) notice within the stipulated period was mandatory and that failure to do so renders the block assessment order void**. This decision has been approved by the High Court.

❖ An order passed without discussion is liable for reopening.{ Kelvinator 256 ITR 1 (Del) (FB) }

In respect of AY 2000-01, the assessee filed a ROI. In the accompanying balance sheet it was disclosed that prior period expenditure of Rs. 5,41,850 was debited to the P&L A/c and that interest of Rs. 8,34,720 receivable from a particular party had not been accounted for as income. The AO passed an order u/s 143(3) in which he did not make any addition on account of the aforesaid two items. Subsequently (within four years), he issued a notice u/s 148 in which he took the view that income had escaped assessment as the prior period expenditure was not allowable as a deduction and the interest on advances was assessable. The assessee filed a writ petition on the ground that there being a disclosure of the material facts and the implied acceptance of the stand of the assessee vide the s. 143 (3) order, the reopening was based on a change of opinion. HELD, dismissing the Petition:

Reassessment is permissible where the AO has passed an assessment order without any application of mind. ***If the order of assessment does not contain any discussion on a particular issue, the same may be held to have been rendered without any application of mind****. On facts, as there was no discussion by the AO in the s. 143 (3) order about the prior period expenditure and the non-offering of interest income, there was no application of mind by the AO and he was entitled to reopen.*

❖ Debatable issues are not "mistakes apparent from the record" u/s 154. { Mepco Industries vs. CIT (Supreme Court) Important }

The assessee filed a revision petition u/s 264 in which it claimed that the subsidy received by it from the government was a capital receipt and not chargeable to tax in view of **P.J. Chemicals Ltd** 210 ITR 830 (SC). The Petition was allowed by the CIT. Subsequently, the Supreme Court held in **Sahney Steel and Press Works** 228 ITR 253 that the subsidy received by that assessee was a revenue receipt. Pursuant to this judgement, the CIT passed a rectification order u/s 154 by which he held that the subsidy was a revenue receipt. The assessee challenged the said order by a writ petition before the Madras High Court which was dismissed. On appeal by the assessee, SC allowing the appeal:

The case was a classic one of change of opinion. The question whether a subsidy is capital or revenue depends on the facts of the case. S. 154 can only apply to a "mistake apparent from the record". A "rectifiable mistake" is a mistake which is obvious and not something which has to be established by a long drawn process of reasoning or where two opinions are possible. A decision on a debatable point of law cannot be treated as a "mistake apparent from the record".

❖ Despite s. 271(1B), s. 271 (1)(c) penalty is not valid if AO's satisfaction not recorded at stage of initiation. { Madhushree Gupta vs. UOI (Delhi High Court) }

Relying on **Ram Commercial Enterprises** 246 ITR 568 (Del) {affirmed in **Rampur Engineering** 309 ITR 143 (Del) (FB)}, the Delhi High Court held that if the AO did not record his satisfaction that the assessee had concealed particulars of his income before completion of the assessment proceedings, the initiation of penalty proceedings was bad in law and the order imposing penalty was invalid. High Court held that t**he Revenue's submission that prima facie satisfaction of the AO need not be reflected at the stage of initiation is not acceptable**. The presence of prima facie satisfaction for initiation of penalty proceedings was and remains a **jurisdictional fact** which cannot be wished away even post amendment. **If an interpretation such as the one proposed by the Revenue is accepted then s. 271 (1B) will fall foul of Article 14 of the Constitution as it will then be impregnated with the vice of arbitrariness**. The AO would then be in a position to pick a case for initiation of penalty merely because there is an addition or disallowance without arriving at a prima facie satisfaction with respect to infraction of s. 271 (1)(c).

❖ Filing Fee for appeal to ITAT in 'assessed loss' cases is only Rs. 500. { Gilbs Computer vs. ITAT (Bombay High Court) }

The assessee, having been assessed to a loss of Rs. 9 crores, filed an appeal before the Tribunal. S. 253 (6) provides that if the assessed 'total income' is "less" than Rs. 1 lakh, a fee of Rs. 500 for filing the appeal is payable while if the income is "more", a higher fee is payable subject to a maximum of Rs. 10,000. The Tribunal took the view that **if the loss was more than Rs.1 lakh, the total income would be more than Rs.1 lakh** (although negative) and a higher fee was payable on the basis that the object behind s. 253(6) was that big cases involving income of more than a particular figure, positive or negative, required more time and effort of the Tribunal to deal with and as the nature of fees was compensatory, a higher fee for a bigger case would be in consonance with the object. On a writ petition by the assessee, HELD, reversing the order of the Tribunal by stating that the expression "more and less" in s. 253 (6) will have to be given its natural meaning. **Though "income" includes a loss ("negative income"), negative income can never be more than positive income. It will always be less**. The fee payable would be Rs.500/.

- <u>High Court has no power to condone delay in filing appeals. { CCE vs. Hongo India (Supreme Court – Larger Bench) }</u>

Where s. 35G of the Central Excise Act (= 260A of the I. T. Act) provided a time limit of 180 days for filing an appeal and there was no provision for condoning delay by showing sufficient cause after the prescribed period, there was complete exclusion of section 5 of the Limitation Act and the High Court had no power to condone the delay after expiry of the prescribed period. Even otherwise, the legislature had provided sufficient time for filing a reference to the High Court which was more than the period prescribed for an appeal and revision.

- <u>S. 115JA assessment is not liable for advance tax interest u/s 234B and 234C.{ Snowcem vs. DCIT (Bombay High Court) }</u>

Where an assessment is made u/s 115JA of the Act, an assessee is not liable to pay interest for non-payment/shortfall of advance tax u/s 234B and 234C of the Act.

<u>Note:</u> In case of any query, please feel free to contact me or mail your query to <u>bikashbogi@yahoo.co.in</u>.

Success is not the matter of being the BEST & WINNING the race: Success is a matter of HANDLING the WORST & FINISHING the Race.