

ASSESSMENT PROCEDURE

Recent amendments

Alternate dispute resolution mechanism [Section 144C]

The Finance (No.2) Act, 2009 has introduced reference to Dispute Resolution Panel by eligible assessee. Following are the salient features of the section.

- (1) The Assessing Officer shall forward a draft of the proposed order of assessment to eligible assessee if he proposes to make any variation in the income or loss returned, which is prejudicial to the interest of the assessee. It is applicable in respect of any draft order made on or after 01.10.2009.
- (2) On receipt of the draft order, the assessee shall within 30 days file his acceptance of the variations to the Assessing Officer or file his objections to such variation with (i) the Dispute Resolution Panel; and (ii) the Assessing Officer.
- (3) The Assessing Officer shall complete the assessment on the basis of the draft order if the assessee intimates the acceptance of the variation or no objection was received within the period of 30 days from the date of receipt of draft order by the assessee.
- (4) The Assessing Officer shall pass an order within one month from the end of the month in which the acceptance of the assessee is received for variation or the period for filing objection mentioned herein before has expired.
- (5) Where the assessee has objected to the variation proposed in the draft order by the Assessing Officer, the Dispute Resolution Panel shall issue such directions, as it thinks fit, for the guidance of the Assessing Officer to enable him to complete the assessment.
- (6) The Dispute Resolution Panel shall issue the direction referred to above after considering the following namely – (a) draft order; (b) objections filed by the assessee; (c) evidence furnished by the assessee; (d) report if any, of the Assessing Officer, Valuation Officer or Transfer Pricing Officer or any other authority; (e) records relating to the draft order; (f) evidence collected by or caused to be collected by it ; and (g) result of any enquiry made by, or caused to be made by, it.
- (7) The Dispute Resolution Panel before issuing any direction shall make such further enquiry, as it may think fit or cause any further enquiry to be made by any income-tax authority and report the result of the same to it.

- (8) The Dispute Resolution Panel may confirm, reduce or enhance the variations proposed in the draft order and it shall not set aside any proposed variation or issue any direction to the Assessing Officer for further enquiry and passing of the assessment order.
- (9) If the members of the Dispute Resolution Panel defer in opinion on any point, the point shall be decided accordingly to the opinion of the majority of the members.
- (10) Every direction issued by the Dispute Resolution Panel shall be binding on the assessing officer.
- (11) If any direction is prejudicial to the interest of the assessee or interest of the revenue, then, the same can be issued only after an opportunity of being heard is given to the assessee or the Assessing Officer, as the case may be.
- (12) Such direction has to be issued within 9 months from the end of the month in which the draft order is forwarded to the eligible assessee.
- (13) Upon receipt of such direction, the Assessing Officer has to complete the assessment in accordance with the same, within one month from the end of the month in which the direction is received. There is no requirement of providing any further opportunity of being heard to the assessee.
- (14) The CBDT is empowered to make rules for the efficient functioning of the Dispute Resolution Panel and speedy resolution of the objections filed by the eligible assessee.
- (15) 'Eligible assessee' means (i) any person in whose case such variation arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of section 92CA; and (ii) any foreign company.

Question 1

Is the Assessing Officer empowered to assess or reassess an income which is chargeable to tax and has escaped assessment, in a case which is pending before the Appellate Tribunal? Discuss.

Answer

As per second proviso in section 147 the Assessing Officer may assess or reassess an income which is chargeable to tax and which has escaped assessment, other than the income involving matters which are the subject matter of any appeal, reference or revision. Therefore, in respect of income involving the matters which are the subject matter of an appeal, it is not possible for the Assessing Officer to initiate proceeding under section 147.

Question 2

A search was conducted under section 132 in the business premises of Harish on 15th December, 2010. At that time, assessments under section 143(3) for assessment years 2008-

09 and 2009-10 and reassessment proceeding under section 147 for assessment year 2007-08 were pending before the Assessing Officer.

- (i) What are the assessment years for which notice can be issued for making post-search assessment?
- (ii) What would be the fate of pending assessments and reassessment?
- (iii) What would be the effect, if the post-search assessment orders are annulled by the Income-tax Appellate Tribunal?

Answer

- (i) The notice under section 153A can be issued for six assessment years preceding the assessment year relevant to the previous year in which the search is conducted. In this case, the search is conducted in the previous year 2010-11, the relevant assessment year for which is A.Y.2011-12. Therefore, notice can be issued for the six preceding assessment years i.e. for assessment years 2005-06 to 2010-11.
- (ii) As per section 153A, the assessment or reassessment relating to any assessment year, falling within the above period of six assessment years, pending on the date of initiation of the search under section 132, shall abate. In other words, they will cease to be applicable. Therefore, the assessments under section 143(3) for assessment years 2008-09 and 2009-10 and the reassessment proceeding under section 147 for assessment year 2007-08 **shall abate**.
- (iii) Section 153A provides that where the post-search assessment order is annulled in any appeal or any other legal proceeding, the abated assessment and reassessment proceedings shall stand revived. Therefore, the assessments under section 143(3) relating to assessment years 2008-09 and 2009-10 and the reassessment proceeding relating to assessment year 2007-08, which abated on initiation of search, **shall stand revived**.

Question 3

Mr. X filed the return of A.Y.2009-10 declaring an income of Rs.3,25,000. He had been assessed under section 143(3) and the Assessing Officer made the following additions:

- (i) Unexplained cash credit for want of confirmation from creditors Rs.2,00,000.
- (ii) Disallowance in respect of travelling expenditure of Rs.46,000 for tour to Chennai for effecting sales there, as Mr. X failed to establish that the expenditure had been incurred for the purpose of business.

At a later stage, he has been served with a notice under section 148 for income escaping assessment in respect of A.Y. 2009-10. During the course of reassessment proceeding, the Assessing Officer sought to add unaccounted sales of Rs.4,00,000 made at Chennai.

During the course of hearing, the assessee produced confirmation from creditors and requested to delete the addition for unexplained cash credit of Rs.2,00,000 and to allow

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deduction of travelling expenditure of Rs.46,000. Discuss the validity of the contention raised by the assessee.

Answer

Where reassessment is made under section 147 in respect of income which had escaped tax, the Assessing Officer's jurisdiction is not only confined to such income which has escaped tax but also extends to reconsidering the whole assessment.

However, the law does not permit the assessee to reagitate questions which had been decided in original assessment proceedings, unless relatable to an item sought to be taxed as "escaped income"[*CIT v. Sun Engineering Works (P) Ltd. [1992] 198 ITR 297(SC)*]. Therefore, considering the Supreme Court decision in the above case, **the assessee cannot seek a review of a concluded item, i.e., unexplained cash credit, which is unconnected with escaped income.** However, request for allowing traveling expenditure can be considered because it is relatable to income which is sought to be assessed as escaped income i.e., unaccounted sales effected in Chennai.

Question 4

Does the Assessing Officer have power to make any adjustment to income disclosed by the assessee in the return of income in course of processing the return under section 143(1)?

Answer

As per section 143(1), the total income or loss of an assessee shall be computed after making the following adjustments to the returned income:

- (i) any arithmetical error in the return; or
- (ii) an incorrect claim, if such incorrect claim is apparent from any information in the return.

For the purpose of section 143(1), "an incorrect claim apparent from any information in the return" means such claim on the basis of an entry, in the return of income:

- (i) if an item, which is inconsistent with another entry of the same or some other item in such return;
- (ii) in respect of which, the information required to be furnished under the Income-tax Act to substantiate such entry, has not been so furnished;
- (iii) in respect of a deduction, where such deduction exceeds specified statutory limit which may be expressed as monetary amount or percentage or ratio or fraction.

Thus, the Assessing Officer, in course of processing the return of income under section 143(1), has the power to make the above adjustments to the income disclosed by the assessee in the return.

Question 5

The assessee had failed to deposit the amount of tax under section 140A amounting to Rs.10,000 but filed his return of income in time. The Assessing Officer, besides charging of interest as per section 234B and section 234C, also issued show cause notice to levy a

penalty of Rs.2,000. The assessee claimed that there is no provision in the Act to impose penalty for non-payment of tax under section 140A.

Answer

The failure on the part of the assessee to pay the whole or any part of the self-assessment tax under section 140A of the Income-tax Act makes him an assessee-in-default within the meaning of section 140A(3). The Assessing Officer can levy a penalty on the assessee-in-default by virtue of provisions of section 221(1) of the Income-tax Act and the maximum penalty which can be levied upon the assessee is to the extent of amount of tax remaining unpaid. Therefore, the issue of show cause notice levying a penalty of Rs.2,000 on the assessee, for non-payment of self-assessment tax of Rs.10,000 under section 140A, is in order.

Question 6

Tai Ltd. filed its return of income for assessment year 2010-11 on 6th June, 2010. The return is selected for regular assessment under section 143(3) for which notice under section 143(2) is served on the company on 3rd October, 2011. The company responded to the notice under section 143(2). State whether the service of the notice is within time and if not, whether the assessment order can be challenged by the assessee.

Answer

The time limit for service of notice under section 143(2) is six months from the end of the financial year in which the return of income was furnished by the assessee. The return of income for assessment year 2010-11 was filed by the assessee on 6th June, 2010. Therefore, the notice under section 143(2) has to be served by 30th September, 2011. However, the notice was served on the assessee only on 3rd October, 2011. Hence the notice issued under section 143(2) is time-barred.

However, as per section 292BB, where an assessee had appeared in any proceedings or co-operated in any enquiry relating to an assessment or reassessment, it shall be deemed that any notice required to be served upon him, has been duly served upon him in time in accordance with the provisions of the Act and such assessee shall be precluded from raising any objection in any proceeding or enquiry that the notice was (a) not served upon him or (b) not served upon him in time or (c) served upon him in an improper manner. However, the above provision shall not be applicable where the assessee has raised such objection before the completion of such assessment or reassessment. Therefore, in the instant case if the assessee, Tai Limited, had raised an objection to the proceeding, on the ground of non-service of the notice under section 143(2) upon it on time, then the validity of the assessment order can be challenged. In absence of such objection, the assessment order cannot be challenged.

Question 7

The assessment was made under section 143(1) for assessment year 2007-08. The assessee has received a notice under section 148 on 6th April, 2010 for reopening of assessment. Can the assessee challenge the legality of the notice on the ground of change of opinion?

Answer

Under the scheme of section 143(1), only the adjustments relating to any arithmetical error in the return and incorrect claim which is apparent from any information in the return are permitted. In short, what is permissible is only correction of errors apparent on the basis of the return filed. Thus, while making the adjustments under section 143(1), the Assessing Officer has no power to go beyond the information given in the return and make any allowance or disallowance. Therefore, the intimation given under section 143(1) cannot be treated as an order of assessment. Hence, there being no assessment under section 143(1), the question of change of opinion does not arise.

Therefore, the assessee cannot challenge the legality of the notice issued under section 148 reopening the assessment on the ground of change of opinion in a case where no assessment is made under section 143(3), but only an intimation is issued under section 143(1). This inference is supported by the Supreme Court ruling in *ACIT vs. Rajesh Jhaveri Stock Brokers P. Ltd.* (2007) 291 ITR 500.

Question 8

Discuss the correctness or otherwise of the following proposition in the context of the Income-tax Act, 1961:

A fresh claim before the Assessing Officer can be made only by filing a revised return and not otherwise.

Answer

This proposition is correct. A return of income filed within the due date may be revised by filing a revised return under section 139(5) where the assessee finds any omission or wrong statement in the original return subject to satisfying other conditions. There is no provision in the Income-tax Act to make changes or modification in the return of income by filing a letter. In a case where a return of income has been filed within the due date, the only option available to the assessee to make an amendment to such return is by way of filing a revised return under section 139(5). Therefore, a fresh claim can be made before the Assessing Officer only by filing a revised return and not otherwise. The Supreme Court in *Goetze (India) Ltd. vs. CIT* (2006) 284 ITR 323 has held that there was no provision in the Income-tax Act to allow an amendment in the return of income filed except by way of filing a revised return.

Question 9

The Assessing Officer within the powers vested in him under section 142(2A), while examining the accounts of PNF Ltd., had ordered to get the same audited. The company challenges this

order on the ground “that the opportunity was not provided to them by the Assessing Officer prior to passing of such an order”. Decide the correctness of the action of the Assessing Officer.

Answer

As per proviso to section 142(2A) the Assessing Officer shall not direct the assessee to get the accounts so audited unless the assessee has been given a reasonable opportunity of being heard.

Therefore, in this case, the order of the Assessing Officer is not valid since the assessee was not given an opportunity of being heard prior to passing of such order.

Question 10

Smt. Kanti engaged in the business of growing, curing, roasting and grounding of coffee after mixing chicory had a total income of Rs.4,80,000 from this business which was her only source of income during the year ended on 31.3.11. She consults you to have an opinion whether she is required to file return of income for the Asst. Year 2011-12 as per provisions of section 139(1) of the Act.

Answer

The clarification regarding filing of return of income by the coffee growers being individuals covered by Rule 7B of the Income tax Rules, 1962 is given in Circular No.10/2006 dated 16.10.06. According to Rule 7B, an individual deriving income from growing, curing, roasting and grounding of coffee with or without mixing chicory, would not be required to file the return of income if the aggregate of 40% of his or her income from growing, curing, roasting and grounding of coffee with or without mixing chicory and income under all other sources liable to tax in accordance with the provisions of this Act, is equal to or less than the basic exemption limit prescribed in the First Schedule of the Finance Act of the relevant year.

In this case, Smt. Kanti has a total income of Rs.4,80,000 from this business, which was her only source of income for P.Y.2010-11. 40% of her total income works out to Rs.1,92,000, which is more than the basic exemption limit of Rs.1,90,000 in respect of resident women assessee. Therefore, Smt. Kanti is required to file a return of income for the A.Y.2011-12 as per the provisions of section 139(1).

Question 11

Ram, an individual, filed his return of income for the assessment year 2010-11 on 15.6.2010. He later discovered that he had not claimed deduction under section 80-C in the said return. He claimed the said deduction through a letter addressed to the Assessing Officer. The Assessing Officer completed the assessment without allowing the deduction claimed by Ram. Is the Assessing Officer justified in doing so?

Answer

The Supreme Court has, in *Goetze (India) Ltd. v. CIT* (2006) 284 ITR 323, ruled that the assessing authority has no power to entertain a claim for deduction made after filing of the return of income otherwise than by way of a revised return. In the instant case, Ram has claimed the deduction under section 80C, which he omitted to claim in the original return of income, through a letter addressed to the Assessing Officer and not by filing a revised return under section 139(5). In view of the decision of the Supreme Court cited above, the Assessing Officer was justified in completing the assessment without allowing the deduction under section 80C.

Question 12

X, an individual, has got his books of account for the year ending 31.3.2011 audited under section 44AB. His total income for the assessment year 2011-12 is Rs.1,90,000. He desires to know if he can furnish his return of income for the assessment year 2011-12 through a Tax Return Preparer.

Answer

Section 139B provides for submission of return of income through Tax Return Preparers. It empowers the Central Board of Direct Taxes (CBDT) to frame a scheme for the purpose of enabling any specified class or classes of persons to prepare and furnish their returns of income through Tax Return Preparers. Specified class or classes of persons have been defined to mean any person, other than a company or a person whose accounts are required to be audited under section 44AB or under any other existing law, who is required to furnish a return of income under the Act. Thus, companies and persons whose accounts are liable for tax audit under section 44AB do not fall within the definition of 'specified class or classes of persons' and consequently, cannot furnish their returns of income through Tax Return Preparers. In the instant case, the books of account of X for the year ending 31.3.2011 have been audited under section 44AB. As such, he cannot furnish his return of income for the assessment year 2011-12 through a Tax Return Preparer.

Question 13

T, an individual, filed his return of income for the assessment year 2011-12 on 15.6.2011 declaring a total income of Rs.1,20,000. He later discovered that he had not claimed a particular deduction amounting to Rs.2,10,000 while computing his business income in the said return. He filed a revised return on 3.1.2012 declaring a total loss of Rs.90,000. The Assessing Officer proposes to disallow the claim of T for carry forward of the business loss amounting to Rs.90,000 for the reason that the revised return declaring loss for the first time was filed beyond the time prescribed under section 139(3). Examine the validity of the proposed action of the Assessing Officer.

Answer

T has filed his original return of income for the assessment year 2011-12 within the due date specified in section 139(1). Section 139(5) empowers an assessee, who discovers any omission or wrong statement in the return filed by him under section 139(1), to file a revised return before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment, whichever is earlier. T, having discovered an omission to claim a particular deduction in the return filed by him under section 139(1), has filed a revised return within the time prescribed under section 139(5). A revised return has the effect of replacing the original return and relates back to the date of the original return. Thus, where a return was filed under section 139(1) declaring income and later it was revised declaring a loss, the loss shall be allowed to be carried forward as the revised return shall substitute the original return which was filed within time. There is no bar on filing a revised return showing loss for the first time. Therefore, the proposed action of the Assessing Officer to deny the benefit of carry forward of business loss to T is not valid in law. [*CIT v. Periyar District Co-operative Milk Producers Union Ltd (2004) 266 ITR 705 (Mad)*].

Question 14

Can an order of assessment, which was in accordance with the law as it stood on the date when it was passed, be rectified by the Assessing Officer under section 154 of the Income-tax Act, 1961, on account of a subsequent amendment of the law with retrospective effect?

Answer

An order of assessment, which was in accordance with the law as it stood on the date when it was passed, becomes erroneous on account of a retrospective amendment of the law made subsequently. Such an order falls within the scope of section 154. The Supreme Court has, in *IAC of Agricultural I.T. v. V.K. Ravi Namboodiripad (1974) 96 ITR 73*, held that an assessment based on the law as it stood on the date of assessment could be rectified after an amendment of the law with retrospective effect within the period of limitation. In *CIT v. E. Sefton & Co. (P.) Ltd. (1989) 179 ITR 435*, the Calcutta High Court observed that if the assessment order is plainly and obviously inconsistent with the specific and clear provision as amended retrospectively, indisputably there is a mistake apparent from record. In the light of the retrospective amendment, the assessment order had to be revised. In view of this, it can be said that the Assessing Officer can, under section 154 of the Income-tax Act, 1961, rectify the order of assessment in the light of the later amendment of the law with retrospective effect, subject to limitation provided under sub-section (7) of section 154.

Question 15

State whether the following persons have to mandatorily furnish their return of income for the assessment year 2011-12.

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- (i) *Mr. Ashok, an individual, aged 50 years, whose gross total income before deduction under section 80C is Rs.2,60,000 and total income after deduction under section 80C and section 80D is Rs.1,05,000.*
- (ii) *M/s. XYZ, a firm, which has incurred a loss.*

Answer

- (i) The fourth proviso to section 139(1) requires every person, whose total income without giving effect to the provisions of section 10A, 10B, 10BA and Chapter VIA exceeds the maximum amount not chargeable to tax, to compulsorily furnish the return of income for the relevant assessment year on or before the due date. The gross total income of Mr. Ashok before deduction under section 80C exceeds the basic exemption limit of Rs.1,60,000 and therefore, Mr. A has to furnish his return of income for the assessment year 2011-12.
- (ii) It is compulsory for firms to furnish their returns of income and loss on or before the due date. Therefore, M/s XYZ has to furnish its return of loss for the assessment year 2011-12 on or before the due date.

Question 16

Elh Private Ltd's assessment for assessment year 2005-06 was completed under Section 143(3) on 31st August, 2006. The company went in appeal to the Commissioner (Appeals) and the appeal was decided on 16th August, 2007 and the appeal effect was duly given by the Assessing Officer on 25th August, 2007. Thereafter, on 1st September, 2011 the Assessing Officer noticed a mistake in calculation of depreciation on a particular block of assets, which reduced the income excessively by Rs.1.10 lakh. The Assessing Officer issued notice under section 154 for the purpose of rectifying the mistake. Is such rectification permissible?

Answer

Any rectification order under section 154 has to be passed within 4 years from the end of financial year in which the order sought to be amended was passed. Order sought to be amended does not necessarily mean the original order. It could be any order including the amended or rectified order. Where any matter has been considered and decided in any proceeding by way of appeal or revision, the authority passing such order may amend the order in relation to any matter other than the matter which has been so considered and decided.

For subsequent rectification, the time limit of 4 years shall be from the end of the financial year in which the earlier rectification order was passed. [*Hind Wire Industries Ltd vs. CIT (1995) 212 ITR 639 (SC)*]. In the given case, the time limit of 4 years has to be reckoned from the end of the financial year in which the order giving effect to the CIT(Appeal)'s decision was passed. Therefore, the rectification order can be passed by the Assessing Officer at any time before expiry of 4 years from the end of the financial year 2007-08 i.e. on or before 31st

March, 2012. In this case, the mistake was noticed by the Assessing Officer on 1st September, 2011, for which he issued notice under section 154 for rectifying the mistake. Such rectification is permissible as the time limit of 4 years expires only on 31st March, 2012.

Question 17

A company submitted the return of income for assessment year 2009-10 on 10th October, 2009. The Assessing Officer served a notice u/s 143(2) on the company on 14th August, 2010 in order to make assessment under section 143(3). Thereafter, on 1st September, 2010, the Assessing Officer issued intimation under section 143(1). Such intimation shows a demand for Rs.10,500 towards tax and interest. The company argues that the issue of intimation under section 143(1) is bad in law. Discuss.

Answer

This issue came up before the Apex Court, in *CIT v. Gujarat Electricity Board* (2003) 260 ITR 84. The Supreme Court held that once regular assessment proceedings have commenced under section 143(2) of the Income-tax Act, 1961, it is a limitation on the jurisdiction of the Assessing Officer to commence proceedings under section 143(1)(a) of the Act. Section 143(1)(a) of the Act enacts a summary procedure for quick collection of tax and quick refunds. Under the scheme, if there is a serious objection to any of the orders made by the Assessing Officer determining the income, it is open to the assessee to ask for rectification under section 154. It is not open to the Revenue to issue intimation under section 143(1)(a) of the Income-tax Act, 1961, after notice for regular assessment is issued under section 143(2). The Legislature intended that where the summary procedure under section 143(1) has been adopted, there should be scope available for the Revenue, either *suo moto* or at the instance of the assessee, to make a regular assessment under section 143(2). However, the converse is not available. A regular assessment proceeding having been commenced under section 143(2), there is no need nor is it possible for a summary proceeding under section 143(1)(a).

Question 18

- (a) *J filed a return of income for the Assessment Year 1999-2000, in due time disclosing a total income of Rs.4 lakhs. The taxes due on the income were covered by taxes deducted at source, advance tax and self-assessment tax.*

The return was taken for scrutiny by the Assessing Officer, who made large additions to the income disclosed by J. On appeal, the High Court set aside the order of assessment and directed a fresh assessment to be made after hearing the parties. The court order had become final since neither party had preferred an appeal against it.

The Assessing Officer did not make any fresh assessment with the result that the assessment became barred by time.

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J has filed a petition that since no assessment of his income had been made by the Assessing Officer, the entire taxes paid, including the pre-assessment payments, must be refunded to him.

Is he justified in making this claim? Discuss.

- (b) *An assessment was completed by the Assessing Officer under section 143(3) on the basis of return submitted and other information furnished by the assessee. The Assessing Officer accepted the cost of the land after waiting for a reasonable period for report of the valuation officer to whom a reference was made. Subsequent to receiving the report from the valuer, it revealed that there was a variation by about Rs.3.00 lacs. On the basis of this valuation report, the Commissioner issued notice under section 263 to set aside the completed assessment.*

Justify the action of the Commissioner.

- (c) *M filed return of income for Assessment Year 2009-10 claiming a refund of Rs.45,000. The said refund was granted and paid to the assessee on 1st March, 2010 after processing the return under section 143(1). Later on, the case was taken up for regular assessment by issue of notice under section 143(2) and the said assessment was completed on 16th August, 2011 resulting in demand of Rs.2500. Is the assessee liable to pay interest on the amount of refund already granted to him?*

Answer

- (a) The Gujarat High Court held, in *Saurashtra Cement and Chemical Industries Ltd. v. ITO* (1992) 194 ITR 659, that the liability to pay income-tax arose under section 4(1) of the Act and did not depend upon an assessment order being made by the Assessing Officer. It depends upon the enactment of the annual Finance Act laying down the rates of taxation for the relevant assessment year. Thus, as soon as the rates are prescribed, the liability to pay tax crystallizes.

On filing of return under section 139, the provisions of section 140A also get activated, since if any taxes over and above those paid by way of advance tax and tax deducted at source remain, payment has to be made under section 140A before a valid return of income could be filed by an assessee. Payment of pre-assessment taxes does not depend on an assessment being made by the Assessing Officer.

In the present case, J had paid taxes on the basis of his own declaration of income. J's primary liability under section 4 of the Act is not absolved merely due to absence of a formal assessment. As decided by the Supreme Court in *CIT v. Shelly Products* (2003) 261 ITR 367, pre-assessment taxes paid on the basis of admitted income do not become refundable in the absence of an assessment. Hence J's contention is incorrect.

- (b) As per the facts of the case, the Assessing Officer completed the assessment before the valuation report was received. The valuation report was received subsequent to completion of the assessment. However, it may be noted that the said report forms part of the 'record', which the Commissioner may call for and examine under section 263(1).

A perusal of the valuation report revealed a variation of Rs.3 lakhs and to that extent it can be said that the order of the Assessing Officer was prejudicial to the interests of Revenue and also erroneous. The Commissioner is absolutely justified in issuing notice u/s 263 since the term "record" used in the said section includes all the records available at the time of examination by the Commissioner even though such records may not have been available at the time of regular assessment. This view was upheld by the Supreme Court in *CIT v. Shree Manjunathesware Packing & Camphor Works (1998) 231 ITR 335*.

- (c) As per section 234D, where any refund is granted to the assessee after processing the return u/s 143(1) and later on, in the regular assessment there is no refund due or the amount refunded exceeds the amount refundable, the assessee shall be liable to pay simple interest at $\frac{1}{2}\%$ for every month or part of a month from the date of grant of refund to the date of such regular assessment on the whole or the excess amount so refunded.

In this case, the assessee was granted refund after processing the return u/s 143(1) and upon regular assessment u/s 143(3) it was found that nothing is refundable and the assessee had to pay Rs.2,500 towards taxes. The assessee hence has to pay interest @ $\frac{1}{2}\%$ per month or part of a month on the refund granted of Rs.45,000 from the date of grant of refund to the date of regular assessment.

Question 19

On whom and when does section 139(4C) cast responsibility to file a return of income. What will be the effect of failure to comply with the provisions of this section?

Answer

Section 139(4C) applies to -

- (i) Research Association referred to in section 10(21).
- (ii) News agency referred to in section 10(22B)
- (iii) Association or institution referred to in section 10(23A) or 10(23B).
- (iv) Fund or institution or trust or university or educational institution or any hospital or medical institution referred to in section 10(23C) and
- (v) Trade union referred to in section 10(24)

These entities shall furnish their return of income if their total income without giving effect to the provisions of section 10, exceeds the maximum amount which is not chargeable to tax.

Failure to comply with the provisions of section 139(4C) will attract penalty under section 272A(2)(e) equal to Rs.100 for each day during which the default continues.

Question 20

M/s Shiv Traders, a partnership firm sustained business loss of Rs.2 lakhs, inclusive of admissible depreciation of Rs.1.15 lakhs (u/s 32 of I.T. Act) for the year ended 31.3.2010. The firm did not file its return for that year. The Assessing Officer issued a notice u/s 142(1) on 1st

March, 2011, in compliance to which the firm filed its return for the said year declaring the loss of Rs.2 lakhs, and sought carry forward for next year. Is the firm's claim justified?

Answer

M/s. Shiv Traders failed to file its return of loss within the time allowed under section 139(3) and the same was filed by it in response to notice u/s 142(1). The provisions of section 80 read with section 139(3) clearly specify that the return filed by the assessee in response to notice u/s 142(1) is a belated return and therefore, the benefit of carry forward of business loss shall not be available. However, the assessee shall be entitled to carry forward the unabsorbed depreciation of Rs.1.15 lakhs as per provisions of section 32(2) of the Act. The unabsorbed depreciation shall be added to the depreciation allowance of the following previous year and will be deemed to be part of that allowance of that previous year.

Question 21

- (a) *In an order of assessment for the A.Y. 2009-10, the assessee noticed a mistake for which application u/s 154 was moved and the order was rectified. Subsequently, the assessee moved further application for rectification u/s 154 which was rejected by the Assessing Officer on the ground that the order once rectified cannot be rectified again. Is the contention of the Assessing Officer correct?*
- (b) *The return for A.Y.2009-10 was filed on time as per Section 139(1). The assessee during the course of assessment proceedings u/s 143(2), noticed certain omissions and therefore filed a revised return on 18.4.2011. The Assessing Officer ignoring the revised return so filed framed the order on 27.4.2011. Is the action of Assessing Officer correct?*

Answer

- (a) It has been held by the Hon'ble Apex Court in the case of *Hind Wire Industries Ltd. v. CIT* (1995) 212 ITR 639 that the order once amended can also be rectified subsequently provided the mistake apparent from record is rectifiable u/s 154. The Apex Court enlarged the scope of the words used in that section by stating that it does not necessarily mean the original order. It could be any order including the amended or rectified order. The action of the Assessing Officer is therefore, incorrect.
- (b) The original return was filed in time and the proceedings were already taken up for assessment u/s 143(2). The revised return filed by the assessee and it was not given cognizance and the action of the Assessing Officer in making the assessment in disregard of the revised return filed is correct because as per the provisions of section 139(5) the assessee can file the revised return only within a period of one year from the end of the relevant assessment year to which the return relates or before completion of the assessment, whichever is earlier.

In this case, the time limit of one year from the relevant assessment year had already expired and the assessee is not eligible to file a revised return. If at all a revised return

is filed, the Assessing Officer may ignore that return and proceed further. Hence, the action of the Assessing Officer is correct.

Question 22

Briefly discuss the concept of accelerated assessment applicable to Association of persons/body of individuals for the assessment year 2011-12.

Answer

Section 174A provides for accelerated assessments in cases of certain Association of Persons (AOP), Body of Individuals (BOI) & Artificial Juridical Persons. If such AOP, BOI etc. is formed or established for a particular event or purpose and the Assessing Officer, apprehends that the AOP/BOI is likely to be dissolved in the same year or in the next year before completion of assessment in the normal course, the Assessing Officer may make an assessment of the income upto the date of dissolution as income of the relevant assessment year even without waiting for the end of the previous year or filing of return by the assessee. This provision is on the same basis as contained in section 174 which deals with accelerated assessment of persons leaving India. The provisions of sub-section (2) to (6) of section 174 shall, so far as may be, apply to any proceedings in the case of any such person (AOP, BOI etc.) as they apply in the case of persons leaving India.

Question 23

Can the Assessing Officer complete the assessment under section 144 of the Income-tax Act, 1961 even though there is no failure on the part of the assessee under Section 139(1), (4), (5), 142(1), 142(2A) or 143(2) of the Act? If so, what are the situations?

Answer

As per section 144, the Assessing Officer is empowered to make an assessment of the total income to the best of his judgment when there are failures on the part of the assessee under sections 139(1), 139(4) and 139(5) or sections 142(1), or 142(2A) or 143(2).

The Assessing Officer can exercise this power legally in other situations contemplated under section 145 of the Act and he may make the assessment in the manner provided in section 144 of the Act. Such power is, however, optional and may be exercised in the following situations:

1. Where the Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee;
2. Where the method of accounting has not been regularly followed by the assessee;
3. Where the Accounting Standards notified by the Central Government under section 145(2) of the Act have not been regularly followed by the assessee.

Question 24

What do you understand by the expression Protective Assessment? Illustrate your answer with an example.

Answer

Under the Income-tax Act, 1961, clubbing provisions enable the Assessing Officer to tax the income of a person in another person's hands under certain circumstances. However, the same income cannot be taxed in the hands of two persons under the law. When the ownership of the income is in dispute or is a matter of doubt, it is open to the Assessing Officer to assess a particular income in the case of the person who is considered as liable to tax and include the same income in the case of another person also as a protective measure. Such an assessment is known as protective assessment.

For example, Mrs.A files her return of income showing a business income of Rs.2 lakhs, and if the Assessing Officer is of the view that the said income belongs to her husband, Mr.A. The Assessing Officer can assess the sum of Rs.2 lakhs in the hands of Mr.A and shall proceed to assess the same amount in the hands of Mrs. A also in a protective basis.

Protective assessment is made to ensure that when the issue is finally settled, the assessment of such income is not barred by time limitation. When the issue is finally settled in appeal or otherwise, only one assessment will stand and the other one will be cancelled automatically.

Question 25

Discuss the correctness of the proposition that 'assessment reopened under section 147 cannot be dropped'

Answer

The proposition is not correct. Under section 152(2), where the assessment is reopened under section 147, an assessee may claim that the proceedings be dropped for the following reasons -

- (a) He had been assessed on an amount or to a sum not lower than what he would be rightly liable for even if the income alleged to have escaped assessment had been taken into account ; or
- (b) His assessment or computation had been properly made and he has not impugned any part of the original assessment order for that year either under sections 246 to 248 or under section 264.

It may be noted that in a reassessment proceeding, the assessee is not eligible to reopen matters concluded by an order under sections 154 or 155 or 260 or 262 or 263.

Question 26

A return of income was filed within the statutory time provided under the Act, without making the payment of self assessment tax due as per return. The same was paid before completion of assessment. The Assessing Officer wants to declare the return as invalid. Is the Assessing Officer justified?

Answer

Section 140A directs the assessee to pay self assessment tax and interest due and enclose the proof of such payment along with the return. Still if a return is furnished without proof of payment of taxes, it has to be accepted and treated as a return. At the best it can be treated as a defective return.

Sub-section (3) of section 140A says that the assessee to be treated as an assessee in default for non payment of self assessment tax.

Hence, while the return is to be treated as defective, the application of section 140A(3) may also be pressed into service. A defective return is considered invalid only when the assessee fails to rectify the return within the specified time in spite of the intimation from the Assessing Officer.

Question 27

The assessment of Shah Ltd for the assessment year 2009-10 was completed under section 143(3) on 30.6.2011. There was an audit objection that interest on borrowals ought to have been disallowed partly as there was diversion of borrowed funds to sister concerns without charge of interest. Shah Ltd did not accept the audit objection. On these facts

- (a) *What are the options open to revenue to deal with audit objection?*
- (b) *Can the assessment be re-opened?*

Answer

- (a) One of the options available to Revenue to disallow a part of the interest is by invoking section 263. The Supreme Court in the case of *CIT v. Sree Manjunatheswara Packing Products and Camphor Works* 231 ITR 35 has held that the power of the Commissioner under section 263 is of wide amplitude. Section 263 empowers Commissioner to make or cause to be made such inquiry as he deems fit in order to find out whether any order passed by the Assessing Officer is erroneous in so far as is prejudicial to the interests of Revenue. Once he comes to the conclusion on the basis of material that the order of the Assessing Officer is prejudicial to the interests of Revenue, he is empowered to pass an order to enhance, modify, cancel or set aside the assessment and direct a fresh assessment. On the facts of the present case, the Commissioner can call for the records of the case and decide whether there is any error in not disallowing a part of the interest under section 36(1)(iii). If he is satisfied that such an error has been committed, he can issue a notice to the assessee and pass appropriate orders.

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- (b) The assessment cannot be reopened under section 147 on the basis of an audit objection. Audit party cannot express an opinion on the admissibility of an item of expenditure, since this a matter to be decided by the Assessing Officer having regard to the facts of the case. The amended provisions of section 147 empower the Assessing Officer, to reopen an assessment, if he has "reason to believe" that income has escaped assessment. The Delhi High Court has examined the scope of this power and had held that the belief must be own, not based on change of opinion on the same facts (*Garden Silk Mills Pvt Ltd v. DCIT* (1999) 237 ITR 671).

Question 28

On 1.9.2010, Prem & Sons have been searched. During the search, papers belonging to his close friend Mr. Shyam indicating concealed income have been found. How should the Assessing Officer proceed in such a situation under the Act?

Answer

Where the Assessing Officer is satisfied that any undisclosed income belongs to any person other than the person subjected to section 132 search proceedings or whose books or documents or assets were requisitioned under section 132A, then, the relevant books, records or assets seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against such other person. Section 153C provides for assessment of such other person subsequent to such transfer of books, records or assets seized or requisitioned.

Question 29

Examine whether the following actions initiated / taken by the Income-tax Authorities are proper and valid under the provisions of the Act.

- (i) *The Assessing Officer, within his jurisdiction, surveyed the residential house of an assessee who is engaged in money lending business therefrom on 12.7.2010 (Monday) at 4.30 p.m.*
- (ii) *The assessment completed under section 143(3) for Assessment Year 2004-05 was found to have been based on wrong information given by the assessee. Accordingly, the income of Rs.1,32,500 earned on 03.05.2003 had escaped assessment, for which, notice under section 148 to reopen the assessment was issued on 11.3.2011.*

Answer

- (i) The Assessing Officer, under section 133A, is empowered to conduct a survey on the business premises of an assessee within his jurisdiction *on any working day after sunrise but before sunset*. In the present case, the assessee was engaged in money lending business from his residence which shall be construed as business premises and therefore, the action of the Assessing Officer to conduct survey on residential premises on Thursday, which was a working day, at 4.30 p.m. is correct.

- (ii) The assessment under section 143(3) was completed for the assessment year 2004-05 and the notice under section 148 was issued on 11.03.2011. The validity of the notice is discussed hereunder.

An assessment completed under section 143(3) can be reopened under section 148 (where the income escaping assessment is more than Rs.1 lakh) within a period of 6 years from the end of the assessment year in which the income was first assessable. The income of Rs.1,32,500 which escaped assessment could be subjected to reassessment within a period of 6 years from the end of the assessment year to which it relates. The time limit of 6 years from the end of the relevant assessment year would expire on 31.03.2011 and since the notice was served on 11.03.2011, it is valid in law. However, after serving notice under section 148 the time limit for completion of assessment would be 9 months from the end of the financial year in which the notice was served. The time limit in this case would be available upto 31.12.2011.