

## Legal Decisions<sup>1</sup>

### DIRECT TAXES



#### Income-tax Act

**LD/63/43**

*GVK Industries Ltd. & Anr  
vs.*

*The Income Tax Officer & Anr.  
February 18, 2015 (SC)*

#### **Section 9 of Income-tax Act, 1961-Income-Deemed to accrue or arise in India**

*Where for setting up a power project, assessee-company engaged non-resident company which had specialised knowledge of preparing financial scheme and to tie up with financial institution for required loans, and due to said non-resident's service assessee company availed loans from Indian and US financial institution, success fees paid to said non-resident would be treated as fees for technical services liable to TDS*

The appellant had intended and desired to utilise expert services of qualified and experience professional who could prepare a scheme for raising requisite finances and tie-up loans for the power projects. As the company did not find any professional in India, it had approached the consultant non-resident company (NRC) located in Switzerland, who offered their services.

The obligation of the NRC was to: (i) Develop comprehensive financial model to tie-up the rupee and foreign currency loan requirements of the project. (ii) Assist expert credit agencies worldwide and obtain commercial bank support on the most competitive terms. (iii) Assist the appellant company in loan negotiations and documentation with the lenders.

The Supreme Court held as follows:

The expressions managerial, technical or consultancy service are not defined in the Act. The general and common usage of the said words has to be understood at common parlance.

The present case is related to the expression "consultancy services". The word 'consultation' has been defined as an act of asking the advice or opinion of someone (such as a lawyer). It means a meeting in which a party consults or confers and eventually it results in human interaction that leads to rendering of advice. As the factual matrix in the case at hand, would exposit the NRC had acted as a

consultant. It had the skill, acumen and knowledge in the specialised field *i.e.* preparation of a scheme for required finances and to tie-up required loans. The nature of service referred by the NRC, can be said with certainty would come within the ambit and sweep of the term 'consultancy service' and, therefore, it has been rightly held that the tax at source should have been deducted as the amount paid as fee could be taxable under the head 'fee for technical service'. Once the tax is payable paid the grant of 'No Objection Certificate' was not legally permissible.

**Note: Judgment & Order of the High Court, upheld.**

**LD/63/44**

*Expro Gulf Ltd.*

*vs.*

*Union of India*

*January 22, 2015 (Uttarakhand)*

#### **Section 94A of the Income-tax Act, 1961 read with Article 226 of the Constitution of India– Notified Jurisdictional Area**

*Notification by Central Government dated 1.11.2013 declaring "Cyprus" as Notified Jurisdictional Area under section 94A was just and proper; Writ Court should not ordinarily proceed to look into as to whether information sought by the Indian Authorities was ever declined by Government of Cyprus; satisfaction recorded by Indian Authorities for issuing such notification was not to be disbelieved without any evidence*

**LD/63/45**

*Neo Trust*

*vs.*

*Income-tax Officer*

*January 16, 2015 (GUJ)*

#### **Section 164 of the Income-tax Act, 1961– Charge of tax where share of beneficiaries unknown**

*Option will be available to the Assessing Officer to resort to the provisions of section 164 in the event the beneficiary of the first level trust are discretionary trust to the extent of their respective shares, but such analogy or the mode would not be available by connecting the beneficiary of second level trust with third level trust even if they are discretionary trust or the shares of the beneficiaries are uncertain and such aspect may arise for consideration only if there is separate*

<sup>1</sup> Readers are invited to send their comments on the selection of cases and their utility at [eboard@icai.in](mailto:eboard@icai.in). For full judgment, write to [eboard@icai.in](mailto:eboard@icai.in)

## *assessment of the trustees of second level trust or third level trust*

The Appellate Tribunal held that where some or all beneficiaries of the Trust are discretionary Trust, to the extent of share of beneficiary as discretionary Trust, the tax can be charged at the maximum marginal rate under Section 164 and not under Section 161.

The Gujarat High Court held as follows:

The Scheme of the Trust Act shows that the creation of the Trust is recognised and the provisions made for rights and liabilities of the Trustees and also of the beneficiaries show that there is a *jural* relation for enforcement of such rights and liabilities between the Trustees of any Trust and the beneficiaries of a Trust. The breach of trust by the Trustees in respect of any properties of the Trust can be enforced by the beneficiaries against the Trustees.

For the purpose of the tax, the Income-tax Act provides for assessment in representative capacity, but the representative capacity of the Trustees of the First Level Trust is to represent the beneficial interest of the beneficiary of its Trust, it cannot reach to the Third Level Trust or the beneficiaries of the Third Level Trust. Had the option been not available under Section 164 to the Assessing Officer, possibly the beneficiaries of Second Level Trust could also not be considered, but as such option is expressly made available under Section 164 of the Act, that may be read and interpreted for the purpose of tax under the Act, the Assessing Officer may be in a position to find out the status of the beneficiaries of the First Level Trust and while finding out the status of the beneficiaries of the First Level Trust, he may look upon the taxable liability of the beneficiaries of Second Level Trust, who are the beneficiaries of First Level Trust and if the tax payable is higher, while making assessment of the First Level Trust, option may be resorted to under Section 164 of the Act to that extent only, but such cannot be permitted again to reach to the Third Level Trust and to find out the taxable liability of the beneficiaries of the Third Level Trust.

Even if such principle is considered, it would be to the extent of beneficiaries of first level trust to be independently taxed or for considering the tax liability, beneficiary of second level trust may be considered, but it would not be for the beneficiary's beneficiary to the extent of reaching beneficiaries of the third level trust as sought to be canvassed.

The option is available to the Assessing Officer as observed earlier to tax the trustees or to the

beneficiaries who receive the share in the trust property.

The Appellate Tribunal has substantially erred in law in holding that since some or all beneficiaries of the Trust are discretionary Trust, to the extent of share of beneficiary as discretionary Trust, the tax can be charged at the maximum marginal rate under Section 164 and not under Section 161.

However, the option will be available to the assessing officer to resort to the provisions of section 164 in the event the beneficiary of the first level trust are discretionary trust to the extent of their respective shares, but such analogy or the mode would not be available by connecting the beneficiary of second level trust with third level trust even if they are discretionary trust or the shares of the beneficiaries are uncertain and such aspect may arise for consideration only if there is separate assessment of the trustees of second level trust or third level trust.



## Sales Tax

**LD/63/46**

*State of Karnataka*

vs.

*PRO Lab & Ors.*

*January 30, 2015 (SC)*

### **Entry 25 of Schedule VI, of the Karnataka Sales Tax Act, 1957-Processing and supplying of photographs, photo prints and photo negatives**

*Entry 25 of Schedule VI to the Act which makes that part of processing and supplying of photographs, photo prints and photo negatives, which have "goods" component exigible to sales tax is constitutionally valid*

Entry 25 of Schedule VI provides for levy of tax for processing and supply of photographs, photo prints and photo negatives. The constitutional validity of this Entry was challenged on the grounds that (i) the State Legislature does not have any power to impose tax on "services" and (ii) the retrospective effect given to the said Entry was violative of Article 265 of the Constitution being confiscatory in nature. The High Court held this Entry Constitutionally invalid.

The Supreme Court held as follows:

After insertion of clause 29-A in Article 366, the Works Contract which was indivisible one by legal fiction, altered into a contract, is permitted to be

bifurcated into two: one for "sale of goods" and other for "services", thereby making goods component of the contract exigible to sales tax. Further, while going into this exercise of divisibility, dominant intention behind such a contract, namely, whether it was for sale of goods or for services, is rendered otiose or immaterial. It follows, as a *sequitur*, that by virtue of clause 29-A of Article 366, the State Legislature is now empowered to segregate the goods part of the Works Contract and impose sales tax thereupon. It may be noted that Entry 54, List II of the Constitution of India empowers the State Legislature to enact a law taxing sale of goods. Sales tax, being a subject-matter into the State List, the State Legislature has the competency to legislate over the subject.

Keeping in mind the aforesaid principle of law, the obvious conclusion would be that Entry 25 of Schedule VI to the Act which makes that part of processing and supplying of photographs, photo prints and photo negatives, which have "goods" component exigible to sales tax is constitutionally valid.

**Note: Judgment of the Karnataka High Court, set aside.**



## Banking Laws

**LD/63/47**

*Pooja Ravinder Devidasani*

vs.

*State of Maharashtra*

*December 17, 2014 (SC)*

### **Section 138, read with section 141, of the Negotiable Instruments Act, 1881-Dishonour of cheque for insufficiency, etc., of funds in the account**

*Where trade finance facility was extended by finance Company to default Company during six months period in 2008, against which cheques were issued by Company which stood dishonored, much before that in 2005 appellant resigned from the Board of Directors, continuation of criminal proceedings against appellant under Section 138, read with Section 141 would be a pure abuse of process of law and it has to be interdicted at the threshold*

The respondent 2- finance Company had extended trade finance facility to the company in which the appellant was earlier a Director. Several cheques issued by company, in discharge of its liability towards part payment, stood dishonoured for insufficient funds. Respondent 2- finance

Company filed complaints under the N.I. Act against the appellant ex-director and others for dishonor of cheques issued by the company. The Metropolitan Magistrate, took cognisance of the complaints and issued process against the accused (appellant) for the offence punishable under section 138.

The Supreme Court held as follows:

For making a Director of a Company liable for the offences committed by the Company under Section 141 of the N. I. Act, there must be specific averments against the Director showing as to how and in what manner the Director was responsible for the conduct of the business of the Company.

Section 141 raises a legal fiction. By reason of the said provision, a person although is not personally liable for commission of such an offence would be vicariously liable therefor. Such vicarious liability can be inferred so far as a company registered or incorporated under the Companies Act, 1956 is concerned only if the requisite statements, which are required to be averred in the complaint petition, are made so as to make the accused therein vicariously liable for the offence committed by the company. By

verbatim reproducing the wording of the Section without a clear statement of fact supported by proper evidence, so as to make the accused vicariously liable, is a ground for quashing proceedings initiated against such person under Section 141 of the N.I. Act.

In the entire complaint, neither the role of the appellant in the affairs of the Company was explained nor in what manner the appellant is responsible for the conduct of business of the Company, was explained. From the record it appears that the trade finance facility was extended by the Respondent No. 2 to the default Company during the period from 13<sup>th</sup> April, 2008 to 14<sup>th</sup> October, 2008, against which the Cheques were issued by the Company which stood dishonored. Much before that on 17<sup>th</sup> December, 2005 the appellant resigned from the Board of Directors. Hence, we have no hesitation to hold that continuation of the criminal proceedings against the appellant under Section 138 read with Section 141 of the N. I. Act is a pure abuse of process of law and it has to be interdicted at the threshold.

**Note: Judgment of the Bombay High Court, set aside. ■**