

DT CASES FOR 2016

Note : I have written the names of case laws which were decided in year 2015 in bold letters... Try to learn the names of these case laws, as they are latest from exam point of view.

BASIC CONCEPTS

1.) What is the nature of liquidated damages received by a company from the supplier of plant for failure to supply machinery to the company within the stipulated time -- Capital receipt or Revenue receipt?

Ans. : **Capital Receipt** , as the damages were directly and intimately linked with the procurement of capital asset, which led to delay in coming into existence of profit making apparatus. It was not receipt in the course of profit earning process.

2.) Can capital contribution of the individual partners credited to their accounts in the books of the firm be taxed as cash credit in the hands of the firm, where the partners have admitted their capital contribution but failed to explain satisfactorily the source of receipt in their individual hands? [2015 , M. Venkateswara Rao]

Ans. : **No** , Sec.68 directs that if an assessee fails to explain the nature and source of credit entered in books of accounts of any P.Y., the same can be treated as income. In this case, the amount involved is the contribution made by partners to the capital, which is for the business of the firm and it is difficult to treat the pooling of such capital as credit. Hence, Sec.68 can't be invoked. At the most, A.O. can make enquiry against the individual partners and not the firm when the partners have admitted their capital contribution. In the absence of any material to indicate that they are profits of the firm, cash credits can't be assessed in the hands of firm, though may be assessed in hands of individual partners.

INCOMES WHICH DO NOT FORM PART OF TOTAL INCOME

3.) Whether Sec.14A is applicable in respect of deduction, which are permissible under Chapter VI-A?

Ans. : **No** , Sec.14A is applicable only if an income is not included in total income. As per Sec.14A, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to such income which does not form part of total income. Hence, no disallowance can be made u/s 14A in respect of income included in total income in respect of which deduction is allowable u/s 80C to 80U.

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

Ans. : **No** , Sec.12AA(2) : Every order granting or refusing registration u/s12AA(1)(b), shall be passed by registering authority before the expiry of 6 months from the end of the month in which the application was received.

But, the expression 'shall' is not always decisive to ascertain whether the provision is mandatory or not, when public duty is to be performed by public authorities. Further, since consequence for non-adherence of time limit of 6 months is not spelt out in the statute, it cannot be said that passing the order within time limit is mandatory. Hence, there would be no 'deemed registration'.

5.) Where a charitable trust applied for issuance of registration u/s12A within a short time span (9months in this case) after it's formation, can registration be denied by concerned authority on the ground that no charitable activity has been commenced by the trust?

Ans. : **No** , With the money available with the trust, it cannot be expected to carry out the activity of charity immediately. The objects of the trust as mentioned in trust deed have to be taken into consideration by authority for satisfying themselves about genuineness of the trust and not the activities carried on by it. Later on, if it is found from subsequent returns filed by the trust, that it is not carrying on charitable activity, registration may be cancelled or withdrawn by authority.

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

Ans. : **No**. **[Read case no.6 in detail for proper understanding]**

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

Ans. : **No** , Approval of civil court is not mandatory for amendment of trust deed where the settler has given power to the trustees to alter the trust deed, provided all the conditions laid down by the settler are fulfilled and the altered or additional object in the

deed is of charitable nature under the Income Tax act, 1961. The sanction of civil court is required only when there is no such power.

INCOME FROM SALARIES

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

Ans. : **No** , Because the perquisite value has to be computed as per Rule 3 and Rule 3 does not require addition of such notional interest.

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

Ans. : **No** , it's not a standard deduction.

Rule 3(5): In case educational institution is maintained and owned by employer and free or concessional education facility is provided to employees' household in such institution, the cost of education in a similar institution in or near locality shall be taken to be value of perquisite. If cost does not exceed ₹1,000 p.m. per child, perquisite value shall be NIL. Hence, if it exceeds ₹1,000 , whole value shall be taxable in employee's hands.

INCOME FROM HOUSE PROPERTY

10.) Whether the rental income derived from unsold flats which are shown as stock-in-trade in books would be taxable under head PGBP or under head HP, where the actual rent receipts formed the basis of computation of income?

Ans. : **Income from house property** , Irrespective of whether it is the deemed rent or actual rent which forms the basis of computing income from unsold flats held as stock-in-trade, the head under which the income is taxable would be 'Income from H.P.'

11.) Can rental income from the unsold flats of a builder be treated as it's business income merely because the assessee has, in his wealth tax return , claimed that unsold flats were stock-in-trade of his business?

Ans. : **No** , Rental income shall be taxable under 'Income from House property' and hence assessee can claim statutory deduction of 30%. The fact that the said flats have been claimed as not chargeable to wealth tax, treating the same as stock-in-trade, will not affect computation under the Income Tax Act, 1961.

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

Ans. : **No** , Because HUF is not a fictional entity as it comprises of a group of natural persons (family) related to each other. HUF cannot consist of artificial persons like in case of a firm. Sec.23(2) requires self-occupation of H.P. by owner. Owner would include owners. Hence, HUF is entitled to benefit u/s 23(2).

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

Ans. : **No** , Because while lodging is a business, letting out of building on long term lease is not treated as business. Rental income has to be assessed as 'Income from H.P.'.

14.) Can notional interest on interest-free deposit received by an assessee in receipt of a shop let out on rent be brought to tax as 'Business income' or 'Income from House Property' ?

Ans. : **No** , The notional interest is neither assessable as business income nor as income from H.P. Sec.23(1) deals with determining annual letting value of property for computing 'Income from H.P.'. It provides that annual letting value is deemed to be the sum for which property might reasonably be expected to be let out from year to year and not interest on fixed deposit.

PGBP

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

Ans. : **PGBP** , The contract between the assessee and the franchisees contained various conditions ranging from obtaining of permits and licences, maintenance of rooms, common area, garden maintenance, catering, bar, etc. The assessee had not simply leased the land and building but had imposed further conditions as to how the business of franchisees' should be conducted with regard to hotels given on lease. These special conditions were a clear indicator that the assessee continued to be in the business of tourism activities, though not directly but through the franchisees, and received income as franchisee fee. Hence, income earned is in the nature of business income and not income from house property.

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

Ans. : **Yes** , The interest income from the deposits made by assessee is inextricably linked to the business of the assessee and such income, therefore, cannot be treated as income under the head 'Income from other sources'. The margin money requirement was an essential element for obtaining the bank guarantee. If the assessee had not furnished bank guarantee, it would not have got the business contract. Hence, taxable under the head 'PGBP'.

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

Ans. : **Yes** , When the object of the expenditure was not to bring into existence a new asset or to obtain a new advantage, the said expenditure qualifies as 'current repairs' u/s 31. 'Moulds and dies' are not independent of plant & machinery but are parts of plant & machinery. Once the dies are worn out, they had to be replaced so that the machine can produce the product according to business specifications and so as to ensure its performance. Even though the assessee has claimed depreciation in earlier years, the claim of assessee for deduction of expenditure on replacement of moulds and dies as 'current repairs' is justified on the ground that there was no change in the performance of machinery on account of such replacement.

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

Ans. : **No** , Depreciation cannot be denied to the lessor on these grounds. Sec.32 imposes twin requirement of 'ownership' & 'usage for business' as conditions to claim depreciation. Here, the assessee used the vehicles in his leasing business. Actual usage by assessee itself is not mandatory. Secondly, provision creates legal fiction of ownership in favour of lessee only for Motor Vehicle Act and not this Act. Also, ownership of lessor is evident from lease agreement. Hence, both the requirements are satisfied.

19.) What is the eligible rate of depreciation in respect of computer accessories and peripherals under the Income Tax Act, 1961?

Ans. : **60%** , The computer accessories and peripherals such as printers, scanners & server, UPS, etc. form an integral part of the computer system and they cannot be used without the computer. Since, they are part of computer system, they would be eligible for depreciation at the rate of 60% applicable to computers including computer software and not general rate of 15% applicable to plant & machinery.

20.) Can the second provision to Sec.32(1) be applied to restrict the additional depreciation u/s 32(1)(ia) to 50%, if new plant & machinery was put to use for less than 180 days during the Previous year?

Ans. : **Yes** , There is statutory stipulation restricting the allowability of depreciation to 50% of the amount computed u/s 32(1)(iia), where asset is put to use for less than 180 days.

Finance Act, 2015 has inserted third proviso to Sec. 32(1)(ii) to provide that the balance 50% of additional depreciation on new plant & machinery required and used for less than 180 days, which has not been allowed in the year of acquisition and installation, shall be allowed in the immediately succeeding Previous year.

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

Ans. : **Yes** , The intangible assets acquired come under the category 'other business or commercial rights of similar nature' and accordingly eligible for depreciation. The principle of Ejusdem Generis was also applied in this case, i.e., where there are general words following particular and specific words, the meaning of latter words shall be confined to things of same kind.

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

Ans. : **Yes** , 'Any other business or commercial rights of similar nature' in Explanation 3(b) indicates that goodwill would fall under the said expression. In the process of amalgamation, the amalgamated company has acquired a capital right in the form of goodwill because of which market worth of amalgamated company stood increased. Hence, goodwill is an asset under Exp. 3(b) to Sec. 32(1) and depreciation is allowable.

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

Ans. : **Yes** , In this case, by transferring the right to use the name of hospital itself, the previous owner had transferred the goodwill. When goodwill paid was for ensuring retention and continued business in the hospital, it was for acquiring a business & commercial right and was comparable with trademark, franchise, copyright, etc. Hence, entitled to depreciation.

24.) Can EPABX and mobile phones be treated as computers to be entitled to higher depreciation at 60%?

Ans. : **No** , There is no ground to treat communication equipment as computers.

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

Ans. : **Yes** , To tax the income, owner is a person who is entitled to receive income from the property in his own right. The owner need not necessarily be the lawful owner entitled to pass on the title of the property to another. Since, in this case, the assessee has made available all the documents relating to business and also established that she is the beneficial owner, she is entitled to claim depreciation even though not legal owner.

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

Ans. : **Yes**

Assessing officer's contention: A.O. applied Sec.36(1)(ii) and held that if the amount was not paid to directors as commission, the same would have been payable as profits or dividend. Accordingly, assessee company avoided dividend distribution tax u/s 115-O which was otherwise payable. Hence, expenditure should be disallowed.

High Court's final decision: The assessee company, in its commercial wisdom, had agreed to pay a commission for furnishing of guarantee by director employees, which cannot be faulted. A.O. only has to determine whether transactions are real and genuine. It is not within his jurisdiction to impose his views as regards necessity or quantum of expenditure. As regards sec.36(1)(ii), recipient directors were not entitled to receive commission in lieu of bonus or dividend. Dividend is paid to all shareholders and recipient directors were not the only shareholders of the company. The payment of commission, hence, cannot be taken as payment of dividend, since dividend is paid to all the shareholders and not to select shareholders. Hence, High court directed rectification of disallowance of commission paid.

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

Ans. : **Yes** , To claim deduction u/s 36(1)(iii), following conditions are to be satisfied : (i)Interest should have been payable; (ii)There should be a borrowing; (iii)Capital must have been borrowed or taken for business purposes. The High court observed that the assessee had deep business interest in the existence of subsidiary and therefore, repaid instalments of loan to financial institutions. Such loans were given for the purpose of business. Hence, claim for deduction of interest by assessee-holding company is allowable.

28.) Can employees' contribution to Provident Fund & Employee's State Insurance be allowed as deduction where the assessee-employer had not remitted the same on or before 'due date' under the relevant Act but remitted the same on or before due date for filing return of income u/s 139(1)?

Ans. : **No** , Sec.43B(b) pertaining to employer's contribution cannot be applied with respect to employees' contribution which is governed by Sec.36(1)(va). The time limit for remitting employees' contribution is the 'due date' prescribed under PF&ESI Act. There is no provision for applying the extended time limit provided u/s 43B for remittance of employees' contribution. Hence, not deductible while computing business income, even though remittance has been made before due date of filing return of income.

A contrary view was expressed by Uttarakhand H.C. in 2013 allowing the deduction, if remittance made before due date of filing Return of income.

29.) Is expenditure incurred for construction of transmission lines by the assessee for supply of power to UPPCL (Uttar Pradesh Power Corporation Ltd.) by the assessee deductible as revenue expenditure? [2015, Dharmpur Sugar (P) Ltd.]

Ans. : **Yes** , The expenditure which was incurred by the assessee in the laying of transmission lines was clearly on the revenue account. The transmission lines, upon erection, vested absolutely in UPPCL. The expenditure incurred by assessee was for aiding efficient conduct of it's business since the assessee had to supply electricity to it's sole customer UPPCL. The assessee had not acquired a capital asset or any enduring benefit or advantage. This was not an advantage of capital nature.

30.) Where the assessee-company came into existence on bifurcation of a joint Venture Company(JVC), can the amount paid by it to the JVC for use of customer database and transfer of trained personnel be claimed as revenue expenditure?

Ans. : **Yes , Revenue Expenditure.**

The expenditure incurred for use of customer database did not result in acquisition of capital asset as it was incurred for use and not acquisition. The assessee got the right to use the database and the company which provided the database was not precluded from using it. Hence, revenue expenditure.

As regards payment for transfer of trained personnel, the assessee-company made payment towards expenditure incurred for their training and recruitment. Such expenditure was in revenue field and therefore, payment made by assessee-company as per agreement to save expenditure was also revenue in nature. Hence, it's not capital expenditure though the benefit may be of enduring nature.

31.) What is the nature of expenditure incurred on glow-sign boards displayed at dealer outlets -- Capital or Revenue?

Ans. : **Revenue** , (i)Expenditure does not bring into existence an asset or advantage for enduring benefit. (ii)Glow sign board is not an asset of permanent nature. It has a short life. (iii)Material used in boards decay with effect of weather and hence, require

replacement. So, assessee has to incur expenditure almost every year. (iv) Assessee incurred expenditure with the object of facilitating business operation.

32.) Would expenditure incurred for issue and collection of convertible debentures be treated as revenue expenditure or capital expenditure?

Ans. : **Revenue expenditure.**

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

Ans. : **Yes** , Since the feasibility studies were conducted by assessee for the existing business with common administration & common fund and the studies were abandoned without creating new asset, expense were of revenue nature.

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

Ans. : **Yes** , Expenditure incurred by assessee for commercial expediency relates to carrying on of business and for facilitating trade operation & enabling the management to conduct business more efficiently and profitably. The expenditure is of such nature that a prudent businessman may incur for his business. Hence, the expenses are solely intended for furtherance of enterprise and hence, revenue expenditure.

35.) Is Circular No. 5/2012 dated 1/8/2012, disallowing expenditure incurred on freebies provided by pharmaceutical companies to medical practitioners, in line with Exp. to Sec.37(1), which disallows expenditure which is prohibited by law?

Ans. : **Yes**, in line with Exp. to Sec.37(1).

As per Exp. to Sec.37(1), it is clear that any expenditure incurred by assessee for any purpose which is prohibited by law shall not be deemed to have been incurred for purpose of business or profession. If assessee satisfies Assessing authority that expenditure is not in violation of regulations framed by Medical Council, then it may legitimately claim deduction , but burden of proof is on assessee.

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

Ans. : **Disallowed** , As per Indian Medical Council Regulations, 2002, no physician shall give, solicit, receive or offer to give, solicit or receive, any gift, gratuity, commission or bonus in consideration of a return for referring any patient for medical treatment. The

demanding as well as paying of such commission is bad in law. It is not a fair practice and is opposed to public policy and should be discouraged.

Also, Sec.37(1) does not entitle deduction of payments made in contravention of law or opposed to public policy. Hence, commission not allowable as business expenditure.

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

Ans. : **No** , Because there was no evidence on record that any person was appointed as trainee or sent to abroad for higher studies. There was no such scheme. Hence, there was no nexus between education expenditure incurred abroad for director's son and business of assessee company. Hence, not deductible.

38.) Can the expenditure incurred on heart surgery of an assessee, being a lawyer by profession, be allowed as business expenditure u/s 31 by treating it as current repairs considering heart as plant & machinery or u/s 37 by treating it as expenditure incurred wholly & exclusively for purpose of business/profession?

Ans. : **No** , A healthy and functional heart is necessary for human being irrespective of vocation or profession he is attached with. It cannot be said that heart is used as an exclusive tool for purpose of professional activity by the assessee.

(i)The heart has to be included in the Balance sheet and assessee will also face difficulty in arriving at cost of acquisition of such asset for showing in books. Hence, cannot be said to be plant for business or profession and not allowed.

(ii)u/s 37, the expenditure must be incurred wholly & exclusively for purpose of assessee's business. Hence, no direct nexus between expense on surgery and professional work. Hence, not allowable.

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

Ans. : **No** , Since these payments are illegal in nature. Any payment made towards the security of business is an allowable expenditure but here the payment made to police amounts to bribe and payment made to gundas as precautionary measure for not causing any disturbance is illegal. Hence, not allowed.

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

Ans. : **No** , The amount paid to compound an offence is obviously a penalty and hence, does not qualify for deduction u/s 37. Merely describing the payment as compounding fee/regularization fee would not alter the character of payment. It is the actual character of payment and not its nomenclature that has determined the disallowance of such expenditure. The principle of substance over form has been applied here , for disallowing expenditure.

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

Ans. : **No** , Assessing officer is only required to ensure that --- (i) remuneration is paid to working partners mentioned in partnership deed; (ii) terms & conditions of deed provide for payment of remuneration to working partners; & (iii) remuneration is within limits prescribed u/s 40(b)(v). If these complied, he can't disallow any part of remuneration u/s 40A(2)(a).

42.) Can unpaid electricity charges be treated as 'fees' to attract disallowance u/s 43B?

Ans. : **No** , Sec.43B do not include electricity charges. Hence, non-payment of electricity charges would not attract disallowance u/s 43B since such charges cannot be termed as fees. Hence, deduction is allowable.

CAPITAL GAINS

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

Ans. : The character of a transaction cannot be determined solely on the application of any abstract rule, principle or test but must depend upon all facts and circumstances of the case. The facts that may be considered while determining the same are magnitude & frequency of buying and selling of shares by assessee, period of holding of shares, ratio of sales to purchases and total holdings, etc. Mere classification of shares in books is not relevant for determining the nature for income-tax purposes.

In case of Foreign Institutional Investors(FII), profit on transfer of security would always be taxable as capital gains even if nature of such security in the hands of FII is stock-in-trade.

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

Ans. : **From date of purchase** , The difference between short term & long term is the period over which the property has been held by assessee and not the nature of title over the property. Conversion of rights of lessee from leasehold to freehold is only by way of improvement of rights over property. It would not affect taxability of gain. Hence, if more than 36 months → Long term capital asset.

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

Ans. : **No** , Period of holding has to be reckoned from the date of dissolution of firm. In this case, the assessee partner has sold the property within 3 days of acquiring it on dissolution. Hence, the gain has to be treated as STCG.

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

Ans. : The right to subscribe comes into existence only when the rights offer is announced by the company. Hence, for determining the LTCG / STCG, the period of holding would be from the date on which such right to subscribe for additional shares comes into existence upto the date of renunciation of such right.

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

Ans. : **From the year in which first acquired by previous owner.**

As per 'deemed holding period fiction' created by the statute , the assessee is deemed to have held the capital asset from the year the asset was held by previous owner. Therefore, for determining the indexed cost of acquisition u/s 48, assessee must be treated to have held the asset from the year it was first held by previous owner and accordingly CII for year it was first held by previous owner would be considered for determining indexed Cost of Acquisition.

Indexed COA= [CII for the P.Y. in which asset transferred / CII for the P.Y. in which first held by previous owner] X COA

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

Ans. : **Yes** , Assessee is entitled to exemption of capital gains in respect of investment in the residential house, comprising of independent residential units handed over to the assessee. Sec.54 & 54F use the expression 'residential house' and not 'residential unit'.

49.) Would an assessee be entitled to exemption u/s 54 in respect of purchase of 2 flats, adjacent to each other and having a common meeting point?

Ans. : **Yes** , u/s 54, assessee is entitled to exemption for investment in a residential house. Restriction is regarding investment being made in one residential house, and not in one unit of a residential house. Also, where the flats are situated side by side and builder had effected necessary modification to make it as one unit, assessee would be entitled to exemption u/s 54 in respect of investment in both the flats, despite the fact that they were purchased by separate sale deeds. Hence, assessee was entitled to investment in both the flats purchased by him, since they were adjacent to each other and had a common meeting point.

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

Ans. : **No** , Merely because the assessee's son was shown in the sale deed as co-owner did not make any difference because the capital gains were not in any way misused for any other purpose contrary to the provisions of law. Hence, exemption allowed.

51.) Can exemption u/s 54F be denied on the ground that the new residential house is purchased by the assessee exclusively in the name of his wife?

Ans. : **No** , Sec.54F does not require purchase of new residential house property in the name of the assessee himself. It only requires the assessee to purchase or construct a residential house. Also, the assessee had not purchased the new house in the name of a stranger or somebody who is unconnected with him. The entire investment for purchase of new house had come out of sale proceeds of capital asset of the assessee and there was no contribution from wife. High court applied the rule of purposive construction and allowed exemption.

52.) In case of a house property registered in joint names, whether the exemption u/s 54F can be allowed fully to the owner who has paid whole of the purchase consideration of the House property or will it be restricted to his share in the H.P.?

Ans. : **Whole allowed** , Sec.54F mandates that the house should be purchased by assessee but it does not stipulate that the house should be purchased only in the name of assessee. In this case, H.P. was purchased in his name and his wife's name. The conditions stipulated in Sec.54F stand fulfilled and the entire exemption shall be allowed

to assessee as he contributed the whole amount and there was no contribution from his wife.

53.) Can exemption u/s 54F be denied to the assessee in respect of investment made in construction of a residential house, on the ground that the construction was not completed within 3 years after the date on which transfer took place, on account of pendency of certain finishing work like flooring, electrical fittings, fittings of door shutter, etc.?

Ans. : **No** , Sec.54F requires investment either in purchase of residential house or construction of residential house within the stipulated period. Merely because the construction was not completed in all respects and possession could not be taken within the stipulated period would not disentitle the exemption u/s 54F. In this case, assessee has taken possession of residential building and is living in the said premises despite the pendency of a few works. Hence, entitled to exemption.

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

Ans. : **Yes** , The deeming fiction created by Sec.50 that capital gain arising on transfer of a depreciable asset shall be treated as capital gain arising on transfer of short term capital asset is only for the purpose of Sec.48 & 49 and not for any other section. Sec.54F being an independent section will not be bound by Sec.50. The depreciable asset if held for more than 36 months shall be a long term capital asset and hence, assessee can claim exemption u/s 54F.

55.) Where Stamp Duty Value u/s 50C has been adopted as full value of consideration, can the reinvestment made in acquiring a residential property, which is in excess of actual net sale consideration, be considered for the purpose of computation of exemption u/s 54F, irrespective of source of funds for such reinvestment?

Ans. : **Yes** , When capital gain is assessed on notional basis as per Sec.50C and the higher value, i.e., Stamp Duty Value has been adopted as full value of consideration, entire amount reinvested in residential house within the prescribed period should be considered for exemption u/s 54F, irrespective of source of funds for reinvestment.

[In this case, Sale consideration : ₹20lacs , Reinvestment : ₹20lacs + ₹4lacs (agricultural income) , Value adopted as full value of consideration : Stamp duty value ₹36lacs.

Hence, Full ₹24lacs exempted u/s 54F.]

56.) Can exemption u/s 54EC be denied on account of bonds being issued after 6months of the date of transfer even though the payment for the bonds was made by assessee within 6months period?

Ans. : **No** , u/s 54EC, capital gains have to be invested in a long-term specified asset within a period of 6months from the date of transfer. The date of investment by assessee must be regarded as date on which payment is made. Here, the assessee has made payment within 6months and the same is reflected in the bank account & a receipt has been issued as on that date. Exemption can't be denied merely because bond was issued after 6months expiry or date of allotment was after 6months expiry.

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

Ans. : **Yes** , Gains arising on sale of those shares as investments by dealer-assessee (i.e., Sale price - FMV on date of conversion) were to be assessed under the head 'Capital gains' & not under 'PGBP'.

INCOME FROM OTHER SOURCES

58.) What are the tests to determine "substantial part of business" of lending company for the purpose of application of exclusion provision u/s 2(22)?

Ans. : U/s 2(22), dividend does not include any advance or loan made to a shareholder by a company in the ordinary course of business, where lending of money is substantial part of business of company.

Sometimes, a portion which contributes a substantial portion of turnover though small portion of profits is substantial. Sometimes, a small portion in turnover but creating large profits is substantial. Sometimes, it may be portion of manpower or capital employed, etc. In this case, 42% of total assets of lending company were deployed by it by way of loans & advances. Further, if income earned by way of interest is excluded, other business had resulted in a net loss. These factors were considered in concluding that money lending was a substantial part of business of company. Hence, money given by way of advance/loan to assessee had to be excluded from definition of dividend.

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

Ans. : **No** , There was no money paid by way of advance or loan to the shareholder who has substantial interest in the company. Further, the amount spent was towards repairs & renovation of premises owned by assessee but occupied by the company as lessee. Repairs & renovation expense cannot be brought within the definition of advance or loan given to the shareholder having substantial interest in the company, though he is the owner of the premises. It cannot be treated as payment by the company on behalf of shareholder or for the individual benefit of such shareholder. If held in such manner, it is a mere assumption not tenable in law. Hence, not deemed dividend.

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

Ans. : **No** , Advance or loan u/s 2(22)(e) means those advances or loans which a shareholder enjoys simply on account of being a beneficial owner of shares holding not less than 10% of voting power. In case such loan/advance is given to shareholder as a consequence of any further consideration which is beneficial to company received from such shareholder, it cannot be said to be deemed dividend. Gratuitous loan/advance given by company comes within the purview of Sec.2(22)(e) but not where loan/advance is given in return to advantage to the company.

In this case, shareholder permitted his property to be mortgaged to bank for enabling company to take benefit of loan. In return, company gave advance to shareholder as consideration. Hence, not deemed dividend.

61.) Would the provisions of deemed dividend u/s 2(22)(e) be attracted in respect of financial transactions entered into in the normal course of business?

Ans. : **No** , Because Sec.2(22)(e) does not apply in case of advance made in the course of assessee's business as a trading transaction.

62.) Can winnings of prize money on unsold lottery tickets held by the distributor of lottery tickets be assessed as business income and be subject to normal rates of tax instead of rates prescribed u/s 115BB?

Ans. : **No** , Unsold lottery tickets cease to be stock-in-trade of the distributor because after the draw, those tickets are unsaleable and have no value. All prizes from unsold tickets and unclaimed prizes shall be property of the organizing agent. The receipt of prize money is in capacity of a lottery ticket holder and not lottery ticket distributor. Further, winnings from lotteries are assessable under special provisions of Sec.115BB, irrespective of the head in which they fall. Hence, rate of tax will be 30%.

SET OFF & CARRY FORWARD OF LOSSES

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

Ans. : **No** , The erstwhile partnership firm was dissolved. And the loss cannot be carried forward by successor sole proprietor, since it is not a case of succession by inheritance. Hence, sole proprietor is not entitled to set off the loss of erstwhile partnership firm against his income. Had the partnership firm not been dissolved on death of partners and a reconstituted partnership firm formed by legal heirs, it would have been case of succession by inheritance where loss is allowed to be carried forward u/s 78(2).

DEDUCTIONS FROM GROSS TOTAL INCOME

64.) Can unabsorbed depreciation of a business of an industrial undertaking eligible for deduction u/s 80-IA be set off against income of another non-eligible business of assessee?

Ans. : **Yes** , The deeming provision of a particular section cannot over-ride the provisions of another section. Hence, Sec.80-IA becomes insignificant, since there is no profit from which this deduction can be claimed. It is thereafter, Sec.70(1) comes into play, whereby assessee is entitled to set off losses from one source against income from another source under the same head. Hence, assessee was entitled to benefit of set off of loss of eligible business against profits of non-eligible business. But, once set off is allowed u/s 70(1) against income from another source, deduction to such extent is not possible in any subsequent A.Y. So, loss set off u/s 70(1) has to be first deducted while computing profits eligible for deduction u/s 80-IA in subsequent year.

Example :- 1 company has 2 units. [Unit A (eligible business) having profits before depreciation ₹100lacs & depreciation ₹120lacs] & [Unit B (non-eligible business) having profit ₹70lacs]. Hence, in current A.Y., Unit A : $(100-120 = -20)$, i.e., loss of 20lacs set off from profit of Unit B $(70-20=50)$ profit left). If next A.Y.'s profit is ₹200lacs for Unit A & ₹80lacs for Unit B, then eligible deduction for Unit A u/s 80-IA = $(200-20=180)$.

65.) Can freight subsidy arising out of scheme of Central government be treated as "profit derived from business" for the purposes of Sec.80-IA?

Ans. : **No** , since it is not an operational profit. The source was not the business of assessee but the scheme of C.Govt. Words 'derived from' are narrower as compared to words 'attributable to'. Hence, freight subsidy cannot be treated as profits derived from business u/s 80-IA.

66.) Can duty drawback be treated as profit derived from business of industrial undertaking to be eligible for deduction u/s 80-IB?

Ans. : **No** , Sec.80-IB provides for allowing of deduction in respect of profits & gains derived from eligible business. However, duty drawback or incentive profits are not profits derived from eligible business u/s 80-IB. They belong to the category of ancillary profits of such undertaking. Profits derived by way of incentives such as DEPB/ Duty drawback cannot be credited against cost of manufacture of goods debited in the P&L account and they do not fall within the expression 'profits derived from industrial undertaking' u/s 80-IB.

67.) Would grant of transport subsidy, interest subsidy and refund of excise duty qualify for deduction u/s 80-IB?

Ans. : **Subsidies → No & Refund of excise duty → Yes.**

Sec. 80-IB provides for deduction in respect of profits & gains derived from business. There should be direct nexus between the generation of profits and source of profits. The transport & interest subsidies had no direct nexus with the profits derived from the industrial activity of the business. But, the payment of Central excise duty had direct nexus with manufacturing activity and hence, refund also had a direct nexus.

68.) Does income derived from sale of export incentive qualify for deduction u/s 80-IB?

Ans. : **No** , Don't qualify for deduction as it cannot be said to be income 'derived from' industrial undertaking.

69.) Would the procurement of parts & assembling them to make windmill fall within the meaning of 'manufacture' & 'production' to be entitled to deduction u/s 80-IB?

Ans. : **Yes** , Manufacturing means new & different goods emerge having a distinctive name, use & character. Production means bringing into existence new goods by a process, which may or may not amount to manufacture. It also takes in all the by-products, intermediate products and residual products, which may emerge in the course of manufacture of goods. Here, parts procured could not be treated as windmill individually. Those parts have distinctive names and only when assembled together, they transform into an ultimate product 'windmill'. Hence, it amounts to manufacture as well as production to qualify for deduction u/s 80-IB.

70.) Can an industrial undertaking engaged in manufacturing or producing articles or things treat the persons employed by it through agency (including contractors) as 'workers' to qualify for claim of deduction u/s 80-IB?

Ans. : **Yes** , One of the conditions to claim deduction u/s 80-IB is that it should employ 10 or more workers in a manufacturing process carried on with the aid of power, or 20 or more workers in a manufacturing process carried on without the aid of power. 'Worker' is not defined and hence, it is referable to persons employed by assessee directly or by or through agency (including a contractor). The employment of 10 or more workers is what is relevant and not mode & manner in which the workers are employed by assessee.

71.) Does the period of exemption u/s 80-IB commence from the year of trial production or year of commercial production? Would it make a difference if sale was effected from out of the trial production?

Ans. : **Year of commercial production** ,i.e., when the final product to the satisfaction of manufacturer has been brought into existence and is fit for marketing. In this case, since the assessee had effected sale in trial period, it had crossed the stage of trial production and final product had been manufactured & sold. The purpose of sale in trial period to obtain registration of excise/sales tax is not material. With the sale, marketable quality was established. Hence, trial period sale has to be considered for allowing deduction for 5 years u/s 80-IB.

72.) Can an assessee who has claimed deduction u/s 80-IB in the initial years, start claiming deduction thereunder for the remaining years during the period of eligibility, if the conditions are satisfied?

Ans. : **Yes** , There's nowhere stipulated that claim for deduction u/s 80-IB has to be made from the 1st year of qualification of deduction. Hence, deduction for remaining years can be claimed, if conditions u/s 80-IB are satisfied.

ASSESSMENT OF VARIOUS ENTITIES

73.) Where land inherited by 3 brothers is compulsorily acquired by the State Govt., whether the resultant capital gain would be assessed in the status of AOP or in their individual status?

Ans. : **Individual status** , An AOP could be formed only when 2 or more persons voluntarily combine together for certain purposes.

In this case, the property came to the assessee's possession through inheritance, i.e., by operation of law. It is not a case where any AOP was formed by volition of parties. Further, the income earned in the form of interest is not because of any business venture of 3 assessee's, but is the result of act of Govt. in compulsorily acquiring the said land. Thus, income from land inherited by legal heirs is taxable in their individual hands & not in the status of AOP.

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

Ans. : **HUF property** , When the property came to the hands of assessee, it was not his self-acquired property, it was property belonging to his HUF. The assessee had given a portion of the property to his wife without a registered document, which is possible only if property is a HUF property. If such property is treated as a self-acquired property, then assessee would have been able to give the portion of the property to his wife only by registered document.

75.) Under which haed of income is rental income from plinths inherited by individual co-owners from their ancestors, taxable -- 'Income from H.P.' OR 'Income from other sources'? Further, would such income be assessable in the hands of individual co-owners or in the hands of AOP?

Ans. : **'Income from other sources'** , because income from plinths is not income from property consisting of land or building appurtenant thereto.

Secondly, it's **not assessable in the hands of AOP** because for an AOP, individual co-owners should have joined their resources & property should have been commonly managed. In this case, co-owners inherited the property & having proportionate share. Hence, not an AOP.

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

Ans. : **No , Interest is taxable.** Principle of mutuality ends the moment the club deposits the amount with it's corporate members ,i.e., banks & financial institutions, with the sole aim of earning interest. Also, the corporate members have treated the club as regular customer in this case, accepting deposits in normal course of business. Hence, interest income is not exempt.

77.) Can transfer fees received by a co-operative housing society from it's incoming & outgoing members be exempt on the ground of principle of mutuality?

Ans. : **Yes** , Transfer fees received by a co-operative society is not taxable since the pre-dominant activity of such co-operative society is maintenance of property of society and there is no taint of commerciality, trade or business. Charging of transfer fees had no element of trading or commerciality. Also, it cannot be treated as business income u/s 28(iii) which provides that income derived by a trade professional or similar association from specific services performed for it's members shall be treated as business income, because co-operative housing society is not a trade or professional association.

78.) Would Non-resident match referees & umpires in the games played in India fall within the meaning of 'sportsmen' to attract taxability under the provisions of Sec.115BBA, & consequently attract the TDS provisions u/s 194E in the hands of payer?

Ans. : **No** , u/s 194E, person should be N.R. sportsperson or N.R. sports association or institution whose income is taxable as per provisions of Sec.115BBA. Umpires & match referees can be described as professional or technical persons who render professional or technical services & hence, not covered under above sections. Also, for Sec.194J, match referees & umpires are considered as professionals & TDS is attracted only when deductee is resident individual. Hence, neither covered u/s 194E nor 194J. Since, the income has accrued & arisen to India to N.R. umpires & match referees, TDS provisions u/s 195 would be attracted and tax would be deductible.

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

Ans. : **Yes** , Payment of remuneration to working partners is allowed as deduction if it is authorised by the partnership deed and is subject to overall ceiling limits specified in Sec. 40(b)(v). No deduction will be admissible unless the partnership deed either specifies the amount of remuneration payable to each individual working partner or lays down the manner of quantifying such remuneration. In a given year, partners may decide to invest certain amount of profits into other ventures & receive less remuneration than that which is permissible, but nothing debars them from claiming maximum amount of remuneration payable.

80.) Can interest u/s 234B & 234C be levied where a company is assessed on the basis of book profits u/s 115JB?

Ans. : **Yes** , u/s 115JB, where tax payable on total income is less than 18.5% of book profit of company, book profit would be deemed to be total income & tax is payable @ 18.5%. Since in such cases, book profit is deemed to be total income, hence, as per sec.207, tax shall be payable in advance in respect of such book-profit also. Hence, interest u/s 234B & 234C shall be payable on failure to pay advance tax in respect of tax payable u/s 115JB.

81.) Can LTCG exempted by virtue of Sec. 54EC be included in book profit computed u/s 115JB?

Ans. : **Yes** , Capital gain u/s 54EC will form part of Book profits.

As the LTCG are part of profits included in P&L account, capital gains cannot be excluded unless provided. Hence, LTCG so exempt u/s 54EC would be taken into account for computing book profits u/s 115JB, since Explanation 1 to Sec.115JB does not provide for

such deduction. Even LTCG exempt u/s 10(38) is included for computation of book profit u/s 115JB.

INCOME-TAX AUTHORITIES

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

Ans. : **No** , Sec.132B(1)(i) uses the expression 'the amount of any existing liability' & 'the amount of liability determined'. The words 'existing liability' postulates a liability that is crystallized by adjudication; likewise, 'a liability is determined' only on completion of the assessment. Until the assessment is complete, it cannot be postulated that a liability has been crystallized.

83.) Where no proceeding is pending against a person, can the A.O. call for information u/s 133(6), which is useful or relevant to any enquiry, with the permission of Director or Commissioner?

Ans. : **Yes** , A.O. has been empowered to requisition information which will be useful for or relevant to any enquiry or proceedings under the Income Tax Act, 1961 in the case of any person. However, income tax authorities below the rank of Director or CIT can exercise the power in respect of an enquiry in case where no proceeding is pending, only with prior approval of Director or CIT. Hence, notice could be validly issued by assessing authority u/s 133(6).

84.) Is the requirement to grant a reasonable opportunity of being heard, stipulated u/s 127(1), mandatory in nature?

Ans. : **Yes , wherever it is possible to do so.**

U/s 127(1), income tax authority may give an opportunity of being heard to the assessee, & after recording reasons for doing so, transfer any case from 1 or more A.O. subordinate to him to any other A.O. subordinate to him. The word 'may' used should be read as 'shall' & hence becomes mandatory. Reasonable opportunity can be dispensed with in a case where it is not possible to provide such opportunity. In such a case also, authority should record reasons for making transfer, even though no opportunity was given to assessee.

85.) Does CBDT have the power u/s 119(2)(b) to condone delay in filing Return of income?

Ans. : **Yes** , Sec.119(2)(b) empowers CBDT to authorise any income tax authority to admit an application or claim for any exemption, deduction, refund or any other relief under

the Act after the expiry of period specified, to avoid genuine hardship in any case. Claim for carry forward of loss in loss return which is the issue in this case, is relatable to claim arising under category of any other relief. There was delay of one day in filing of return due to the fact assessee was sent from 1 room to another and by the time he reached the room where his return was to be accepted, the counter has been closed. Hence, there was sufficient reason for delay & CBDT can condone delay.

ASSESSMENT PROCEDURE

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

Ans. : **Yes** , as it does not require return of loss to be filed for carry forward of unabsorbed depreciation. It is governed by Sec.32(2) where unabsorbed depreciation becomes part of next year's depreciation allowance & is allowed to be set off. Sec.80 & Sec.139(3) applies to carry forward of business loss and not unabsorbed depreciation.

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

Ans. : **No** , A.O. has no power to entertain a fresh claim made by assessee after filing of original return except by way of filing a revised return u/s 139(5). There is no provision to enable an assessee to revise his income by filing a revised statement of income and this is of no value for A.O. for assessment purposes.

88.) Is a person having income below taxable limit, required to furnish his PAN to the deductor as per the provisions of Sec.206AA, even though he is not required to hold a PAN as per u/s 139A?

Ans. : **No** , Sec.139A does not require a person having income less than maximum exemption limit to hold PAN. Sec. 206AA requires every person to furnish PAN (to the deductor) who is entitled to receive any sum on which tax is deductible at source. In case he files Form 15G u/s 197A, he is required to furnish PAN to seek exemption. Hence, both contradict each other. So, in order to avoid undue hardship caused to small investors who become liable to pay tax at higher rate if PAN is not furnished, Sec.206AA has been made inapplicable in case of persons having income below maximum exemption limit. No one can insist them for furnishing PAN u/s 197A.

89.) Can A.O. reopen an assessment on the basis of merely a change in 'opinion'?

Ans. : **No** , **Formation of a reason to believe is necessary.** The existence of tangible material is essential to safeguard against an arbitrary exercise of this power. Hence, assessment if reopened u/s 147 on the basis of mere change in opinion, it's invalid.

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

Ans. : **No** , The assessee had disclosed full details in the return of income in the matter of it's dealing in stocks & shares. There was no failure on the part of assessee to disclose material facts. There is nothing new which has come to the notice of A.O. The accounts had been furnished when called upon. Hence, re-opening of assessment by A.O. is clearly a change of opinion & therefore, order of reopening assessment is not valid.

91.) Can the A.O. reassess issues other than the issues in respect of which proceedings were initiated u/s 147 when the original 'reason to believe' on basis of which the notice was issued ceased to exist?

Ans. : **No** , As per Sec.147, A.O. may assess or re-assess such income and also any other income chargeable to tax which has escaped assessment & which comes to his notice in the course of proceedings under this section. Also, as per Explanation 3 to Sec.147, A.O. may assess the income which has escaped assessment & which comes to his notice subsequently in the course of proceedings u/s 147 even though said issue did not find mention in the reasons recorded in notice u/s 148.

The words 'and also' used in Sec.147 are 'conjunctive & cumulative with' and not 'in alternative to' the part 'such income' used here. Hence, if the income, the escapement of which was the basis of formation of 'reason to believe' is not assessed or reassessed, it would not be open to A.O. to independently assess only that income which comes to his notice subsequently in the course of proceedings u/s 147. If he intends to do so, a fresh notice u/s 148 would be necessary. [Ranbaxy Laboratories Ltd.]

CONTRARY VIEW

H.C. noted that Explanation 3 to Sec.147 nowhere postulates or contemplates that the A.O. cannot make any additions on any other ground unless some addition is made on the basis of the original ground for which re-assessment proceeding was initiated. Hence, held that even though no addition is made on the original grounds which formed the basis of initiation of re-assessment proceedings, A.O. is empowered to make additions on another ground for which re-assessment notice might not have been issued but which came to his notice subsequently during the course of proceedings for re-assessment. [Mehak Finvest P Ltd.]

92.) Does the finding or direction in an appellate order that income relates to a different A.Y. empower reopening of assessment for that A.Y., irrespective of the expiry of the 6y time limit?

Ans. : **Yes** , u/s 149(1)(b), the time limit for issue of notice u/s 148 is 6y from the end of relevant A.Y., where the income chargeable to tax which has escaped assessment amounts to or is likely to amount to ₹1lac or more for that year. Sec.150(1) states that notwithstanding anything contained in Sec.149, notice u/s 148 may be issued at any time for the purpose of making an assessment or re-assessment or re-computation in consequence of or to give effect to any finding or direction in an appellate or revisionary order. Hence, the order is not barred by limitation.

93.) Is initiation of re-assessment beyond a period of 4y on the basis of subsequent Tribunal & H.C. ruling valid, if there is no failure on the part of the assessee to disclose fully and truly all material facts?

Ans. : **No** , In terms of the proviso to Sec.147, where any assessment is sought to be opened beyond a period of 4y from the end of relevant A.Y., 2 conditions have to be fulfilled cumulatively. The first condition is that there must be reason to believe that income has escaped assessment. The second condition is that such escapement of income should have arisen due to failure on the assessee's part to fully & truly disclose all material facts required for assessment. Even a subsequent change of law cannot be taken as income escaping assessment for triggering re-assessment provisions beyond 4y from the end of A.Y. unless there was a failure on the part of assessee to disclose fully & truly all material facts. Hence, not valid.

94.) Is recording of satisfaction & quantification of escaped income a pre-condition for issuing notice u/s 148 after 4y from the end of relevant A.Y.? [2015, Amarnath Agrawal]

Ans. : **Yes** , For issuance of notice u/s 148 after a period of 4y , 2 conditions must be satisfied; (i) escapement of income (ii) omission or failure on the part of the assessee to disclose fully & truly all material facts necessary for his assessment.

U/s 149(1)(b), it is imperative for the A.O., in his reasons, to state that the escaped income is likely to be ₹1 lakh or more for initiating re-assessment proceedings after 4y. In this case, the reasons recorded by A.O. did not indicate any failure in part of assessee to disclose fully & truly material facts; it also did not indicate the quantum of escapement of income exceeds ₹1 lakh. Hence, issue of notice u/s 148 after 4y time period is not valid.

95.) In case of change of incumbent of an office, can the successor A.O. initiate re-assessment proceedings on the ground of change of opinion in relation to an issue which the predecessor A.O., who had framed the original assessment, had already applied his mind and come to a conclusion?

Ans. : **No** , A.O. has the power only to re-assess and not to review. The reasons recorded themselves indicated that the successor A.O. had merely recorded a different opinion in relation to an issue to which the A.O., who had framed the original assessment, had

already applied his mind & come to a conclusion. Hence, notice of re-assessment was not valid on mere change of opinion. Establishment of 'reason to believe' is important.

96.) Can the A.O. issue notice u/s 154 to rectify a mistake apparent from record in the intimation u/s 143(1), after issue of a valid notice u/s 143(2)?

Ans. : **No** , The scope of proceedings u/s 143(2) is wider than the power of rectification u/s 154. A change can be done in the assessment u/s 143(3) & not by exercising the power u/s 154 to rectify the intimation issued u/s 143(1). If issue of notice u/s 154 is permitted to rectify the intimation issued u/s 143(1), then it would lead to duplication of work and wastage of time.

97.) Would doctrine merger apply for calculating the period of limitation u/s 154(7)?

Ans. : **Yes.**

Issue :- Whether time limit of 4y as per Sec.154 would apply from the date of original assessment order or the order of Appellate authority?

Conclusion :- Once an appeal against order passed by an authority is preferred and is decided by appellate authority, order of A.O. merges with the order of appellate authority. After merger, the order of original authority ceases to exist & order of appellate authority prevails. Thus, period of limitation of 4y has to be counted from the date of order of Appellate authority.

APPEALS & REVISION

98.) Should the 4y time limit for rectification of order by the Tribunal under Sec.254(2) be reckoned from the date of it's order or from the date of receipt of order by the assessee?

Ans. : **From the date of receipt of order by the assessee.**

The expression 'order' means an order, of which the affected party has actual or constructive notice. The right to make an application for revision is given to an assessee against an order, & that right can only be effectively exercised if the party affected had knowledge, either actual or constructive of that order. The effective right to appeal against the order or to seek rectification could be exercised only when the affected party gets to know of the order.

99.) Can an assessee, objecting to the re-assessment notice issued u/s 148, directly approach the High Court in the normal course contending that such re-assessment proceedings are apparently unjustified and illegal?

Ans. : **No** , When a notice u/s 148 is issued, the proper course of action for the notice is to file a return and if he so desires, to seek reasons for issuing notices. The A.O. is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and A.O. is bound to dispose off the objections by passing a speaking order. It will not be proper & appropriate to permit and allow the petitioner to bypass and forgo the procedure, since the said procedure has been almost universally followed and has helped cut down litigation & crystallize the issues.

100.) Should time limit u/s 263 to be reckoned with reference to the date of assessment order or the date of re-assessment order, where the revision is in relation to an item which was not the subject matter of re-assessment?

Ans. : The jurisdiction u/s 263 could not be assumed on issues which were not the subject matter of issues dealt with in the order of re-assessment but were part of the original assessment, for which the period of limitation expired long ago.

[Read case no.100 in detail for proper understanding]

101.) Would the period of limitation for an order passed u/s 263 be reckoned from the original order passed by A.O. u/s 143(3) or from the order of assessment passed u/s 147, where the subject matter of revision is different from the subject matter of re-assessment u/s 147?

Ans. : **'From the original order u/s 143(3)'**.

Doctrine of merger cannot be applied here. Order u/s 143(3) cannot stand merged with the order of re-assessment in respect of those issues which did not form the subject matter of re-assessment. Hence, period of limitation of 2y from the end of the F.Y. in which the order sought to be revised was passed, u/s 263 shall be reckoned from the date of original order u/s 143(3).

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

Ans. : **Yes** , The entire object of administration of tax is to secure the revenue for the development of the country and not to charge the assessee more tax than which is due & payable by the assessee. A.O. cannot advantage of assessee's mistake.

In this case, assessee committed a mistake by including exempt income in its return, though the same was correctly disclosed in the Schedule containing details of exempt income. Hence, A.O. has to consider the rectification application filed by assessee u/s 154 and dispose off the rectification application on its own merits, without awaiting the result of revision proceedings before the CIT on remand, at the earliest.

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

Ans. : **Yes** , Additional grounds can be raised before Appellate Authority even otherwise than by way of filing ROI. However, in case the claim has to be made before A.O. (who is not an appellate authority), the same can only be made by filing a revised return of income.

104.) Does the Appellate Tribunal have the power to review or re-appreciate the correctness of it's earlier decision u/s 254(2)?

Ans. : **No** , Sec.254(2) is limited to rectification of mistake. Tribunal cannot change it's own view by substituting a view which it believes should have been taken at first instance. In this case, Tribunal, while dealing with application u/s 254(2), virtually reconsidered the entire matter and came to a different conclusion. This amounted to re-appreciation of correctness of earlier decision, which is beyond the scope of Sec.254(2).

105.) Can the Tribunal exercise it's power of rectification u/s 254(2) to recall it's order in entirety, where there is a mistake apparent from record?

Ans. : **Yes** , Tribunal does not have the inherent power to review it's order on merits, but it can recall it's order for the purpose of correcting a mistake apparent from record. While exercising power of rectification u/s 254(2), it can recall it's order in entirety if it is satisfied that prejudice has resulted to the party which is attributable to the tribunal's mistake, error or omission and the error is apparent.

106.) Does the High Court have an inherent power the Income Tax Act, 1961, to review an earlier order passed on merits?

Ans. : Power to review is not an inherent power and must be conferred by law specifically by express provision or by necessary implication. The power of re-admission/restoration of appeal is always enjoyed by the H.C. Such power to restore the appeal cannot be treated to be a power to review the earlier order passed on merits.

PENALTIES

107.) Can an assessee who has surrendered his income in response to the specific information sought by A.O. in the course of survey, be absolved from penal provisions u/s 271(1)(c) for concealment of income?

Ans. : **No** , The surrender of income in this case is not voluntary as the offer of surrender was made in view of detection made by A.O. in the survey conducted in the sister

concern of assessee. The surrender was with a view to avoid litigation, to buy peace & to channelize energy and resources towards productive work & make settlement with the Department. Since, the assessee also failed to offer explanation regarding surrendered income, the amount of income surrendered is deemed to represent the income in respect of which particulars have been concealed, thereby attracting penal provisions u/s 271(1)(c).

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

Ans. : **No** , Mere making of an incorrect claim, which is not sustainable in law (i.e., a claim which has been disallowed), will not amount to furnishing inaccurate particulars regarding income of the assessee where there is no finding that any details supplied by assessee in it's return is incorrect or erroneous or false. Hence, no penalty.

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

Ans. : **No** , The income was honestly reported in the return. Merely because A.O. was of the opinion that income fell under some other head cannot be reason enough to treat the particulars reported in the return as 'inaccurate particulars' or 'suppression of facts'. Hence, no penalty u/s 271(1)(c).

110.) Can penalty u/s 271(1)(c) be imposed on the ground of disallowance of certain deduction under Chapter VI-A owing to subsequent decision of Supreme court?

Ans. : **No** , For imposing penalty u/s 271(1)(c), there should be concealment of income or furnishing inaccurate particulars of income, which were missing in this case. Assessee had disclosed all material facts relevant for assessment & there was no concealment. So, there was no failure on assessee's part. Hence, no penalty.

111.) Can penalty u/s 271(1)(c) for concealment of income be imposed in a case where assessee has raised a debatable issue?

Ans. : **No** , Raising a debatable issue would not amount to concealment or furnishing inaccurate particulars and hence, no penalty u/s 271(1)(c).

112.) Is concealment penalty leviable when the High court admits the quantum appeal as involving substantial question of law?

Ans. : **No** , When the quantum proceeding is admitted by H.C. as involving substantial question of law, it amounts to a debatable issue and hence, concealment penalty is not leviable.

113.) Is penalty u/s 271D imposable for cash loans/deposits received from partners?
[2015, Muthoot Financiers]

Ans. : **No** , Sec.269SS would not be violative when money is exchanged between the partners and the firm. In this case, there was no dispute as regards the money brought in by the partners of the assessee-firm. The source of money was also not doubted. The transaction was bona-fide & not aimed to avoid any tax liability. The credit worthiness of partners and genuineness of the transactions coupled with relationship between the 'two persons', could constitute a reasonable cause for not invoking Sec.271D / 271E read with Sec.273B. High court held that the issue being a debatable one, there was reasonable cause for not levying penalty.

114.) Where an assessee repays a loan merely by passing adjustment entries in it's books of accounts, can such repayment of loan by assessee be taken as a contravention of the provisions of Sec.269T to attract penalty u/s 271E?

Ans. : **Yes , subject to reasonable cause.**

Sec.269T puts a condition that in case a loan or deposit is repaid, it should be by way of account payee cheque/draft. Hence, the assessee has violated the provisions of sec.269T by repaying the loan by passing book entries & hence, penalty u/s 271E is applicable. However, since the transaction is bona-fide in nature being a normal business transaction & not been made with a view to avoid tax, it was held that the assessee has shown reasonable cause for failure u/s 269T. Hence, no penalty u/s 271E could be imposed.

OFFENCES & PROSECUTION

115.) Would prosecution proceedings u/s 276CC be attracted where the failure to furnish return in time was not wilful?

Ans. : **No** , For Sec.276CC to get attracted, there should be wilful delay in filing return. The failure must be intentional, deliberate, calculated & conscious with complete knowledge of legal consequences flowing from them. In this case, there were sufficient grounds for delay in filing Return of income and not wilful. Hence, Sec.276CC not attracted.

MISCELLANEOUS PROVISIONS

116.) Can the A.O. suo moto assume jurisdiction to declare sale of property as void u/s 281?

Ans. : **No** , In order to declare a transfer as fraudulent u/s 281, an appropriate proceeding in accordance with law was required to be taken u/s 53 of the Transfer of Property Act, 1882. A.O. is required to file a suit for declaration to the effect that the transaction of transfer was void u/s 281 of the Income Tax Act; but he himself cannot assume jurisdiction to declare the sale deed as void.

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

Ans. : **No** , There is no separate identity of partnership firm & that the partner is entitled to use the funds of the firm. In the present case, the assessee acted bona-fide and there was a reasonable cause within meaning of Sec.273B. Therefore, transaction cannot be said to be in violation of Sec.269SS and no penalty is attracted in this case.

DEDUCTION, COLLECTION & RECOVERY OF TAX

118.) Do the tips collected by hotel & disbursed to employees constitute salary to attract provisions for tax deduction at source u/s 192?

Ans. : **Yes** , The assessee company allowed employees to receive tips from the customers, by virtue of employment and in case the employer himself collected tips, those were also disbursed by employer to employees. Hence, the tips collected is salary & TDS is required to be deducted on its payment.

Here, company had not deducted TDS on bona-fide belief that tax was not deductible. There was no dishonest intention. Hence, not liable to penalty u/s 201, but liable to interest u/s 201(1A).

119.) Is Sec.194A applicable in respect of interest on fixed deposits in the name of Registrar General of High Court?

Ans. : **No** , The expression 'payee' u/s 194A would mean the recipient of income, whose account is maintained by the person paying interest. In this case, the actual payee is not ascertainable & the person in whose name the interest is credited is not a person liable to pay tax. The Registrar General is neither recipient of the amount credited to his account nor to interest accruing thereon. The deposits kept with the bank under the orders of the Court were funds in the custody of court. The interest on that account-although credited in Registrar General's name, was also part of funds under the custody of the court. Hence, he cannot be considered as 'payee' u/s 194A & thus would not attract Sec.194A.

120.) Where the assessee fails to deduct tax at source u/s 194B in respect of the winnings, which were wholly in kind, can he be deemed as an assessee-in-default u/s 201?

Ans. : **No , Proceedings u/s 201 cannot be initiated against the assessee.**

Where winnings are wholly in kind, the question of deduction of any sum does not arise. The only responsibility u/s 194B is to ensure that tax is paid by winner of the prize before the prize or winnings is released in his favour. If the assessee fails to ensure this, then Sec.271C empowers JCIT to levy penalty equivalent to amount of tax not paid and u/s 276B, such non-payment of tax is an offence attracting rigorous imprisonment for a term of 3m-7y & fine. Hence, Sec.201 not attracted because it requires either failure to deduct or failure to pay after deduction.

121.) Can the transmission, wheeling & SLDC charges paid by a company engaged in distribution and supply of electricity, under a service contract, to the transmission company be treated as fees for technical services so as to attract TDS provisions u/s 194J or in the alternative , u/s 194C?

* Transmission of electricity from point of generation to point of distribution is termed as 'wheeling'.

* SLDC -- State Load Dispatch Centre.

Ans. : Transmission & wheeling charges paid by applicant to transmission company are in the nature of fees for technical services to attract TDS provisions u/s 194J. Transmission of electrical energy is a technical service & requires constant involvement of technical system consisting of sophisticated instruments, constant monitoring and supervision by persons with a technical ability & knowledge to operate and manage the system so as to ensure regular and consistent supply of electricity at the grid voltage at the distribution point of applicant.

SLDC charges : Main duty of SLDC is to ensure integrated operation of power system in the State for optimum scheduling & dispatch of electricity within the State. SLDC charges paid appeared to be more of a supervisory charge with a duty to ensure just and proper generation & distribution in the State as a whole. Hence, such services are not in the nature of technical service to attract TDS u/s 194J or 194C.

122.) Can discount given to stamp vendors on purchase of stamp papers be treated as 'commission or brokerage' to attract provisions for tax u/s 194H?

Ans. : **No** , The sale of stamp papers by Govt. to the licensed vendors is on 'principal to principal' basis involving 'contract of sale'. The sale of stamp papers by licensed vendors to customers has been subject to sales tax levy, because they are selling on their own. If they had been agents of State Govt., then there would not have been sales tax levy.

Hence, the transaction is a sale & discount on purchase of stamp papers in bulk quantity is in the nature of cash discount and Sec.194H is not applicable.

123.) Can incentives given to stockists & distributors by a manufacturing company be treated as 'commission' to attract -- (i) the provisions for tax deduction at source u/s 194H; and (ii) consequent disallowance u/s 40(a)(ia) for failure to deduct tax at source?

Ans. : **No** , The assessee had undertaken sales promotion by way of product discount scheme under which it offered incentive to the stockists/distributors and dealers. The relationship between the assessee & the distributors/stockists was that of principal to principal. The stockists & distributors were not acting on behalf of the assessee and most of the credit was by way of goods on meeting the sales target which could not be said to be a commission within the meaning of the Explanation(i) to Sec.194H. Accordingly, held that such payment does not attract deduction of tax at source. Consequently disallowance u/s 40(a)(ia) would not be attracted.

124.) Can discount given on supply of SIM cards & pre-paid cards by a telecom company to its franchisee be treated as commission to attract the TDS provisions u/s 194H?

Ans. : **Yes** , There is an indirect payment of commission, in the form of discount, by the assessee-telecom company to the franchisee and hence, attract TDS provisions u/s 194H.

- * Property in the start-up pack & pre-paid coupons, even after transfer and delivery to franchisee remained with the assessee-telecom company.
- * Franchisee really acted as a facilitator for providing services by assessee-telecom company to ultimate subscriber.
- * Franchisee had no free choice to sell the pre-paid coupons & cards & everything including selling price was regulated by assessee-telecom company.
- * Rate at which franchisee sells to retailers is also regulated & fixed by assessee-telecom company.

Hence, there was principal & agent relationship though the nomenclature used is 'franchisee' and hence, the discount was actually commission.

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

Ans. : **No** , The issue had to be decided on the basis of fact as to when & what point of time, the property in the goods passed to the concessionaire. In this case, concessionaire became owner of milk and products on taking delivery of the same from the assessee-

dairy. Hence, relationship between assessee & concessionaire is Principal-to-Principal relationship. Also, the inclusion of some clauses in the agreement like right to inspect by the assessee, right to check register & ensure proper usage of furniture, equipment, etc. was only for the purpose of smooth operation of the system and it does not affect principal-to-principal relationship. Hence, difference between purchase price (price paid to dairy) & MRP is the concessionaire's income from business and cannot be categorized as commission to attract Sec. 194H.

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

Ans. : **No** , Airline company had permitted the agents to sell the tickets between the published price and the minimum fixed price. In order to deduct tax at source, the exact income in the hands of agents must necessarily be ascertainable. Here, airline company had no information about the exact rate at which the tickets are sold. Hence, no TDS liability, even though the amount earned by agent over & above minimum fixed commercial price would be taxable as income in his hands.

127.) Is payment made for use of passive infrastructure facility such as mobile towers subject to tax deduction u/s 194C or 194-I?

Ans. : **Sec. 194-I** , It was the intention of the parties to use the technical & specialized equipment maintained by the assessee. The infrastructure was given for the use of mobile operators. The towers were the neutral platform without which the mobile operators could not operate. The underlying object of the arrangement was the use of machinery, plant & equipment, i.e., passive infrastructure and it is incidental that it was necessary to house the equipment in some premises. H.C. directed that tax deduction be made at 2% as per Sec.194-I(a), the rate applicable for payment made for use of plant & machinery.

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

Ans. : **Sec. 194-I applies for each co-owner.**

Since, the share of each co-owner is definite & ascertainable, they cannot be assessed as AOP. The income from such property is to be assessed in the individual hands of co-owners. Hence, it is not necessary that there should be a physical division of property by metes & bounds. Thus, since the payment of rent is made to each co-owner by way of separate cheque and their share is definite, the threshold limit u/s 194-I has to be seen

separately for each co-owner. So, if the individual limit is less than the prescribed limit, no TDS is to be deducted at source and no interest u/s 201 is leviable.

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

Ans. : Rent u/s 194-I includes 'agreement or arrangement for use of land'. When the wheels of aircraft coming into airport touch the surface of airfield, use of land of airport begins. Similarly, for parking the aircraft in that airport, again there is use of land. Hence, Sec.194-I is attracted on payments for use of land of airport. [Japan Airlines Co. Ltd.]

CONTRARY VIEW :

Only if the agreement or arrangement has characteristics of lease or sub-lease or tenancy for systematic use of land, the charges levied would fall u/s 194-I 'Rent'. The charges on landing & take-off show that they are with reference to number of facilities provided by Airport Authority and are not made for any specified land usage or area allotted. There is shared use of airfield by airlines. Thus, charges levied are in the nature of fee for services offered rather than in nature of rent for use of land. Hence, charges would get attracted under provisions of Sec.194C. [Singapore Airlines Ltd.]

130.) Can the payment made by an assessee engaged in transportation of building material & transportation of goods to contractors for hiring dumpers, be treated as rent for machinery or equipment to attract provisions of tax deduction at source u/s 194-I?

Ans. : **No** , The assessee had given sub-contracts for transportation of goods and not for renting out of machinery or equipment. Hence, such payments could not be termed as rent paid for use of machinery and provisions of Sec.194-I would not be applicable. Instead, Sec.194C applies as the transactions are in the nature of contracts for shifting of goods from one place to another which could be covered under works contracts.

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

Ans. : **No** , The overseas agents were paid commission and were paid for reimbursement of expense incurred on travelling. As far as reimbursement of expenses is concerned, it was towards the air travel on which no tax was required to be deducted. With regard to payment of commission, the agent did not act as a performing artist or entertainer. He only contacted the artists & negotiated with them for performance in India. Hence, the service rendered by agent was outside India and not chargeable to tax in India. Thus, the requirement of deducting tax at source u/s 195 on such payment does not arise.

132.) Can the Tax recovery officer (TRO) adjudicate disputes regarding quantum of liability between the garnishee (petitioner company, in this case) & the defaulting company, by exercising his powers u/s 226(3)?

Ans. : **No** , u/s 226(3)(vi), a limited enquiry could only be conducted by the TRO & that too, by following the principles of natural justice. When the claim of amount is disputed by the debtor, TRO cannot proceed to adjudicate the dispute between the parties, i.e., the defaulting company and its debtor, for recovery of tax.

[Read case no.132 in detail for proper understanding]

CA SABA NAZ