1

BASIC CONCEPTS

1. What will be the relevant date for considering cost of acquisition of a capital asset, which was held by the assessee prior to the date on which it was included as a capital asset in the Act?

CIT v. Gurcharan Singh (2007) 292 ITR 387 (Punj. & Har.)

Relevant section: 2(14)

The assessee had sold some agricultural land and declared the cost price thereof at Rs. 25,000 per acre as on February 28, 1970. The Assessing Officer rejected this figure and adopted the cost as on January 1, 1954, at Rs. 5,000 per acre and calculated capital gain arising therefrom accordingly.

The assessee's plea against the order of Assessing Officer to the Appellate Assistant Commissioner of Income-tax, that agricultural land, became a capital asset only with effect from February 28, 1970, by the amendment in section 2(14) of the Income-tax Act, 1961. Before this date, the agricultural land owned by the assessee was not a capital asset. The Appellate Assistant Commissioner accepted the plea of the assessee. The Tribunal upheld the decision of the Appellate Assistant Commissioner.

The High Court held that by the amendment in the Act, agricultural land became a capital asset, on the sale of which capital gain tax became exigible. Therefore, the date of valuation of the capital asset would be the date when the agricultural land became a capital asset and the cost of agricultural land should be on that date only.

2. Whether interest earned on amount deposited in the bank received from members for development of plots can be treated as capital receipt?

CIT v. Saraswati Kunj Co-operative House Building Society (2006) 157 Taxman 166 (Del.)

Relevant section: 4

The assessee Co-operative House Building Society had been receiving amount from the plot holders for being utilized for incurring the expenditure on purchasing land and constructing residential plots on it for its members. According, to the agreement between the Government of Haryana and the assessee, the Society shall keep 30 per cent of the amount received from the plot holders in a bank deposit for internal development work in the society.

The High court held that the moneys received from members and kept in savings bank account is utilized for purchasing agricultural land and converting it into residential plots for its members. Therefore, the moneys kept in the savings bank account have direct link with the acquisition of land. Hence, the interest earned on said deposit would be a capital receipt.

3. Whether the Tribunal was right in confirming the addition of an amount not received by the appellant as the income of the appellant for the block period?

Pyramid Films International v. Deputy CIT (2007) 292 ITR 103 (Mad.)

Relevant section: 4

The assessee is a partnership firm engaged in the production of feature films. There was a search under section 132 of the Income Tax Act, 1961 in the business and residential premises of the assessee firm, which resulted in seizure of several incriminating documents. The assessee filed a return in Form No. 20B admitted undisclosed income of the block period as 'NIL'. While the Assessing Officer made an addition. Aggrieved by the order, the assessee filed an appeal to the Commissioner, who confirmed the addition made by the Assessing Officer. On further appeal, the Tribunal confirmed the order of the Commissioner and dismissed the appeal filed by the assessee.

The High Court observed that the Tribunal is the highest fact finding authority ought to have considered the same as to how the amount could be considered as undisclosed income under Chapter XIVB of the Act, or not. The Court set aside the order of the Tribunal.

4. Are provisions of section 68 attracted in case the Assessing Officer does not reject the explanation offered by the firm?

CIT v. Taj Borewells (2007) 292 ITR 232 (Mad.)

Relevant section: 68

The assessee is a firm consists of seven partners with equal shares and claimed the status of association of persons. The assessee-firm did not maintain any books of accounts for the reason that the total gross receipts were below Rs. 5 lakhs. The assessee-firm filed a return of loss and the said return was processed under section 143(1) of the Income tax Act, 1961. While completing the assessment, the Assessing Officer had not accepted the amount of Rs. 5,25,000 which was shown as amount invested by the partners, and concluded that this amount was to be added under the head "Other sources" under section 68 of the Income-tax Act, 1961. The Commissioner of Income-tax (Appeals) confirmed the addition but the Tribunal deleted it.

The High Court held that Section 68 of the Income-tax Act, 1961, is a charging section and it is also a deeming provision. Unless circumstances exist, the Revenue cannot rely on section 68 of the Act. The following features were present (a) since there were no books of account, there could be no credits in such book; (b) it was the first year of assessment of the assessee; (c) the explanation offered by the assessee-firm was not rejected and only the explanation offered by the partners was rejected. Unless and until the explanation offered by the firm was rejected and was found not genuine, the Assessing Officer could not invoke the provision of section 68. The addition could not be made.

5. Whether the Tribunal was right in holding that income from the unexplained investments should be considered in the hands of firm?

CIT v. K. Chinnathamban (2007) 292 ITR 682 (SC)

Relevant section: 69A

The search was conducted in the premises of K. Chinnathamban, the respondent-assessee, connected with the firm V. V. Enterprises when Rs. 1.18 crores (approx.) was seized. The search was followed by a survey under section 133A and investigations under section 132 of the Income-tax Act, 1961. In the course of assessment proceedings, it was found that the books of accounts were incomplete and K. Palanisamy, who had managed the firm, was not in a position to explain the source of the deposit amount of Rs. 1.18 crores. Therefore, the Assessing Officer treated the said amount as undisclosed income of the persons in whose names the deposit appeared.

In order to find out whether the assessee is the owner of the money in terms of section 69A of the Income-tax Act, 1961, which provides that any unexplained money, etc., may be deemed by the Assessing Officer to be the income of the assessee, the principle of common law jurisprudence in section 110 of the Evidence Act, 1872, can be applied. Where a deposit stands in the name of a third person and that person is related to the assessee, then in such a case the proper course would be to call upon the person in whose books the deposit appears or the person in whose name the deposit stands to explain such deposit.

The Supreme Court held that the department was not right in concluding that the 'V' was not genuine and the income from unexplained investments cannot be considered in the hands of the firm found to be fictitious. The assessee could not establish the source of deposits. There was no evidence to in support of assessee's claim that the aforestated amount was collected from the public. The department was right in making the individual assessment in the hands of the assessee and other assessees.

2

RESIDENCE AND SCOPE OF TOTAL INCOME

1. **Whether the firm could be treated as non-resident in India in case right or control on decisions are outside India?**

   Ms. Meenu Sahi Mamik, In re [2007] 287 ITR 514 (AAR)

   Relevant section: 6(2) & 245Q

   The applicant, a resident of the Netherlands, wanted to establish a manufacturing unit in Himachal Pradesh for the formulation of pharmaceuticals in partnership with Bayer Mumbai to avail the tax holiday under section 80-IC of the Income-tax Act, 1961. The specifications for manufacturing the various drugs would be provided by Bayer and the firm would produce the pharmaceutical formulations under the direct control and supervision of Bayer. An unregistered partnership deed was produced which indicated that the non-resident partner would take decisions regarding policy matters and the resident partner would have effective control over the affairs.

   The Authority ruled that under the partnership deed though the non-resident partner would take decisions regarding policy matters, it would be the resident partner who would have de facto control over the affairs and would look after the day-to-day business of the firm. Under section 6(2) of the Act, a firm situated in India would be resident in India in any previous year in every case, except where during the particular year the control and management of its affairs was situated wholly outside India. The word “affairs” means affairs, which were relevant for the purpose of the Act, which have some relation to income. The expression “control and management” meant de facto control and management and not merely the right or power to control and manage. Hence, the control and management of the affairs of the firm would be with the resident partner, the firm could not be said to be a non-resident.

3

INCOMES WHICH DO NOT FORM PART OF TOTAL INCOME

1. **Whether the assessee could allow exemption under section 10(5) of the Income Tax Act, 1961 on Leave travel concession allowance paid by him to his employees?**

   CIT v. Semiconductor Complex Ltd. (2007) 292 ITR 636 (Punj. & Har.)

   Relevant section: 10(5)

   The assessee was an enterprise of the Government of India and the Assessing Officer during verification discovered that the assessee had allowed its employees exemption in respect of leave travel concession on the basis of the certificate/declaration furnished to the effect that the employee or his/her family members had traveled to a certain distance on leave travel concession. The allegation was that a number of employees of the assessee had claimed leave travel concession as exempt without actually spending the amount received from their employer.

   The High Court held that the Tribunal had recorded a finding that the assessee had reimbursed the expenses incurred by its employees for leave travel concession after obtaining all the information in the prescribed pro forma which gave full details of the journey undertaken by the employee and the expenses actually incurred by them. Moreover, the accounts were subjected to verification by the auditors appointed by the Comptroller and Auditor General of India and the auditors had pointed out no discrepancy. The action of the assessee-company had been found to be bona fide. The leave travel concession was exempt under section 10(5) read with rule 2B.

2. **Whether the assessee is entitled to exemption under section 10(14) of the Income tax Act, 1961 in respect of additional conveyance allowance received by the employee from his employer?**

   CIT v. P. N. Verma, Development Officer, LIC of India (2007) 292 ITR 259 (Raj.)

   Relevant section: 10(14)

   The assessee was serving as a Development Officer with the Life Insurance Corporation of India and he had received additional conveyance allowance from his employer. The assessee had claimed exemption under section 10(14) of the Income-tax Act, 1961, as he had received such allowance as expenditure incurred wholly, necessarily and exclusively in the performance of duties of his office. The Assessing Officer disallowed the claim and the Commissioner (Appeals) upheld the order.

The Tribunal made a finding that section 10(14) of the Income-tax Act, 1961, provides for exemption of any special allowance not being in the nature of a perquisite within the meaning of clause (2) of section 17, specifically granted to meet expenses wholly, necessarily and exclusively incurred in the performance of the duties of an office, to the extent to which such expenses are actually incurred for that purpose. Therefore, two conditions are required to be fulfilled for exclusion of the amount received as special allowance during the employment. Firstly, it must not have been granted to the assessee by way of perquisite but specifically granted to meet expenses wholly, exclusively and necessarily for the purpose of official duties. Secondly, it must have been actually used by the assessee for the purpose for which it has been granted.

Accordingly, the High court held that the assessee had not received the amount as a perquisite. He had received the amount to meet expenses incurred in the discharge of his duties and the Tribunal had found as a fact that he had actually used the amount. He was entitled to the exemption under section 10(14).

3. **Whether the educational institutions were entitled for exemption under section 10(23C) of the Income-tax Act, 1961 in respect of application of income for educational purposes outside India?**

American Hotel and Lodging Association Educational Institute v. Central Board of Direct Taxes (2007) 289 ITR 46 (Del.)

Relevant section: 10(23C)

The petitioner was the branch office of a non-profit organisation set up in America and carried on educational activities. The head office of the petitioner enjoyed tax exemption in America as an educational institution under section 501(c)(3) of the Internal Revenue Code, 1954. It entered into a memorandum of understanding with the National Council for Hotel Management and Catering Technology under the Ministry of Tourism of the Government of India for offering its courses and expertise with a view to improve the quality of hospitality education and training in India. For the purposes of discharging its obligation under the memorandum of understanding, the head office opened a liaison office at Bombay after obtaining approval from the Reserve Bank of India. Thereafter, as its activities increased, the Reserve Bank of India permitted it by a letter, to convert its liaison office into a branch office for the purpose of undertaking its activities. The petitioner applied for approval for exemption under section 10(23C).

The petitioner explained that it was only a branch office of the American Educational Institution. It acted as a mere facilitating and a coordinating section collecting the fees/charges for materials supplied by the head office. These receipts were collected for and on behalf of the head office and this amount was actually owed to the head office and was remitted after making some deductions for office expenses in India. According to the petitioner, the surplus was only the sum of funds available with the branch office, which it owed to the head office and in that sense it was not a genuine surplus in the nature of income. The petitioner clarified that the terms of section 10(23C)(vi) of the Act as well as the third proviso thereto did not require the income to be applied in India or accumulated for application towards the objects of the institution in India. The application was rejected.

On a writ petition the High Court held that the petitioner did not satisfy the condition laid down in clause (a) of the third proviso to section 10(23C). The petitioner was not entitled to exemption under section 10(23C).

4. Can an assessee claiming exemption under section 10B of the Income-tax Act, 1961, have a right to withdraw application for exemption?

CIT v. Tamil Nadu Jai Bharath Mills Ltd. (2006) 287 ITR 512 (Mad.)

Relevant section: 10B

The High Court held that section 10B(8) of the Income-tax Act, 1961, which opens with a non obstante clause clearly confers a right on the assessee to declare that the provisions of the Act may not be made applicable to the assessee, provided such a declaration is given on or before the due date for furnishing the return under section 139(1) of the Act. It was therefore, open to the assessee, notwithstanding the fact that the assessee had exercised the option to have section 10B made applicable, to withdraw that option, provided such withdrawal was made on or before the due date for filing the return.

5. Whether the assessee can claim exemption of the amount of ex-gratia received under Voluntary Retirement Scheme, both under section 10(10C) and 89(1) of the Income-tax Act?

CIT, Trichy v. S. Srinivasan (2007) 160 Taxman 314 (Mad.)

Relevant section: 10(10C) & 89(1)

The issue raised in this question is decided by the High court relied upon the decision in *CIT v. G. V. Venugopal (2005) 273 ITR 307*, wherein it is held that the section 10(10C) refers to exemption in relation to any other assessment year. Every assessment year is an independent year. Hence, the assessee is eligible to claim exemption in respect of compensation received under both sections i.e. under section 10(10C) and 89(1).

4

CHARITABLE OR RELIGIOUS TRUSTS AND INSTITUTIONS

1. **Does an assessee seeking exemption under section 11(2) need to specifically indicate the purposes for which the amount was accumulated?**

   Bharat Kalyan Pratisthan v. Director of Income-tax (Exemption) (2007) 160 Taxman 216 (Del.)

   Relevant section: 11

   In the instant case, the trust set-up for the charitable purposes had three objects, namely, for medical relief, help to poor and educational purposes. The trust had filed an application for exemption under section 11(2) in respect of funds accumulated by it and had specified those three objects. The Assessing Officer, the Commissioner (Appeals) and the Tribunal held that the trust was required to be more specific with regard to the utilization of the funds.

   The High Court held that the trust had mentioned that the funds were accumulated for all the objects and the trust has only three objects. Therefore, it may utilize the funds for all the three objects. Hence, they are not entitled to accumulate income for the objects of the charitable trust without specifying the purpose for which the income was accumulated.

2. **Whether assessee was entitled to get exemption under section 11 as a charitable trust since the business carried on by the assessee was not in the course of actual accomplishment of primary object of trust?**

   CIT, Madurai v. P. Iyya Nadar Charitable Trust (2006) 284 ITR 404 (Mad.)

   Relevant section: 11 & 13(1)(bb)

   The assessee was a public charitable trust carry on the business of manufacturing safety matches. The main object of the trust was to provide relief to the poor, by way of establishing and maintaining hospitals, schools, etc. The assessee claimed exemption under section 11. The Assessing Officer held that the assessee was not entitled to the exemption under section 11 on the ground that the case would come within the purview of section 13(1)(bb). The Commissioner (Appeals) as well as the Tribunal held that the trust was entitled to exemption under section 11 as a charitable trust.

   The High court held that the provisions of section 13(1)(bb) are clearly attracted to the instant case. The scope of the said section was considered in the decision of the

Supreme Court in the case of *Asstt. CIT v. Thanthi Trust (2001) 247 ITR 785/115 Taxman 126*, in which it was held that the requirement of section 13(1)(bb) is that the exemption under section 11 will not be available to such a trust that carries on any business, unless the business is carried on in the course of actual accomplishment of a primary purpose of the trust. Therefore, the business must be carried on in the course of the actual accomplishment of relief to the poor, education or medical relief.

In the instant case, the business was held by the trust as a part of the corpus and, hence, the trust did not directly accomplish any object nor did it carry on business in the course of the actual accomplishment of its real objects. Therefore, by following the principles enunciated in the above Supreme Court's judgment, the Tribunal was not justified in holding that section 13(1)(bb) would not apply to the trust, although it was carrying on business.

3. Whether income could be accumulated by a charitable trust for a plurality of purposes?

Director of Income-tax (Exemption) v. Eternal Science of Man's Society (2007) 290 ITR 535 (Del.)

Relevant section: 11

The High Court held that accumulation of income is permissible for a plurality of purposes. The respondent-trust had accumulated its income for six different purposes. There was no controversy about five of the said objects being charitable in character. The criticism about the sixth object was that it permitted acquisition of property whether movable or otherwise for the achievement of other objects for which the trust/society had been established. The trust in question had been established in terms of a memorandum. Any one of the objects out of the 22 objects enumerated therein was not a charitable object. If that be so, clause (f) permitting acquisition of movable or immovable property for achievement of one of those purposes would necessarily imply that the property was acquired for one of the charitable purposes stipulated in the memorandum.

5

INCOME FROM SALARIES

1. Whether the payment of interest subsidy by the company directly to the financial institution from which employee had availed of loan, amounts to a perquisite under section 17 of the Income tax Act, 1961?

K. Rajendran Pillai v. Union of India (2007) 292 ITR 277 (Kar.)

Relevant section: 17

The High Court held that payment of interest subsidy by the company directly to the financial institution from which the employees had availed of house building loans was a perquisite falling under sub-clause (iv) of section 17(2) of the Income-tax Act, 1961, because under the terms of the loan, as admitted in this case, the financial institution could directly claim the interest subsidy from the company, if default were committed by the employees and similar borrowers who were employees of the company.

6

INCOME FROM HOUSE PROPERTY

1. Whether the rental income from letting out kutcha plinths on open land could be assessable under the head Income from house property?

Gowardhan Das & Sons v. CIT, Jalandhar (2007) 288 ITR 481 (Punj. & Har.)

Relevant section: 22

The HUF leased out kutcha plinths on open land at monthly rent of Rs. 30 per stack to the Food Corporation of India. The assessee claimed that such rental income should be taxable under the head 'Income from house property' and are eligible for deduction of one-sixth for repairs.

The High court held that the kutcha plinths on open land by no stretch of imagination could be termed as house property. Section 22 of the Income tax Act, 1961 provides that it is the income from property consisting of any 'building' or 'land appurtenant thereto' which is chargeable under the head Income from house property and not the income from renting out of open land or some kutcha plinth only. The term 'appurtenant' covers the land that is necessary for enjoyment of the building and not the land only. Therefore, the rental income from letting out open plinths to the Food Corporation of India was assessable under head 'Income from other sources' and not under the head 'Income from house property'.

2. Whether the assessee is deemed to be the owner of the property in case of lease of the house property with an option to retain possession?

CIT v. A. V. K. Constructions P. Ltd. (2007) 292 ITR 512 (Mad.)

Relevant section: 22

The assessee took a property on lease and sublet a portion of the property. Under the lease agreement, there was an option to the lessee to retain possession for a further period of two years on a monthly rent payable in each month in advance on or before 5th day thereof. The Assessing Officer treated the income derived there from as 'Income from House Property'. The Commissioner (Appeals) directed the Assessing Officer to treat the said income as 'Business Income'. The Tribunal confirmed this.

The High Court held that under section 27(iiib) of the Income-tax Act, 1961, the assessee by virtue of its right by way of a lease from month to month or for a period not exceeding one year was excluded from the definition of owner of the house property. Therefore, sections 22 to 26 did not govern the case of the assessee.

7

PROFITS AND GAINS OF BUSINESS OR PROFESSION

1. **Whether business losses are allowable on ordinary commercial principles in computing profits?**

   Dr. T. A. Quereshi v. CIT, Bhopal (2006) 287 ITR 547 (SC)

   Relevant section: 37

   As a result of seizure of huge quantity of heroin drugs from the assessee-doctor's possession, he filed his return claiming that since the heroin seized, formed part of his stock-in-trade, hence, its loss on account of seizure was an allowable deduction while computing his profits and gains of business/profession. The Assessing Officer, however, disallowed the assessee's said claim. On appeal, the Commissioner (Appeals) upheld the impugned disallowance. On second appeal, the Tribunal allowed the assessee's appeal holding that he was entitled to claim the deduction as a business loss. On revenue's appeal, the High Court set aside the ITAT's order.

   On appeal to the Supreme Court, the assessee had contended that he was only earning income from his medical profession and was not doing any illegal activity of manufacturing and selling of heroin. The income- tax authorities themselves had recorded a finding that the assessee was engaged in the manufacture and selling of heroin. Once the income –tax authorities recorded such a finding of fact, it followed that any loss from such a business was a business loss.

   The Explanation to section 37 has really nothing to do with the instant case, as it was not a case of business expenditure, but of business loss. Business losses are allowable on ordinary commercial principles in computing profits. Once it was found that the heroin seized formed part of the stock-in-trade of the assessee, it followed that the seizure and confiscation of such stock-in-trade had to be allowed as a business loss. Loss of stock-in-trade has to be considered as a trading loss.

2. **Whether assessee was entitled to claim deduction of loss incurred on sale of units of mutual fund purchased by the assessee for two days to get the benefit of the dividend income under section 10(33)?**

   Vaneet Jain v. CIT, Panchkula (2007) 158 Taxman 410 (Punj. & Har.)

Relevant section: 28(i)

The assessee had made investment for the purchase of units of mutual fund for Rs. 5 lakhs along with the right to receive dividend. After two days of purchase of units of mutual fund the assessee received dividend and later on after three days he sold the units in loss. The assessee claimed the deduction in respect of loss incurred due to sale of such units. The High Court held that the investment made by the assessee in the units of mutual fund were merely to get the benefit of the dividend income under section 10(33) and the assessee was not otherwise engaged in the said business. Therefore, disallow the assessee's claim.

3. **Whether the foreign exchange gain earned by the assessee in the course of export was revenue in nature?**

Motor Industries Co. Ltd. v. CIT, Bangalore (2007) 160 Taxman 316 (Kar.)

Relevant section: 28(i)

The High court held that in view of the facts of instant case and relied upon the judgment of Mysore High Court in *Hindustan Aircraft Ltd. v. CIT (1963) 49 ITR 471* the foreign exchange gain earned by the assessee in the course of export was revenue in nature.

4. **Whether the expenditure incurred on relocating or reconditioning of aluminum smelters pots would be regarded as current repairs?**

CIT v. Bharat Alluminium Co. Ltd. (2007) 292 ITR 600 (Del.)

Relevant section: 31

The assessee claimed that the expenditure incurred by him for relocating the smelter pots to place them to their original production levels should be deduction as current repairs. According to the Assessing Officer, the pots were being replaced, and therefore, expenditure incurred by the assessee was not in nature of current repairs, but was capital expenditure. In the instant case, it was held that there had been no change of parts but only relining or reconditioning to take care of wear and tear. Since no new asset or new advantage had come into existence, the expenditure incurred by the assessee was revenue expenditure only.

5. **Whether the assessee was entitled to claim depreciation on the machinery that was actually not used by the assessee for the purpose of business or profession but ready to use?**

Dy.CIT, Special Range–4 v. Yellamma Dasappa Hospital (2007) 290 ITR 353 (Kar.)

Relevant section: 32

Section 32 of the Income-tax Act, 1961 provides that the assessee can be allowed to claim depreciation on the plant, machinery or furniture owned by the assessee and used for the purposes of the business or profession. For the purpose of claiming depreciation machinery has to be actually used by the assessee.

The High court held that for the purpose of claiming depreciation the kept ready theory is not available to the assessee. Section 32 is not applicable if the machinery is not used during the previous year for the purposes of the business. Hence, the assessee could not have any benefits.

6. Whether assessee can claim write off of any plant and machinery sold, discarded, demolished or destroyed under section 32(1)(iii) which has not been used for the purpose of business during the previous year in which it was sold, discarded, demolished or destroyed?

Allied Electronics and Magnetics Ltd. v. Dy. CIT (2007) 160 Taxman 325 (Del.)

Relevant section: 32

The assessee company engaged in manufacturing and trading of floppy and other computer consumables claimed deduction under section 32(1)(iii) for write off of the discarded/obsolete plant and machinery The provisions of section 32(1)(iii) provides that for claiming the deduction the building, machinery, plant should have been used for the purposes of the business during the previous year in which the machinery is sold, discarded, demolished or destroyed. The dispute was as to whether the machinery was so used or not.

There was a parallel finding of the Assessing Officer, the Commissioner (Appeals) and the Tribunal to the effect that the machinery was not put to use at all during the relevant previous year. There was nothing on record to show that the machinery in question was put to use during the relevant previous year. The High Court held that the findings of the income-tax authorities were justified and the appeal was dismissed.

7. Whether the spares of critical parts of plant and machinery kept as stand-by are entitled to depreciation under section 32 of the Income-tax Act, 1961?

CIT v. Southern Petrochemical Industries Corporation Ltd. (2007) 292 ITR 362 (Mad.)

Relevant section: 32

The assessee filed its returns claiming depreciation on stand-by items such as spares of critical parts of plant and machinery. The Assessing Officer rejected the claim but the Tribunal allowed it. The High Court held that the assessee was entitled to depreciation on spare parts that were stand-by items even though they were not taken for use during the accounting years.

8. **Whether the premium collected by the assessee on the issue of its share capital would constitute a part of the capital employed in the business of the company for the purpose of section 35D of the Income- tax Act, 1961?**

Berger Paints India Ltd. v. CIT (2007) 292 ITR 658 (Del.)

Relevant section: 35D

The assessee claimed a preliminary expense under section 35D being 2.5 per cent of the capital employed in the business of the company. The Assessing Officer was of the view that the expression "capital employed in the business of the company" did not include the premium received on the share capital as contended by the assessee. The Commissioner (Appeals) took the view that since the "capital employed" consisted of subscribed capital, debentures and long-term borrowings, any premium collected by the company on the shares issued by it should also be included in the expression as the same was also capital contributed by the shareholders. He deleted the disallowance on the ground that the share premium account shown as reserve in the balance sheet of the assessee was in the nature of capital base of the company. On appeal by the Department, the Tribunal held that the premium collected by the company on the share capital was not tantamount to "capital employed in the business of the company" within the meaning of section 35D.

The High Court held that it was nobody's case that the premium collected by the assessee on the issue of shares was a long-term borrowing either in fact or by a fiction of law. The expression "capital employed in the business of the company" is the aggregate of three distinct components, namely, share capital, debentures and long-term borrowings as on the dates relevant under sub-clauses (i) and (ii) of clause (b) of the Explanation to sub-section (3) of section 35D of the Income-tax Act, 1961.

9. **Whether the assessee would be entitled to a deduction of the amount of any bad debt, which has been written off as irrecoverable in its accounts for the previous year?**

CIT v. Morgan Securities & Credits (P.) Ltd. (2007) 292 ITR 339 (Del.)

Relevant section: 36(1)(vii)

The assessee was engaged in the business of money lending by way of intercorporate deposits and other loans. It had written off Rs. 6 crores as bad debts after initiating legal/criminal proceedings against the borrowers. The Assessing Officer added back the bad debts amounting to Rs. 6 crores together with interest accrued thereon. The Commissioner (Appeals) endorsed the reasoning of the Assessing Officer to the effect that the assessee had merely written off the debts at the end of the year so that its taxable income got reduced. He accepted the assessee's decision to write off as a bad debt the sum of Rs. 2 crores only. The Tribunal held that since the principal was irrecoverable, there was no reason or justification to charge interest on this sum and deleted the disallowance of the said amount of Rs. 4 crores treating it to be irrecoverable.

The High Court held that the Commissioner (Appeals) and the Assessing Officer were influenced by the fact that there had been no previous dealings between the assessee and borrowers; no security was taken for the loan and the sequence of events from the advance of the loan to its writing off did not span even one year. These factors would be relevant if the stand of the Revenue was that the transaction itself was sham or false. Once it was accepted that the transactions actually took place, these factors would in fact quell a doubt that the decision to write off the loan as a bad debt was a consequence of an honest judgment. Therefore, the disallowance of bad debt was not justified.

10. Whether interest on money borrowed from bank and lent to sister concern without charging interest should be allowed as a deduction under section 36(1)(iii) of the Income tax Act, 1961?

S. A. Builders Ltd. v. CIT (Appeals) (2007) 288 ITR 1 (SC)

Relevant section: 36(1)(iii) & 37

Whether one should allow deduction under section 36(1)(iii) on interest paid by the assessee on amounts borrowed by it for advancing to a sister concern, the authorities and the courts should examine the purpose for which the assessee advanced the money and what the sister concern did with the money. The borrowed amount is not utilized by the assessee in its own business but had been advanced as interest free loan to its sister concern is not relevant. What is relevant is whether the amount was advanced as a measure of commercial expediency and not from the point of view whether the amount was advanced for earning profits. The expression “commercial expediency” is one of wide import and includes such expenditure as a prudent businessman incurs for the purpose of business. The expenditure may not have been incurred under any legal obligation, but yet it is allowable as business expenditure if it was incurred on grounds of commercial expediency.

Once it is established that there was nexus between the expenditure and purpose of the business (which need not necessarily be the business of the assessee itself) the revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the board of directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximize his profits.

11. Whether amount paid by the assessee for becoming a member of Calcutta Stock Exchange can be said revenue expenditure?

Rajendra Kumar Bachhawat v. CIT (2007) 158 Taxman 54 (Cal.)

Relevant section: 37(1)

The assessee paid a sum of Rs. 25 lakhs for development purposes for the purpose of becoming a member of the Calcutta Stock Exchange. The assessee made two types of claims in regard to the said sum. First, the assessee’s contention was that the amount is by way of revenue expenditure and is not by way of capital expenditure. Secondly, the assessee submitted that it was entitled to bifurcate the revenue expenditure of Rs. 25 lakhs, into 10 equal parts of Rs. 250000 each, and claim deduction thereof in 10 successive assessment years, of which the two assessment years in question were the first two.

In the instant case, it was held that a very enduring benefit was accruing to the assessee on payment of the development charges that would render the expenditure as a capital one. Further, there was no provision in the Act entitling the assessee to carry forward revenue expenditure after dividing it, to subsequent years.

12. Whether premium paid on redemption of debentures was allowable business expenditure?

CIT, Patiala v. Industrial Cables (P.) Ltd. (2007) 162 Taxman 272 (Punj. & Har.)

Relevant section: 37(1)

The assessee issued debenture of Rs. 1 crore carrying interest rate of 15 percent and were redeemable after the expiry of seven years. The fact of the instant case were similar to the judgment of Calcutta High Court in *CIT v. Tungabhadra Industries Ltd. (1994) 207 ITR 553*.

The Calcutta High Court held that the liability to pay premium arose at the expiry of the seventh year from the date of allotment and there was no liability to pay the premium at all if the debentures were repurchased under the buy-back clause and there was no further issue of debentures. The payment of premium was clearly a contingent liability and the liability to pay the premium would arise only if the debentures were not repurchased by the company and were redeemed only at the end of seven years. The entire amount of the premium in respect of the said debentures should be allowed as a deduction in its entirety in one year, i.e., in the year in which such liability was incurred. Hence, the expenditure incurred on redemption of debentures at a premium on expiry of seven years is revenue expenditure.

13. Whether excess charges paid by the assessee for using excess load of electricity was allowable business expenditure?

CIT, Patiala v. Industrial Cables (India) Ltd. (2007) 162 Taxman 423 (Punj. & Har.)

Relevant section: 37(1)

The Tribunal recorded a finding that the amount paid by the assessee was a kind of surcharge levied for drawal of excess load as per the PSEB Rules and not penalty. The assessee had used the excess load in the course of business, which certainly has relation with the business. Hence, excess charges paid by the assessee for using excess load for business purpose, is allowable expense under section 37 of the Income-tax Act, 1961.

14. **Are any amount paid by the assessee as a royalty charges to use technical know-how for limited period, allowable as revenue expenditure?**

CIT v. Kanpur Cigarettes P. Ltd. (2006) 287 ITR 485 (All.)

Relevant section: 37

The assessee manufacturing cigarettes under a franchise agreement with GTC and accordingly, required to pay royalty charges for acquiring GTC's know-how and technical assistance as well as for the use of its trade mark. They entered into an agreement, which was valid for a period of five years with the condition that after the expiry of five years, the assessee would continue to manufacture the cigarettes and to use technical know-how provided to it by GTC. The assessee claimed deduction of the royalty charges paid for the same. The Assessing Officer disallowed it but the Tribunal allowed it.

The High Court held that the Tribunal had recorded a finding that the right acquired by the assessee was not exclusive and that it was for a limited period and could be terminated earlier within the period of the agreement and payment was dependant on the quantum of the items manufactured. In view of these findings, the Tribunal had rightly concluded that the payment towards royalty allowable as revenue expenditure.

15. **Whether expenditure on upgrading computers are allowable as revenue expenditure?**

CIT v. Southern Roadways Ltd. (2007) 288 ITR 15 (Mad.)

Relevant section: 37

The High Court held that the upgradation of computers by changing certain parts thereby enhancing the configuration of the computers for improving their efficiency, but without making any structural alterations is not change of an enduring nature. Therefore, the expenditure incurred by the assessee had to be treated as revenue expenditure.

16. **Whether the contribution made by the company towards building of Chamber of Commerce can be deductible as business expenditure?**

CIT v. Chemicals and Plastics India Ltd. (2007) 292 ITR 115 (Mad.)

Relevant section: 37

The assessee claiming deduction for the contribution made to the Madras Chamber of Commerce as business expenditure, being a member. The assessee contended that the maintenance of the trade chamber was for the furtherance of the business interest of the constituents of the chamber, hence, the payment had to be treated as a business expenditure. The Assessing Officer rejected the claim but the Tribunal held that the amount was deductible.

The High court held that the contribution made by the company was for the Chamber of Commerce whose activities were closely linked with the welfare of the corporate entities who were members thereof and whose interests were taken care of by the Chamber of Commerce. Irrespective of whether the expense incurred was compulsory or otherwise, it was deductible.

17. Whether the upfront fees paid by the assessee for obtaining loan for purchase of machinery can be treated as revenue expenditure

CIT v. Sri Meenakshi Mills Ltd (2007) 290 ITR 107 (Mad.)

Relevant section: 37

The High Court observed that the Commissioner (Appeals) and the Tribunal had concurrently found that the upfront fee, paid by the assessee to the bank for purchase of machinery, was nothing but bank charges and could not be construed as a capital expenditure.

18. Whether the cash payments made to unorganized sector would attract disallowance under section 40(A)(3) of the Income tax Act, 1961?

CIT v. K. K. S. K. Leather Processor P. Ltd. (2007) 292 ITR 669 (Mad.)

Relevant section: 40A(3) & Rule 6DD

Rule 6DD of the Income-tax Rules, 1962, provides that an assessee can be exempted from the payment by a crossed cheque or crossed bank draft in the circumstances specified in the rule. The Central Board of Direct Taxes has issued certain guidelines giving certain circumstances that are illustrative and not exhaustive. The underlying idea of the guidelines are that if the identity of the payee is known, it would be possible for the Income-tax Officer to cross check whether the transaction had in fact taken place.

The Revenue questioned the genuineness of the cash payments made to shandy persons, from whom the assessee obtained not even letters of confirmation. The High Court held that the assessee had produced necessary grounds for making cash payments. The Tribunal noted that these payments were made to small vendors, who came from surrounding villages to sell the skin and the process of dressing the skin done without the aid of power. The Tribunal also noted from the order of the Commissioner, that considering the fact that the purchases were made from the unorganised sector, cash payments were indispensable.

19. Whether the cash payments made by the assessee to unregistered dealer on the ground that it is not possible to issue cheques, would attract disallowance under section 40(A)(3) of the Income tax Act, 1961?

Asst. CIT v. Sri Saraswathi Iron Foundry (2007) 287 ITR 313 (Kar.)

Relevant section: 40A(3) & Rule 6DD

The assessee made cash purchases to the tune of several lakhs of rupees. The Assessing Officer rejected the explanation offered by the assessee that the payments were made to unregistered dealers who insisted on cash payments and disallowed the payments under the provisions of Section 40A(3) of the Income-tax Act, 1961. On further appeal, the Tribunal allowed the appeal in part accepting the assessee's explanation that the payments were made to unregistered dealers who insisted on cash payments.

The High Court held that the Tribunal committed a legal error in accepting the explanation offered by the assessee as one falling within rule 6DD(j) of the Income-tax Rules, 1962, and holding that it would not always be possible for the assessee to issue cheques.

20. Whether the amount of refund received by the assessee on account of sales tax already paid can be chargeable to tax under section 41(1)?

Moti Lal Padampat Udyog Ltd v. CIT (Central), Kanpur (2007) 161 Taxman 45 (All.)

Relevant section: 41(1)

In the instant case, the Apex court has held that where any amount of refund is obtained towards an expenditure it is neither cessation nor remission of trading liability and the amount of refund is to be treated as trading receipts deemed to be the income in the previous year in which it has been refunded under Section 41(1) of the Act. The Apex Court relied upon the issue decided in the *Polyflex (India) (P.) Ltd. v. CIT (2002) 257 ITR 343.*

21. Whether the amount remitted, shown, as liability in balance sheet, can be assessable as income under section 41 of the Income-tax Act, 1961?

CIT v. Tamilnadu Warehousing Corporation (2007) 292 ITR 310 (Mad.)

Relevant section: 41(1)

The assessee had surrendered the Group Gratuity Scheme with LIC and received amount therefrom. The Commissioner passed order under section 263 of the Act, with a direction to the Assessing Officer to assess the amount received under section 41(1) of the Act. The Tribunal set aside the order of the Commissioner.

The High Court held that the assessee had to showed the amount as a liability in the balance sheet. The Commissioner was wrong in holding that it was assessable under Section 41(1) of the Act as it was shown as liability by the assessee. Unless and until there is a cessation of liability, section 41 is not applicable.

22. Whether provisions of section 43B can be attracted in respect of the amount of the 'kist' payable by the assessee to the State Government?

CIT v. Satish Chandra Hegde Family Trust (2007) 158 Taxman 35 (Kar.)

Relevant section: 43B

The question raised in this appeal is covered by the decision of High court in the case of *CIT v. Sri Balaji & Co. (2001) 246 ITR 750*. In the said decision, the court has taken the view that it is only the statutory liability, which is in the nature of tax, duty, cess or fee, to which the provisions of Section 43B of the Act are applied. Hence, in the said decision it was held that the kist / rental amount payable to the Government by the assessee could not be brought within the purview of the provisions of Section 43B of the Act.

23. Whether the payment made by the assessee towards Employees State Insurance and provident fund within the grace period allowed by the statute can be treated as allowable expenditure under section 43B of the Income-tax Act, 1961?

CIT v. Modi Spinning and Weaving Mills Co. Ltd. (2007) 292 ITR 479 (Del.)

Relevant section: 43B

The assessee had made contributions to the Employees State Insurance Fund and Provident Fund after a few days delay but within the grace period of five days allowed by the statute. The High court held that since the payments were made within the grace period allowed by the statute, there was no default on the part of the assessee.

24. Whether the unabsorbed depreciation can be carried forward and set off even if losses have not been determined?

CIT v. Brigadier Parmanand (2006) 287 ITR 142 (All.)

Relevant section: 32 & 80

Section 80 of the Income-tax Act, 1961, confines itself to the losses mentioned in sub-section (1) of section 72 or sub-section (2) of section 73 or sub-section (1) or (3) of section 74 or sub-section (3) of section 74A. It does not deal with the unabsorbed depreciation, which is allowed to be carried forward under sub-section (2) of section 32 of the Act. Hence, the High Court held that the assessee was entitled for carry forward unabsorbed depreciation under section 32(2) of the Act notwithstanding the fact that the losses had not been determined.

8

CAPITAL GAINS

1. **Whether profit earned on sale of shares, held for earning dividend only are to be treated as capital gains instead of as business income?**

   CIT v. N.S.S. Investments (P) Ltd. (2007) 158 Taxman 13 (Mad.)

   Relevant section: 45

   In the instant case, the assessee never treated the shares as stock-in-trade and they were held for earning dividend only. A company can hold some shares as stock-in-trade for the purpose of doing business of buying and selling of such shares, while at the same time it can also hold some other shares as its capital for the purpose of earning dividend income. Here the shares were held as the assessee's capital and not as stock-in-trade. Hence, there would be capital gain only not business income.

2. **Is the additional compensation received on compulsory acquisition of property taxable in the year of receipt?**

   Anil Kumar Forma (HUF) v. CIT (2007) 289 ITR 245 (Mad.)

   Relevant section: 45(5)

   In this case, the assesses received additional compensation on compulsory acquisition of their property comprising land and building, which were subject to land acquisition proceedings under the West Bengal Land (Requisition and Acquisition) Act. The assessee on 22-4-96 and 2-4-97 received the said compensation. The amounts were received pending appeal that too, on the basis of the conditional interim order passed by the Calcutta High Court.

   The High Court applied the ratio of the decision in *CIT v. Smt. T.Girija Ammal (2006) 282 ITR 614*, and held that the right of the assessees on the amount received by them as enhanced compensation was only an inchoate right during the pendency of appeals before the Calcutta High Court and the amounts could be assessed only when the appeals were finally determined by the Calcutta High Court. Therefore, it cannot be said that the right over the amounts had accrued to the assessee on the date of receipt. The High Court held that the Tribunal had failed to take note of the fact that the amounts were received pending appeals and therefore, the Tribunal was not right in holding that the amounts received as per interim conditional orders of the Court were liable to tax.

3. **Whether transfer of a property by way of sub-lease could be treated as a capital asset and liable for capital gain tax?**

   Commissioner of Income-tax v Sujatha Jewellers (2007) 290 ITR 631 (Mad.)

   Relevant section: 45 & 2(14)

   According to section 2(14) of the Income-tax Act, 1961, the word capital asset means, property of any kind held by an assessee. Therefore, it does not necessarily mean that the property, which the assessee holds, must be his own. According to this definition, any kind of property held by an assessee would come within the definition of capital asset. Transfer by way of lease is treated as transfer of a capital asset on the principle that the lease creates an interest in the property and therefore to that extent, it extinguishes the right of the transferor. When an assessee transfers his leasehold rights in property in his occupation by way of a sub-lease to another person, it amounts to extinguishing his rights in the property and since his leasehold rights had created an interest in the property. The transaction of sub-lease constituted transfer and the gains arising there from were assessable as capital gain.

4. **Whether the amalgamation of the wholly owned subsidiary foreign company with the parent company give rise to capital gain under section 45 of the Income-tax Act, 1961?**

   Hoechst GmbH, In re (2007) 292 ITR 312 (AAR)

   Relevant section: 45 & 47(via)

   The applicant, a company incorporated in Germany, got amalgamated with a 100 per cent subsidiary foreign company. By virtue of the amalgamation all the assets and liabilities of the subsidiary company became the assets of the applicant. Since the applicant was the sole shareholder in the subsidiary company no share was issued to any third party consequent to the amalgamation. On these facts the Authority ruled that the amalgamation of the wholly owned subsidiary foreign company with the applicant, the parent company, did not result in a transfer for consideration, and therefore, did not give rise to capital gains. Hence, capital gains would not be chargeable under section 45 of the Income-tax Act, 1961.

5. **Whether interest income generated on investment in specified assets would constitute part of net consideration for claiming exemption under section 54E of the Income tax Act, 1961?**

   Smt. P. G. Bhanumathy, Bhavi Books v CIT (2007) 292 ITR 247 (Ker)

   Relevant section: 54E

   The assessee sold a flat and received a net consideration of Rs. 52 lakhs. Out of this, the assessee invested Rs. 44 lakhs in fixed deposit and availed of a loan of Rs. 4 lakhs on the security of the fixed deposit. After adjusting the loan amount the assessee invested Rs. 40 lakhs in the specified assets, which yielded an interest of Rs. 9.4 lakhs. The assessee along with another amount of Rs. 60,000 taken by the bank deposited in the specified assets within the time stipulated under section 54E. The assessee claimed exemption from capital gains on the entire deposit of Rs. 50 lakhs. The Assessing Officer allowed exemption attributable to Rs. 40 lakhs deposited by the assessee in the specified asset but declined to give exemption for the investment of Rs. 10 lakhs under the specified assets on the ground that it did not form part of the net consideration. The Tribunal confirmed the disallowance of Rs. 10 lakhs in the computation of capital gains.

The High court held that the net consideration defined in Explanation 5 to section 54E(1) of the Income-tax Act, 1961, does not include any accruals on the investment from out of the net consideration of the asset transferred. It is only the net sale value obtained on transfer of capital asset, which is the full value received as reduced by the expenditure incurred for and in connection with the transfer. Hence, advance income generated on investment in the specified assets under section 54E could not be treated as net consideration for reinvestment in the same or another specified asset for claiming exemption on such amount also.

9

INCOME OF OTHER PERSONS INCLUDED IN ASSESSEE'S TOTAL INCOME

1. **Are clubbing provisions were attracted in case where profit income from the firm divided in equal share and deposited in accounts of each minor but on facts no trust was created?**

   CIT v. Abdulgafur A. Mistry (2007) 292 ITR 515 (Guj.)

   Relevant section: 64(1)(iii)

   The assessee and his mother were partners in a firm. In a will executed by the mother of the assessee, she bequeathed certain ornaments belonging to her in favour of her four minor grand children. There was a mention in the will that on the death of the testator the said four children would be entitled to all movable properties belonging to her. The assessee's brother's wife was appointed as an executor of the will and the assessee's wife and the assessee's brother's wife were described as the guardians and trustees of the minor children. The will also mentioned that the profit income from the firm would be divided in equal shares and would be deposited in four different accounts of each minor. The Assessing Officer held that as trust was created in favour of the minors, the assessee was liable to tax. The Tribunal held that as a fact no trust was ever created and the words "trustee, executor and guardian" had been used as synonyms and that they were loose expressions.

   The High Court held that on the facts no trust was ever created by the testator under the will. If the executor of the will was to join the partnership to represent the interest of the minors and was to deposit the business income in a separate account of each of the beneficiaries, then such executor would not gain the capacity of a trustee and would only be an executor of the will. Therefore, the provisions of Explanation 2A to section 64(1)(iii) of the Income-tax Act, 1961, were not applicable.

10

DEDUCTIONS FROM GROSS TOTAL INCOME

1. **Whether newly established undertaking can claim deduction both under section 80HH and 80-I of the Income tax Act, 1961?**

   Joint CIT v. Mandideep Eng. and Pkg. Ind. P. Ltd. (2007) 292 ITR 1 (SC)

   Relevant section: 80HH & 80-I

   Sections 80HH and 80-I of the Income-tax Act, 1961, are independent and, therefore, deductions can be claimed by a newly established industrial undertaking both under section 80HH and section 80-I on the gross total income. It was decided by the Madhya Pradesh High Court in *J. P. Tobacco Products P. Ltd. v. CIT [1998] 229 ITR 123.* Having accepted the view taken the Department would not be permitted to take a contrary view in this case involving the same point.

2. **Whether the assessee was entitled to deduction under section 80-IA in respect of interest income and income by sale of import licences derived from its business.**

   Nahar Exports Ltd. v. CIT (2007) 288 ITR 494 (Punj. & Har.)

   Relevant section: 80-IA

   The assessee was engaged in the business of manufacture, export and trading in cotton yarn. It derived interest income and income by sale of import licences and claimed it as a deduction under section 80-IA. The Assessing Officer and the Commissioner (Appeals) disallowed the claim of the assessee. The Tribunal upheld the order of the Commissioner (Appeals).

   The High court held that the source of the import entitlements couldn't be said to be the industrial undertaking of the assessee. The source of the import entitlements can only be said to be the Export Promotion Scheme of the Central Government where under the export entitlements became available. The sale consideration there from cannot be held to constitute profits and gains derived from the assessee's industrial undertaking and the receipts cannot be included in the income of the assessee for the purpose of computing deduction under section 80-IA of the Income-tax Act, 1961.

3. **Whether the amount received by the co-operative society on account of pay recovered from resigned staff, recovery of training cost and security forfeiture were allowable as deduction under section 80P?**

   Gorakhpur Kshetriya Gramin Bank Vs. CIT (2007) 292 ITR 205 (SC)

   Relevant section: 80P

   The assessee, a co-operative society, was engaged in the business of banking. For carrying on the banking business, it provides training to their employees and recovered the cost of training. Under the terms of the contract, if an employee left the service midway, the assessee forfeit the amount of security furnished by such an employee.

   The High court held that for claiming exemption under clause (a) of sub-section (2) of section 80P of the Income-tax Act, 1961, the assessee is required to establish that the income is attributable to carrying on the business of banking. The business of banking could not be carried out without the aid of the employees and therefore whatever amount the assessee had received either towards the excess provision of pay recovered from resigned staff, training cost, recovery and forfeiture of security of employees was attributable to the activity of carrying on the business of banking.

4. **Whether losses from one unit had to be adjusted from the profits of other unit while computing special deduction under section 80-I?**

   CIT v. R. P. G. Telecoms Ltd. (2007) 292 ITR 355 (Kar.)

   Relevant section: 80AB & 80-I

   The assessee had carried on the business of manufacture and sale of telecommunication cables. In computing the special deduction under section 80-I the assessee had considered only business income from telecommunication cables and had not taken into account the loss on account of lease business.

   The High Court held that section 80AB of the Income-tax Act, 1961, would override all other sections for the purpose of deduction under Chapter VI-A of the Act. While calculating the gross total income of the company, one has to adjust the losses from one priority unit against the profits of the other priority unit and if the resultant gross total income is "nil" then the assessee cannot claim deduction under Chapter VI-A.

   Hence, the eligible profits on which special deduction was allowable had to be reduced by the loss incurred by the assessee in its leasing business.

11

INCOME-TAX AUTHORITIES

1. **When jurisdiction in respect of case had been shifted from one place to another place, where revenue could file an appeal under section 260A?**

   CIT v. Sahara India Financial Corporation Ltd. (2007) 162 Taxman 357 (Del.)

   Relevant section: 127

   Consequent to the order passed under section 127(2), the assessee's case was transferred from Lucknow to Delhi and the assessee's SLP against the order of Allahabad High Court confirming the transfer order was dismissed by the Supreme Court and, the transfer order has attain finality.

   By virtue of Explanation to section 127(4), all future proceedings would now have to be in harmony with the order passed under section 127(2) and, consequently, the jurisdiction in respect of the 'case' and the assessee having been shifted from Lucknow to Delhi. The revenue could file appeal under section 260A only in Delhi.

2. ***Income-tax Officer v. Raj and Raj Investments (2007) 293 ITR 66 (Kar.)***

   Relevant section: 133A

   The Income-tax Officer, on the basis of the authorisation issued by the Joint Commissioner, surveyed the premises of the assessee and impounded voluminous documents, books of account and other incriminating materials. On a writ petition challenging the action of the Income-tax Officer, the single judge quashed the authorisation, the impounding order and all other actions of the authorities and directed the impounded documents to be returned to the assessee retaining copies thereof authenticated by the assessee. Liberty was also given to the authorities to take action in accordance with law.

   Section 133A of the Income-tax Act, 1961, confers power upon the Income-tax Officer to survey the premises and to impound documents for further course of action. Certain statutory protections are provided mandating the officer to exercise such power and to do certain acts keeping in view the rights of a citizen under the provisions of the Act.

   The High Court held, that the single judge rightly allowed retention of the authenticated copies of impounded documents accepting the contention of the assessee that no reasons were assigned for retention of the documents impounded. The apprehension of the Department that public interest would be affected and the officers could not function effectively in the absence of the original documents could not be brushed aside.

12

ASSESSMENT PROCEDURE

1. **Whether assessee is entitled to carry forward and set off loss in case of late filing of return?**

   CIT v. Dhatu Sanskar P. Ltd. (2007) 292 ITR 135 (Guj.)

   Relevant section: 139 & 80

   The assessee was required to file the return. The assessee had, by way of an application sought extended time for filing the return. The Assessing Officer passed an order refusing to extend time for filing the return. The refusal of extension of time was not conveyed to the assessee. The assessee had claimed carry forward of the assessed loss but Assessing Officer did not allow it.

   Proviso to section 139(1) of the Income tax Act, 1961, provides that the Assessing Officer is empowered to take a decision on the application for extension of time for filing the return and to communicate the decision to the assessee concerned. Non-communication of an order, which is likely to have a detrimental effect upon the person concerned, would not only be arbitrary and, therefore, violative of the principles of natural justice, but would also make the order ineffective and incomplete.

   It was held that the Assessing Officer had taken a conscious decision and rejected the application for extension of time. However, he had failed to communicate the rejection to the assessee. Therefore, the assessee is entitled to carry forward the assessed loss even though the return was filed late, in view of the specific provisions of section 80.

2. **Can the Assessing Officer refuses to process return on the ground that it was not filed on time prescribed under section 139 of the Income tax Act, 1961?**

   A. Balakrishnan v. General Manager, Hindustan Machine Tools Ltd. (2007) 290 ITR 227 (Kar.)

   Relevant section: 139

   The petitioner had received amount as result of voluntary retirement scheme. The employer at the time of paying this amount deducted tax at source under the provisions of section 192 of the Act and an acknowledgment in Form No. 16A was issued to the petitioner. The petitioner contended that in respect of the amount that he had received, in terms of the provisions of sections 10(10C), 17(3)(i) and 89, read with rule 21A of the

Income-tax Rules, 1962, he was not liable for payment of any tax and the amount deducted on the amount purporting to be on the salary was to be refunded. He filed a return in Form No. 2D seeking the refund. The authorities did not respond and as a consequence the petitioner pressed into service the provisions of the Right to Information Act, 2005, by filing an application. It was in response to this, that the Commissioner of Income-tax, had intimated the petitioner that the return of income was not a valid return and could not be processed as it had been filed beyond the time limit prescribed under section 139.

The High Court held that the time prescribed for filing a return of income in terms of section 139 of the Income-tax Act, 1961, is applicable to a person who is compelled to file a return in terms of section 139(1) of the Act. It is a person who has income over and above the exempted limit and whose income is taxable under the Act, who is required to file the return and while so, is bound to follow the period. A person whose taxable income is nil has no obligation to file a return and the time stipulations also equally cannot apply. A perusal of the provisions of section 139 does not indicate that the authorities are barred from processing a return filed under the Act just because it is not filed within the time stipulated under section 139(1).

3. Whether an order passed by the Deputy commissioner under section 142(2A), without giving an opportunity of being heard to the assessee, can sustain?

Rajesh Kumar v. DCIT (2006) 287 ITR 91 (SC)

Relevant section: 142(2A)

Section 142(2A) of the Income-tax Act provides that the Assessing Officer has to consider following factors before issuing directions for special audit:

(i) The nature of accounts

(ii) Complexity of accounts and

(iii) Interest of the revenue.

All the aforementioned factors are conjunctively required to be read. The principles of natural justice are based on two principles, namely, (i) nobody shall be condemned unheard; (ii) nobody shall be judge of his own cause. Once it is held that the assessee suffers civil consequences and any order passed by it would be prejudicial to him, principles of natural justice must be held to be implicit. The principles of natural justice are required to be applied to minimize arbitrariness.

In the instant case, the assesses were not made known as to what led the deputy Commissioner to form an opinion that all relevant factors including the ones mentioned in section 142(2A) were satisfied. If even one of them was not satisfied, no order could be passed. If the attention of the Commissioner could be drawn to the fact that the underlines purpose for appointment of the special auditor was not bona fide he might not have approved the same.

Thus, the order passed by the Deputy Commissioner under section 142(2A) without giving opportunity of hearing to the assessee and refusing the assessee's request for supplying reasons for passing such order, could not be sustained.

Note: It must be noted here that in order to give effect the above judgment of Supreme Court, the Finance Act, 2007 has amended section 142(2A) and has provided that the Assessing officer is now required to give the assessee an opportunity if being heard before issuing directions for special audit under section 142(2A).

4. Whether closing stock is to be valued at market price in case of conversion of proprietary business into partnership firm?

CIT, Madurai v. M.K. Kathiresan (2007) 160 Taxman 402 (Mad.)

Relevant section: 145

The High Court held that it is an established rule of commercial practice and accountancy that whenever there was no discontinuance of business, the closing stock is to be valued at cost or market price, whichever is lower. The Supreme Court in various decisions held that since there was no cessation of business, the closing stock had to be valued at cost or market price, whichever is lower. The conversion of a proprietary business into partnership is a transfer, it could not be said that the nominal value credited to the capital account in the hands of the firm is the consideration for the transfer. It is only when the business is closed forever, the question of valuing the stock at the market price might arise. In the present case, it cannot be said that the assessee has ceased to remain in the same business, when he converted his proprietary business into a partnership. Hence, the closing stock should not be valued at market price.

5. Whether the Assessing Officer could again initiate the reassessment annulled by Appellate Assistant Commissioner?

CIT v. Air Craft Radio Corporation (2007) 292 ITR 64 (Punj. & Har.)

Relevant section: 147 & 148

The Assessing Officer issued notice under section 148 on the basis of some complaints about tax evasion filed against the assessee without, however, verification of the allegations in the complaint. On receipt of the complaint, the Inspector of Income-tax had made a survey under section 133A of the Act, when the books of account of the assessee were impounded. The books of account pertaining to the relevant assessment year were not available at the shop of the assessee during the course of survey. However, it produced the account books pertaining to earlier years. The books were impounded and examined and reassessment order was passed. The Appellate Assistant Commissioner annulled the order of reassessment as without jurisdiction. The Assessing Officer issued notice under section 148 and again computed the income of the assessee, which was annulled by the Appellate Assistant Commissioner. Again the assessee challenged the order of reassessment framed by the Assessing Officer before the Appellate Assistant Commissioner. The Appellate Assistant Commissioner cancelled the assessment. The Tribunal upheld this.

The High Court held that after the reassessment order had been set aside by the Appellate Assistant Commissioner the Assessing Officer had no jurisdiction to once again embark upon the same proceedings.

6. **Whether the rectification proceeding under section 154 of the Act was justified, in case the Assessing Officer accepted once the books of accounts?**

CIT v. Thirumalai Fertilizer and Co. (2007) 288 ITR 517 (Mad.)

Relevant section: 154 & 44AE

The assessee was a dealer in fertilizer and also derived income from plying three lorries. It filed its return disclosing a loss. A notice under section 143(2) was served directing the assessee to furnish details. After the assessee furnished the details, the Income-tax Officer completed the assessment under section 143(3) of the Act, accepting the total loss return by the assessee. Further, he made addition by estimating the business income from two lorries under section 44AE. Subsequently the Assessing Officer was of the view that there was a mistake in the regular assessment on the ground that, instead of estimating the income from three lorries, income from two lorries were alone estimated and further, the expenses relating to the lorries were to be disallowed while estimating the income under section 44AE of the Act and hence, the same was to be rectified. The Commissioner (Appeals) deleted the additions made in the rectification order. The Tribunal upheld this.

The High Court held that the assessment was made under section 143(3) of the Act and the Assessing Officer accepted the return of loss filed by the assessee. From the records it was seen that the assessee maintained books of account and filed a profit and loss account, which was considered by the Assessing Officer in determining the income. Once the books of account were accepted, it was wrong on the part of the Assessing Officer to estimate income under section 44AE of the Act. Hence, the assessment under section 44AE by invoking the rectification proceeding under section 154 of the Act was not justified.

7. **Whether the rectification under section 154 can be made for the order that is not in conformity with the decision of Supreme Court?**

Dinosaur Steels Ltd. v. Joint CIT (2007) 288 ITR 476 (Mad.)

Relevant section: 154 & 80-IA

The assessee had filed its return and claimed special deduction under section 80-IA of the Income-tax Act, 1961, on its gross income and this was allowed. Subsequently the order was rectified on the ground that the assessee's claim of deduction under section 80-IA had been allowed before setting off the earlier years' losses from the profits and gains of the industrial undertaking. The order was upheld by the Commissioner (Appeals) and the Tribunal.

The High Court held, that only an apparent mistake and a non-debatable issue would be the subject matter of rectification under section 154 of the Act. In this case, the order sought to be rectified is not in conformity with the law declared by the Supreme Court, which amounts to mistake apparent on the face of the record. Hence, the action of the Assessing Officer in rectifying the order under section 154 of the Act is perfectly justified.

13

APPEALS AND REVISION

1. **Whether assessee can raise additional grounds of appeal before the Appellate Tribunal?**

   Abhishek Industries Ltd. v. CIT, Central Ludhiana (2006) 286 ITR 1 (Punj. & Har.)

   Relevant section: 254

   The High Court held that the only pre-condition for permitting an assessee to raise additional ground is that the request should be reasonable. The request made by the assessee for raising additional grounds of appeal in the instant case was reasonable, firstly for the reason that the facts with regard to the legal issues, being raised by the assessee as additional grounds of appeal, were already on record and secondly on merits, the issue sought to be raised had already been decided by the Tribunal in favour of the assessee for other years. Therefore, the assessee was allowed to raise additional grounds of appeal.

2. **Whether appellate authority has power to pass an order of stay in appropriate cases even in absence of specific provision?**

   Agricultural Produce Market Committee v. CIT (2006) 156 Taxman 423 (Pat.)

   Relevant section: 254

   The appeal is pending. The matter is settled that the appellate authority even in the absence of a specific provision has power vested in it by virtue of being an authority to grant stay in appropriate cases. Accordingly, if the proper application is filed before the appellate authority, the appellate authority will exercise its discretion and pass a speaking order in accordance with law.

3. **Whether the period of limitation for revision proceedings by the Commissioner begins from the date of original assessment or from the date of reassessment, in a case where the revision proceedings are related to an item, which was not the subject matter of reassessment?**

   CIT v. Alagendran Finance Ltd. (2007) 293 ITR 1(SC)

   Relevant section: 263

   In this case, in the original assessment order, the assessee's claim relating to Lease Equalisation Fund was accepted. However, the same was not the subject matter of reassessment, which was initiated in respect of other items. Thereafter, the Commissioner initiated revision proceedings only in relation to the item Lease Equalisation Fund. The Appellate Tribunal and the High Court opined that the revision proceedings were barred by limitation as they were initiated four years after the original assessment.

The Supreme Court observed that though there was no doubt that once an order of assessment is reopened, the previous assessment will be held to be set aside and the whole proceedings would start afresh. However, it would not mean that even when the subject-matter of reassessment is distinct and different, the entire proceeding would be deemed to have been reopened. The doctrine of merger would apply only in a case where the subject matter of reassessment and the subject matter of assessment are the same. However, in this case, the revision proceedings related to Lease Equalisation Fund was not the subject matter of reassessment. Therefore, the doctrine of merger does not apply in this case and the revision proceedings are barred by limitation.

4. Whether the decision of the Tribunal was right in respect following substantial question of law:

a) The first question whether the assessee ought to be taxed, on account of perquisite benefits provided to him by the company?

b) The second issue is with regard to the salary payment of Rs. 60,000 to the wife of the assessee?

CIT v. Subrata Roy (2007) 292 ITR 627 (Del.)

Relevant section: 263

(a) The High Court held that the company had claimed a deduction on the expenses incurred in respect of perquisite benefits provided to the assessee. The deductions were disallowed and the company was taxed on that amount. Once the company has been taxed on the amount, the assessee cannot be taxed on the same amount again. Moreover, the benefits given to the assessee are personal to the assessee and the benefits are not intended to be for general use.

(b) According to the Assessing Officer, the wife of the assessee was not entitled to the salary payment of Rs. 60,000 but the appellate authorities found that she was a qualified professional who was looking after the running of Children Welfare Scheme for a long time. She had long experience and, therefore, her income could not be clubbed with that of the assessee. The High Court find no error in the view taken by the appellate authorities in this regard. Hence, no substantial question of law arises.

5. **Whether the Tribunal was right in holding that the assessment cannot be reopened where the assessee had not returned the income which was subjected to tax deducting at source?**

CIT v. Goyal's International Hotels and Resorts Ltd. (2007) 292 ITR 221 (Mad.)

Relevant section: 260A

The assessee-company was incorporated on October 1, 1990, and commenced its business activity. The return of income was not filed for the first two years and after that the first return of income was filed. While processing the return under section 143(1)(a) of the Act, the Assessing Officer noticed that the assessee had deposited some amount with M/s. Classic Financial Services and Enterprises Ltd. during the relevant previous year and the afore-said company had credited the account of the assessee as interest. It was also noticed that the company had also deducted tax at source and paid to the Government. Based on this information, the Assessing Officer initiated proceedings under section 147 for failure of the assessee to file the return of income in respect of the aforesaid interest income and treat the interest income as the income of the assessee from other sources.

The High Court held that the tax was deducted at source only at the particular rate prevailing during the relevant years. The amount of tax deducted at source will always not be equal to the tax payable by the assessee. The Assessing Officer had correctly invoked the provision of section 147 and rightly assessed the interest income.

14

PENALTIES

1. **Whether assessee would be entitled to interest under section 244(1A), in respect of payments made under section 220(2)?**

   CIT v. R. D. Ramnath Company (2007) 159 Taxman 319 (Del.)

   Relevant section: 244

   In the instant case, the High court held that the assessee was entitled to interest under section 244(1A) of the Income-tax Act in respect of payment made by the assessee under section 220(2) of the Act. The Delhi High Court relied upon the decision of the Gujarat High Court in *CIT v. Gujarat State Warehousing Corporation. (2002) 256 ITR 596.*

2. **Whether penalty under section 272A(2)(c) would be levied on the assessee in case of failure of filing TDS return under section 206 or issuing certificate of tax under section 203?**

   CIT-II, Lucknow v. Sahara India Financial Corporations Ltd. (2007) 158 Taxman 435 (All.)

   Relevant section: 272A

   In the case of *CIT v. Sri Ram Memorial Education Promotion Society (2006) 150 Taxman 58 (All)*, it was held that if tax has not been deducted at source, the question of issuing the certificate of tax under section 203 or filing of return under section 206, would not arise at all. In the instant case, the assessee had not deducted any tax at source. Therefore, the assessee has no reason to file the details of the tax or to file return or issue any certificate.

3. **Whether Tribunal was right in deleting the penalty under section 271(1)(c) imposed by the Assessing Officer?**

   Jyoti Laxman Konkar v. CIT (2007) 292 ITR 163 (Bom.)

   Relevant section: 271(1)(c)

   The assessee had filed a return. The Assessing Officer not satisfied therewith, carried out a survey under section 133A of the Income-tax Act, 1961, and during the survey he found that there was a discrepancy in stock, which was brought to the notice of the assessee, and the assessee filed a revised return disclosing additional income. The Assessing Officer imposed penalty under section 271(1)(c) and the Tribunal upheld this.

The High Court held that the question whether there is concealment of income or not has to be decided with reference to the facts of a given case and the fact finding authorities under the Act having come to the conclusion that in the facts of the case, the assessee had concealed the income initially with a view to avoid the payment of tax, the imposition of penalty was valid.

4. **Whether the levy of penalties under section 271(1)(c) of the Income-tax Act, 1961, and prosecution under section 276C are simultaneous?**

Indian Plywood Manufacturing Co. Ltd. v. P. S. Dave (2007) 291 ITR 430 (Bom.)

Relevant section: 271(1)(c) & 276C

The High Court held that once the penalties under section 271(1)(c) are cancelled on the ground that there is no concealment and no penal cause under section 271(1)(c) was made out against the applicants, the quashing of prosecution under section 276C is automatic.

5. **Whether the penalty imposed under section 271B can be set aside on the ground of ignorance of Income-tax Act?**

Saraswathi Electronics v. Income-tax Officer (2007) 292 ITR 411 (Kar.)

Relevant section: 271(1)(c)

The assessee had delayed in filing audit reports for three assessment years. The reasons for the delay were that the assessee could not get the accounts written up daily due to non-availability of accounts clerk, he was not conversant with the Income-tax Act and he was not aware that accounts were to be got audited and the audit report along with the return of income should be filed within the time allowed under the Act and the assessee was also advised that the return of income could be filed at any time within ten years from the end of the year and no penalty would be levied. The Assessing Officer considered the reasons to be unacceptable and imposed penalty. The Tribunal confirmed the penalty imposed.

The High Court held that the ignorance of the Income-tax Act could not be a ground for not writing up the books of account as contended by the assessee. For the three years, there was no reasonable cause shown and the assessing authority rightly imposed the penalty.

15

DEDUCTION, COLLECTION AND RECOVERY OF TAX

1. **Whether there was an obligation on the part of the assessee-company for deducting tax deductible at source (TDS) under section 194A on interest paid by it for loans availed of by the assessee and repaid by it with interest on the ground that the loans were meant for the directors of the assessee-company and not for the assessee-company?**

   CIT v. Century Building Industries P. Ltd. (2007) 293 ITR 194 (SC)

   Relevant section: 194A

   The Directors of the assessee-company took loans in their individual capacities from the creditors in the name of the company. The loan amounts were received by cheques in the name of the assessee-company and were deposited in the bank account of the company and transferred to the accounts of the directors on the same day by cheques. When the directors repaid the loan amounts or interest thereon the payments were also routed through the assessee-company. The books of account of the assessee-company did not reflect the loans borrowed and there was no resolution of the company whereby the company had agreed to act as the medium for routing the borrowings and repayments. No deduction of tax at source was made under section 194A on repayments of interest. The Assessing Officer passed an order under section 201(1A) imposing interest on the assessee-company for not deducting tax at source. The Appellate Tribunal accepted the claim of the company and the High Court affirmed the order of the Appellate Tribunal.

   The Supreme Court held that the lender had advanced the loans to the assessee-company, the assessee made the debit to the "interest account" for a specific amount calculated with reference to the deductor's liability to a creditor. It could not be said that the assessee-company was in charge of disbursing the repayments made by the directors in their individual capacities, and the Department was right in invoking the provisions of sections 201 and 201(1A).

2. **Can revenue resort to the general provisions of the section 194J when there is specific provision in the section 194C by way of an Explanation regarding production of programmes for broadcasting and telecasting?**

   CIT Delhi-XVIII v. Prasar Bharti (Broadcasting Corporation of India) (2007) 158 Taxman 470 (Del.)

Relevant section: 194C & 194J

The Finance Act, 1995, with effect from 1-7-1995, inserted a Explanation III in section 194C, which would covered, payment made towards a contract, concerning 'broadcasting and telecasting including production of programmes for such broadcasting or telecasting'. Simultaneously, the Finance Act, 1995 inserted section 194J, which provides deduction of tax at source at the time of payment of a fee for professional or technical service.

The assessee was engaged in the business of controlling and managing various doordarshan channels. They had made certain payments for programmes as contract payments and deducting tax at source at the rate of 2 per cent under section 194C. The revenue's stand was that the television programme producers should be treated as professional/ technical persons and the payments made to them should be subjected to deduction of tax at source at the rate of 5 per cent under section 194J. Accordingly, the assessee was treated as an assessee in default and short-deduction was computed.

The Tribunal held that Explanation III to section 194C is very specific in its application to include not only broadcasting and telecasting but also includes 'production of programmes for such broadcasting and telecasting'. Further, it was also held that if on the same date, two provisions are introduced in the Act one specific to the activity sought to be taxed and the other in more general terms, resort much be made to the specific provision which manifests the intention of the Legislature. There was no infirmity in the view taken by the Tribunal.

3. **Whether the agents appointed by the contractors are liable to deduct tax at source under section 194C of the Income tax Act, 1961?**

Kumaon Mandal Vikas Nigam Ltd. v. Income-tax Officer (2007) 290 ITR 538 (Uttranchal)

Relevant section: 194C

KMVN made certain payments to its agents for conducting of LTC tours on behalf of the Nigam. The Nigam entered into contracts with a number of travel agents to organise and supervise tours on behalf of the Nigam. These agents were treated as transport contractors who provided buses and conducted LTC tours for Central Government employees on behalf of the Nigam and they were also responsible for collection of amounts from the customers who actually availed of such facilities. The entire payments received by the parties were deposited with the Nigam and the Nigam on such payment used to give 85 per cent to the contractors being hire charges and other incidental charges before the start of the tour. After completion of tour, the balance 5 per cent used to be given on account of commission to the said contractors. Since the parties to whom the payment was given were considered as transport contractors of KMVN, the provisions of section 194C of the Income-tax Act, 1961, were applicable for the purpose of deduction of tax at source and since no tax was deducted orders under section 201(1)/

201(1A) were passed holding the assessee in default for not deducting the tax at source as per the provision of section 194C. The Commissioner of Income-tax (Appeals) and the Tribunal upheld the order.

The High Court held that the liability to pay the tax is created on the contractor under section 194C of the Income-tax Act and the contractor was KMVN, which appointed agents for its own purposes.

4. Whether tax to be deducted at source on the advance rent received as Security Deposit?

CIT v. Reebok India Co. (2007) 291 ITR 455 (Del.)

Relevant section: 194-I

The assessee-company entered into a lease agreement, as per which it took on lease the premises of the lessor at a monthly rent. The lease agreement provided for the payment of security deposit which was to be reduced by the amount of rent which became payable every six months in accordance with the agreement. The Assessing Officer observed that the amount of security deposit was nothing but advance rent and hence, as per the provisions of section 194-I, the assessee should have deducted tax at source there from. Thereafter, the Assessing Officer raised a demand of tax under section 201(1A) on the assessee

The High Court observed that a bare reading of the lease agreement showed that the sum paid by the assessee to the lessor was in the nature of advance rent and not security deposit since such "security deposit" was to be reduced by the amount of rent which became payable every six months. The Court observed that had the amount been a security deposit, it would have been in the nature of a refundable amount at the time of termination of lease. Also, as per the agreement, the assessee was under an obligation to refund the unadjusted portion, if any, of the "security deposit". This means that the amount was adjustable against rental payment and the same was so adjusted. Therefore, the payment was in the nature of advance rent and tax was deductible at source under section 194-I.

5. Whether the payment of landing fee and parking fee for aircraft amounts to rent within the meaning of 'rent' as per the Explanation (i) to section 194-I of the Income-tax Act, 1961?

United Airlines v. CIT (2006) 287 ITR 281 (Del.)

Relevant section: 194-I

The High Court held that Explanation (i) to section 194-I of the Income-tax Act, 1961, states that rent means any payment, by whatever name called, under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of any land or any building (including factory building), together with furniture, fittings and the land appurtenant thereto, whether or not such building is owned by the payee. There could be no consideration of equity if the language of the provision is plain and clear. A perusal of the provision shows that the word rent, as defined has a wider meaning than rent in common parlance. It shows that even the landing of aircraft or parking of aircraft amounts to user of the land of the airport. Hence, the landing fee and parking fee will amount to rent.

16

ASSESSMENT OF VARIOUS ENTITIES

1. Are a firm needs to carry some business before getting registered?

Thayyil Enterprises v. Income-tax Officer (2006) 287 ITR 414 (Kar.)

Relevant section: 185

In order to constitute a genuine firm, the firm should be engaged in a business because section 4 of the Partnership Act, 1932, specifically defines a firm as a relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Therefore, existence of a business is a "sine qua non" for a partnership.

The High Court held that the petitioner did not claim its rental income as business income. Hence, the petitioner was not engaged in any business and the firm was not entitled to registration.

17

INCOME-TAX ON FRINGE BENEFITS

1. Whether the transportation cost incurred by applicant, a non-resident company, in providing transportation facility for movement of offshore employees from their residence in home countries (outside India) to place of work (rigs in India) and back is liable to fringe benefit tax?

R & B Falcon (A) (P.) Ltd. In re (2007) 289 ITR 369 (AAR-NEW DELHI)

Relevant section: 115WB

As regards question whether the transportation costs incurred by the applicant on the to and fro journeys of employees from their residences in their home countries to the designated city in India and from there to the rig (in India) fall within the meaning of 'conveyance' or 'tour and travel', (including foreign travel) in clauses (F) and (Q), respectively, of sub-section (2) of section 115WB, it is necessary to comprehend the connotation of terms, 'residence'. 'tour and travel, 'conveyance' and transport. They are not defined in Chapter XII-H and as they are not technical terms, they have to be given meaning as understood by English speaking people.

The word 'residence' connotes a place of abroad where a person intends to dwell for a considerable length of time and not a place where a person is required to stay for a short duration in connection with his duties like the stay at the rig. The terms 'conveyance' and 'transport' are used many a times interchangeable. They are almost synonymous, though there is a subtle difference in them; conveyance is something which serves as a means of transportation, like a vehicle, helicopter, etc., transportation means movement of people or goods from one place to another.

After a careful reading of the questions and answers in the circular, it is clear that question No. 104 relating to transportation of the employees whether free or on subsidized basis for journeys from their residence to the place of work and from the place of work to their residence, refers to the residence of the employees within India and that the same position will govern sub-section (3) of section 115WB.

For the reasons mentioned above, it is ruled out that the transportation cost incurred by the applicant in providing the transportation facility for movement of offshore employees from their residence in home countries (outside India) to the place of work (rig in India) and back is liable to fringe benefit tax.

1

LEVY OF WEALTH-TAX

1. Whether 'Jeep' can be termed as a motor -car for the purpose of tax in terms of Wealth-tax Act, 1957?

Commissioner of Wealth-tax v. Karnataka Minerals & Manufacturing Co. Ltd. (2006) 287 ITR 411 (Kar.)

Relevant section: 2(ea)

A limited company while computing its wealth-tax claimed that the 'Jeep' is not a motor-car. Hence, exempt from wealth-tax. The Assessing Officer and the Appellate commissioner did not accept the contention of the assessee and ruled that 'jeep' is a motor-car

A Division Bench of the Kerala High Court in the case of *Commissioner of Agricultural Income-tax v. Good Hope Plantation [1988] 170 ITR 173* held that in common parlance, a jeep is understood as a sturdy motor car. Recently, a Division Bench of the Madras High Court in the case of *Southern Roadways Ltd. v. CWT (2001) 251 ITR 213* held that the term 'motor car' means a vehicle that moves with the aid of power, whether mechanical or electrical.

The term motorcar used in the Act is meant to be an inclusive term meant to include all vehicles, which can properly be regarded as motor cars in a broad sense. The object of including motorcars was to refer to motorcars as 'assets' which are required to be taken note of while computing the net wealth of closely held companies. Similarly, in the context in which the term is found in the provision it is meant to cover all motor vehicles other than heavy vehicles, such as lorries and buses. Hence, the term 'motor car' includes jeeps.

2. Whether the land allotted to the assessee being a member of co-operative housing society, transferred by him to his life, assessable in his hands?

Wealth-tax Commissioner v. Ram Saran Das Tandon (2007) 292 ITR 546 (All.)

Relevant section: 4

The assessee became a member of a co-operative housing society. The object of the society was to purchase and allot land in favour of its members. As per the bye-laws, after the allotment, the plots were transferred to the members of the society. The assessee who had been allotted a plot by the society constructed a house and substituted the name of his wife in the record of the society in his place. The society had executed a registered sale deed in respect of the plot in question in favour of his wife. The assessing authority included the value of the said property in his hands. The Commissioner of Wealth-tax (Appeals) and Tribunal confirm this.

The High Court held that the assessee ceased to be a member of the society. He was not a member of the society, he could not be treated to be the owner of the house property. The value of the property was not assessable in his hands.

3. Can the palace transferred by the husband to his wife through will, entitled for exemption under section 5(1)(iv) of the Wealth Tax Act, 1957?

Commissioner of Wealth-tax v. Dilherkunverba C. Jadeja (2006) 287 ITR 501 (Guj.)

Relevant section: 5(1)(iv)

The assessee executed a will in favour of his wife and granted her life interest in the palace belonged to him. The Wealth-tax Officer did not grant any exemption in favour of the assessee. The Tribunal granted her exemption. The High Court held that since the life interest was included in the net wealth of the assessee, the assessee was entitled to claim exemption under section 5(1)(iv) of the Wealth-tax Act, 1957.

2

ASSESSMENT PROCEDURE

1. Whether the various factors and reasons explain by the assessee for failure to non-filing of the returns within the time prescribed under the Act, can be considered as reasonable cause?

CIT v. Chikmagalur Club (2007) 290 ITR 522 (Kar.)

Relevant section: 18

The assessee-club had not filed the returns of wealth within the time stipulated for filing of such returns. The Wealth-tax Officer had issued a notice, inter alia, directing the assessee to file its wealth-tax returns. The Wealth-tax Officer rejected the explanation given by the assessee and levy the penalty. However, the first appellate authority and the Tribunal accepted the explanation for belated filing of the return of the assessee.

The High Court held that the assessee's explanation in the reply filed to the notice issued under section 18(1)(a) was the bona fide belief of the assessee. This belief was not without any reasons. Various High Courts had held that since the club is an association of persons, it is not taxable under the provisions of the Wealth-tax Act in view of the language employed in the charging provisions of the Act.