AIFTP
ALL INDIA FEDERATION OF TAX PRACTITIONERS
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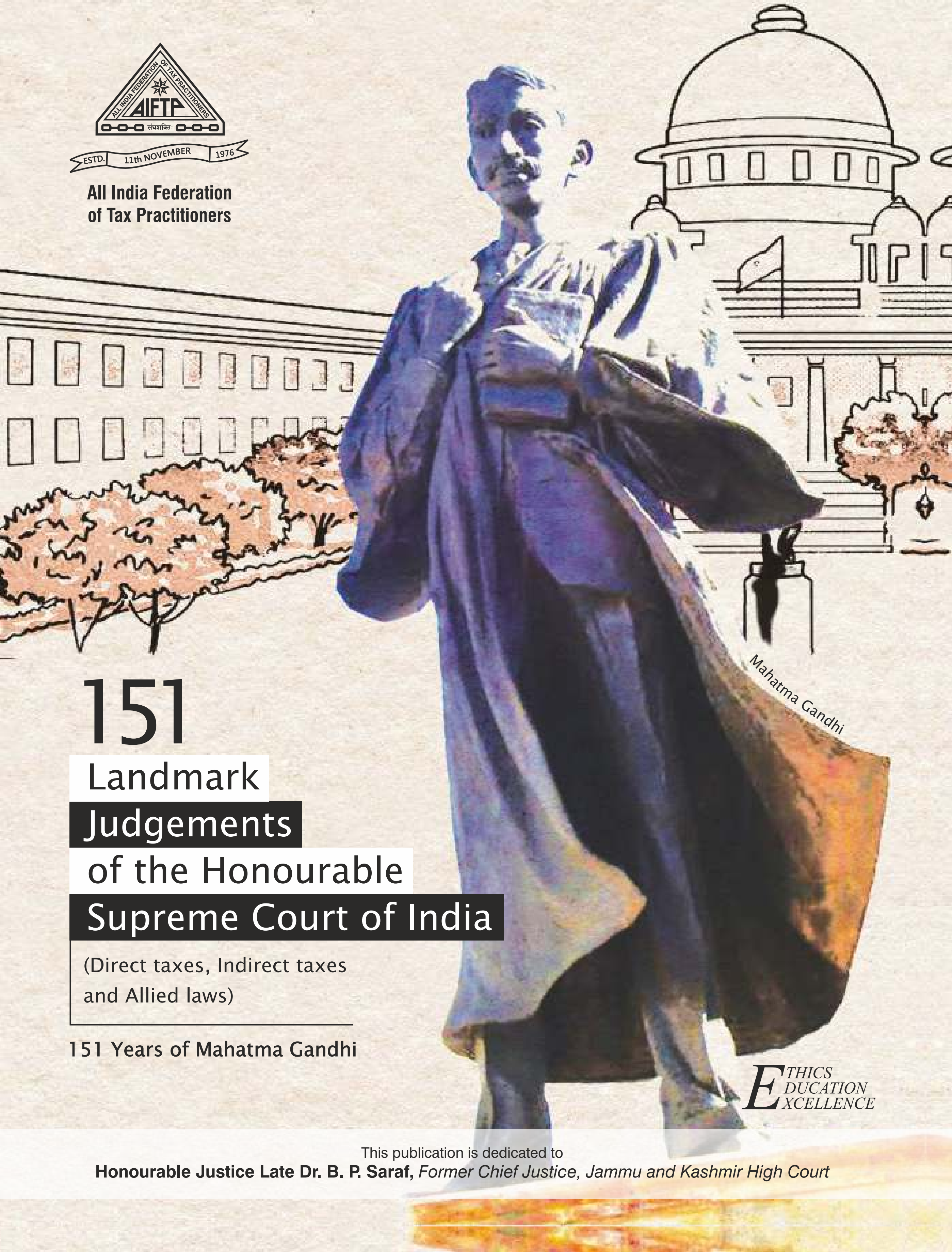
ESTD. 11th NOVEMBER 1976

All India Federation of Tax Practitioners



151 Landmark Judgements of the Honourable Supreme Court of India

(Direct taxes, Indirect taxes and Allied laws)

151 Years of Mahatma Gandhi

ETHICS
EDUCATION
EXCELLENCE

This publication is dedicated to
Honourable Justice Late Dr. B. P. Saraf, *Former Chief Justice, Jammu and Kashmir High Court*

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This publication is dedicated to Honourable Justice Late Dr. B. P. Saraf, Former Chief Justice of Jammu and Kashmir High Court. We are thankful to Dr. Ashok Saraf, Senior Advocate, Guwahati for Sponsoring this publication.

Source – Quotes of Mahatma Gandhiji

To spread the vision, wisdom and messages of the Mahatma Gandhiji we have reproduced 151 quotations in this publication.

We acknowledge that the majority Quotes of Mahatma Gandhiji are reproduced from the Book titled "Quotes of Gandhi" which was Compiled by Shalu Bhallla 41. Pali Hill, Bandra Bombay, which was published with the kind permission of Navajivan Trust, Ahmadabad in the year, 2006.

We are grateful to them.

Mr. Mitesh Kotecha
Chairman, Publication Committee (AIFTP)

AIFTP

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Honourable Justice Late Dr. B. P. Saraf

Former Chief Justice, Jammu and Kashmir High Court

23rd August, 1939 – 15th May, 2012

Biodata of Honourable Justice Late Dr. B. P. Saraf

Former Chief Justice, Jammu and Kashmir High Court

23rd August, 1939 – 15th May, 2012

Born, brought up and educated at Guwahati in the State of Assam, Honourable Justice late Dr. B. P. Saraf had a brilliant academic career. Stealing moments to study in the midst of helping his father in a business of a small cloth shop, he still excelled academically and stood first class first in both B.Com. (Hons.) and M.Com Examinations of the Gauhati University and also secured first position in the LL.B. Examination. For his academic achievements he was awarded gold medals by the University and other educational and social organizations. His hunger for knowledge also led him to extensive research resulting in the award of doctorate for his thesis "Capital Taxation in India".

Joining the Gauhati High Court Bar in 1963, he had an extensive practice in the High Court Taxation, Corporate and Commercial Laws. He was designated as Senior Advocate by the Gauhati High Court and also served as the Senior Standing Counsel for the Income-tax Department for North East India for four years.

The professional and social commitments never distanced Honourable Justice late Dr. B. P. Saraf from the academic side and his perpetual zest and hunger for knowledge and development of law. He served as lecturer in taxation and labour laws in the Gauhati University & Post-Graduate Commerce Department from, 1963 to 1968. His treatises and commentaries on diverse subjects of law are well known-the most notable ones being classic work on the Arbitration and Conciliation Act, 1996 and commentary on the Sales tax laws in Assam and Meghalaya. He also authored Statutes of North East" in six volumes, the Jail Manual and the Police Manual. He was also associated with the National Institute of Public Finance and Policy and the Union Public Service Commission as Adviser. Honourable Justice late Dr. B. P. Saraf also served as a member of the Meghalaya Taxation Enquiry Committee, the Nagaland Taxation and Resource Mobilisation Commission and the Meghalaya Commission on Resource Mobilisation and as Chairman of Assam Taxation & Resource Mobilization Commission.

Despite such a hectic and busy professional life, Honourable Justice late Dr. B. P. Saraf was extremely committed to social causes and was involved with a large number of charitable and social organisations, He was President of Kamrup Chamber of Commerce and the North East India Tax Bar Association and also served as Administrator of Gauhati Municipal Corporation (1983-1985). He was deeply involved with the Red Cross and Rotary movement till elevation to the Bench. Working with these social organizations, he made great contributions to social causes. He served as President of the Rotary Club of Gauhati and also led a Group Study Exchange Team to South Australia and Victoria. He served as the President of Kamrup Chambers of Commerce, P. S. Dhanuka Balika Vidyalaya, North East Tax Bar Association, Federation of North East Chambers of Commerce & Industry, Ajitsaria Chhatranivas, Assam Passengers Association, Purvattar Pradeshik Marwari Sammilan Shikhsa Kosh, etc.

He was also the Chairman of Fancy Bazar Pujo Samity Religious Charitable Trust, Trustee of Rukmanand Ajitsaria Charitable Trust, Sree Gauhati Gosala Trust, Institute' of Child Health and Mother Welfare. He was actively associated with the starting of Marwari Maternity Hospital and establishment of Sadhna Temples. Apart from the above, he also served as the Member of National Railway Users' Consultative Council. He was the editor of the first Hindi weekly published from this region namely "Anatardwand".

Honourable Justice late Dr. B. P. Saraf was appointed as Judge of the Gauhati High Court on 2nd January, 1989 and subsequently joined as a judge of the Bombay High Court on 11th December, 1991. He served as Chief Justice (Acting), of the Bombay High Court and was finally appointed Chief Justice of the Jammu and Kashmir High Court on 21st February, 2000 from where he retired on 22nd August, 2001.

The law journals bear testimony to Honourable Justice late Dr. B. P. Saraf's career as a judge of the High Court. He rendered landmark judgments on diverse complex issues of law. As judge he was known for extremely quick grasp of facts and law. The singular focus of Honourable Justice late Dr. B. P. Saraf was to reach the truth in all matters before him within the parameters of law. His humble background made him relate to the difficulties of the common man which was reflected in his judgments.

As Chief justice, he made radical administrative and judicial reforms to ensure smoother and quicker administration of justice. He was in Kashmir during extremely troubled times. But, that never deterred him from travelling to the most interior parts of Kashmir to be with the judicial officers to keep them motivated. He strove hard to reduce the number of pending cases. Sensitive to the hardship litigants suffer, he introduced a novel system of a "grievance box" in all the subordinate courts wherein litigants could drop their grievances. These boxes were then opened by the representative of the High Court and the issues addressed. He attempted to bring justice to the doorsteps of the people by introducing a mobile court which had sittings at interior parts of Kashmir, to save the public from the inconvenience of travelling often for hearing of their cases.

Honourable Justice late Dr. B. P. Saraf shall be remembered always by the Bar for his extraordinary perspicacity, piercing intellect, scintillating brilliance and above all his overwhelming humanity. He used to study the cases at home with utmost diligence and care. Though it was difficult to dislodge his conclusions, he was never in want of courtesy and respect for the members of the Bar. He was most anxious that the Bar should co-operate with him in the disposal of cases so as to do justice to the common man. Honourable Justice late Dr. B. P. Saraf was utterly devoid of provincial, communal and caste bias or prejudice. He was truly secular at heart and a socialist to the core. His proverbial sympathy for the underdog and those who were socially and economically deprived resulted in a liberal and humane interpretation of laws.

On the passing away of Honourable Justice late Dr. B. P. Saraf, Justice Ranjan Gogoi, Judge, Supreme Court summed up his significant contribution by saying as under:

> *"Dr. Saraf also ensured that he worked for the underprivileged and especially for the backward classes. Justice Saraf's life was a life of purpose and meaning. His work and efforts spoke for itself and thus need not express. For such a man of*

> *substance and humility, it is right to quote John Ruskin that "The first test of a truly great man is his humility".*

Justice S. H. Kapadia, the former Chief Justice of India said that Honourable Justice late Dr. B. P. Saraf was not carried away by unnecessary weight of doctrine of precedents. He kept the tax jurisprudence vibrant and working.

The Chairman of Bar Council of NE Region Shri G. N. Sahewalla paid his tribute to Honourable Justice late Dr. B. P. Saraf in the following words:

> *"Late Justice Dr. B. P. Saraf was a man of enormous integrity and requisite knowledge who can serve as the faithful guardian of the Constitution and of individual liberty. He served that role with utility and dignity until his retirement from the Bench. Until his passing, he served the role as mentor, leader and paternal figure to all of us whom he included in his extended law family."*

Honourable Justice late Dr. B. P. Saraf's life was a life of hard work, high ideas, equanimity, urbanity and dignity. Not only the judiciary respected him, but the Bar revered and idoled him. He was dauntless champion of the independence of judiciary. His message was "to work, achieve and rest not, till the goal of high jurisprudence both legal and ethical stands achieved". He encouraged the Bar to be knowledge oriented.

After retirement Honourable Justice late Dr. B. P. Saraf settled at Mumbai and acted as arbitrator in important commercial arbitrations both domestic and international and as a consultant. Even in this role he excelled. He was an extremely busy and successful arbitrator doing arbitrations all over the world including at Geneva, London and Singapore. He was appointed Chairman of the Committee constituted by the Government of India on 22nd July 2004 to study in-depth implications of the recommendation of Law Commission of India contained in its 176th Report and all aspects of the Arbitration and Conciliation (Amendment) Bill, 2003 and to submit its Report of the Government, known as 'Justice Saraf Committee Report on Arbitration". He was also appointed by the Government of Maharashtra as the Chairman of the State Backward Class Commission and continued on the said post till his death.

Honourable Justice late Dr. B. P. Saraf was a person who lived life to the full. He was a multi-faceted personality, an academician, on intellectual judge, an able administrator, orator, committed to social and charitable causes, the list is endless.

Honourable Justice late Dr. B. P. Saraf was a visionary, who set high targets and then strove relentlessly and unyieldingly to achieve them. He dared to dream.

Honourable Justice late Dr. B. P. Saraf passed away on 15th May, 2012 at Tanzania while holidaying with his family. Nothing will describe him better than the beautiful words of Shakespeare, when he says

"What a piece of work is a man!
How noble in reason !
How infinite in faculty !
In form, in moving, how express and admirable!
In action how like an angel !"

Honourable Prime Minster of India
Shri Narendra Modi
– Mahatma Gandhi’s 150 Birth Anniversary address at Gandhi @ 150, to mark Mahatma Gandhi’s 150 Birth anniversary at UN on 25-09-2019

Secretary General Antonio Gutteres,

President Moon,

Prime Minister Lee,

Prime Minister Sheikh Hasina,

Prime Minister Andrew Holness,

Prime Minister Ardern,

Prime Minister LotayTshering,

Excellencies, Friend’s,

Today we all have gathered here to discuss the relevance of Mahatma Gandhi in the current era on his 150th birth anniversary.

I welcome all the distinguished guests here.

I express my special thanks to the UN for issuing a commemorative stamp on the 150th birth anniversary of Mahatma Gandhi.

Gandhi Ji was an Indian but he was not only for India. Today this platform is a living example of the same.

This is not seen anywhere in history when a person which does not have even far-fetched relationship with the administration and with the power of truth and non-violence, he not only shook the centuries-old empire but also instilled the spirit of freedom in many patriots.

Mahatma Gandhi was such a person and despite being so far away from power, he is still ruling the hearts of crores of people.

You can imagine how impressed people have been with his life even though he never met them. Whether it was Martin Luther King Jr. or Nelson Mandela, the basis of their ideas was Mahatma Gandhi, it was Gandhi’s vision.

Friends,

Today the definition of democracy has a limited meaning that the people should choose the government of their choice and the government should work according to the expectations of the people. But Mahatma Gandhi emphasized on the real power of democracy. He showed the direction in which people should not depend on governance and become self-reliant.

Friends,

Mahatma Gandhi was the focal point of India’s freedom struggle, but for a moment we should also think that if Gandhiji had been born in a free country, what would he have done?

He fought the freedom struggle, this is important but it is not the total expansion of Gandhiji’s work.

Mahatma Gandhi pioneered a social system that did not depend on the government.

Mahatma Gandhi brought change, it is well known, but it is also fair to say that he awakened the inner strength of the people and awakened them to bring about change.

Had Gandhi not been responsible for the freedom struggle, he still would have gone ahead with the basic elements of Swaraj and self-reliance.

This vision of Gandhiji is becoming a great medium of solving big challenges that India is facing today.

In the last 5 years, we have given priority to Peoples Participation. Whether it is Swachh Bharat Abhiyan, Digital India, the people are now leading these campaigns themselves.

Friends,

Mahatma Gandhi used to say that his life is his message. Gandhiji never tried to make an impact from his life, but his life became the cause of inspiration. Today we are living in the era of How to Impress but Gandhiji’s vision was - How to Inspire.

I want to tell you an incident related to what was the strength of Gandhiji’s loyalty towards democracy. When I met Queen Elizabeth of Britain a few years ago, she showed me a napkin with great emotion. This was a handkerchief made from Khadi, which Gandhi had gifted her at the time of her marriage.

Just imagine, with whom he had a conflict of principles, still he had so much sensitivity in his relationship with her. He also wanted, the wellbeing and respect for those who were against him, with whom he was fighting the freedom struggle.

Friends,

It was this commitment to the principles that drew Gandhi's attention to seven such perversions that everyone should be aware of. These are

Wealth Without Work

Pleasure Without Conscience

Knowledge Without Character

Business Without Ethics

Science Without Humanity

Religion Without Sacrifice

Politics Without Principle

Whether it is climate change or terrorism, corruption or selfish social life, these principles of Gandhi ji act as a guide to protect humanity.

I believe that this path shown by Gandhiji will prove to be a motivator in creating a better world.

I understand that as long as this flow of ideas of Gandhiji with humanity continues, Gandhiji's inspiration and relevance will also remain among us.

Once again I express my gratitude to all of you!

Thank you.

[*Source* : https://www.narendramodi.in/text-of-pm-s-speech-at-ecosoc-chambers-on-relevance-of-mahatma-gandhi-in-today-s-era-547614]

Justice Rajesh Bindal
JUDGE

High Court of Jammu & Kashmir
Jammu / Srinagar

Message

Keeping in view its continuous efforts to keep the tax professionals updated in law, the Federation has again come out with a unique book titled as *"151 Landmark judgments of the Hon'ble Supreme Court of India - 151 years of Mahatma Gandhi"*. The effort needs to be commended. As the title of book suggests, it contains most important judgments of Supreme Court not only on taxation but other constitutional issues as well. Even if we may be practising on tax side but still we cannot divorce from development of law in various other fields. These are all inter-woven. We all know that growth of Hindu Law, especially on inheritance is under taxing statutes more. In addition, important quotes of Mahatama Gandhi have also been added in the book.

Publication of this book is not the beginning. Rather it is part of the continuous efforts being made by the Federation. It already has 36 publications to its credit, which are of immense use to the professionals and the students. Besides this regular news letter also updates the knowledge of professionals. Contributions in all the books have been made by the experts in the field. It goes to their credit that despite their busy schedule, they spare time to share their vast knowledge and experience with the coming generation in the field of taxation.

The present books is not the kind of a newspaper but would be an asset to keep in one's library, as important judgments of Supreme Court are always useful. One comes to know about the growth of law on a subject from the basics.

Special credit for publication of this book goes to the Federation for the reason that anyone can just download the soft copy of the book from the website of the Federation, free of cost. This should be given due publicity also so that more and more professionals, students and academicians can make use of the same.

I congratulate the authors on their enormous efforts while bringing out this book I am quite confident, like earlier, this publication would be of immense help to one and all.

10th September, 2020

Justice Rajesh Bindal

Justice Ujjal Bhuyan
Judge
High Court of Bombay

HIGH COURT
AT BOMBAY

Bombay High Court,
Dr. Kane Road, Fort,
Mumbai - 400 032
Tel.: (O) 2267 0106

Message

It gives me immense pleasure to be informed that All India Federation of Tax Practitioners is publishing a book titled *151 Landmark judgments of the Hon'ble Supreme Court of India - 151 years of Mahatma Gandh*i to commemorate the 151st birth anniversary of the father of the nation.

Being a federation of tax practitioners, I believe the selected judgments will cover, like a rainbow, various fields of taxation, both direct and indirect taxes, as well as of allied laws.

During his 20 years of practice as a lawyer, Mahatma Gandhi was a strong notary of settlement culture which he believed is the true practice of law which has become more relevant in today's context. Settlement options is not alien to taxing jurisprudence which should be given its full play for the benefit of both the revenue and the assessee.

Like the previous publications of the Federation, I am sure the book proposed to be published will be useful for all the stakeholders besides being a significant contribution to the field of legal literature.

My best wished to the editorial team and the publication committee.

ujjal bhuyan

7th September, 2020 **Justice Ujjal Bhuyan**

Justice Nitin M. Jamdar

सत्यमेव जयते

6, Rocky Hill,
N. D. Road, Malabar Hill,
Mumbai 400 006

Message

Tax, it's quantum, and the way it is levied, is a dynamic mechanism for social change. Mahatma Gandhi's epic Salt March to protest against the unfair operation of Britain's Salt Act of 1882 became a symbol of India's freedom struggle. In Modern India, the taxes have supported several social welfare schemes transforming lives of millions of underprivileged citizens. Tax and Justice thus share a unique relationship.

I am delighted that the All India Federation of Tax Practitioners,recognising this relationship, is bringing out a special publication. The Book selects landmark judgments on Taxation, in the remembrance of Mahatma Gandhi.

Titled *"151 Judgements of the Honourable Supreme Court of India-151 years of Mahatma Gandhi",* the book would be a valuable guide for the Tax professionals, members of the legal fraternity and the lay readers.

The Federation is appreciated by all for its professional expertise and sincerity. The release of this book will add one more feather in its cap. My congratulations to the editorial and technical team of this publication.

I wish the Federation all the best in all its endeavours.

23rd September, 2020

Justice Nitin Jamdar

DR. JUSTICE ANITA SUMANTH

JUDGE HIGH COURT MADRAS

सत्यमेव जयते

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Message

The All India Federation of Tax Practitioner has always been a pioneer in academic pursuit and with this publication, *'151 landmark judgments of the Hon'ble Supreme Court of India and 151 years of Mahatma Gandhi'* reinforces this position yet again. The publication features judgements covering a wide ambit of subjects, both direct and indirect taxes as well as various allied laws.

The world faces a conundrum today, what with the challenges and restrictions posed by the onset and relentless spread of the Corona virus and never has it been more relevant than now, to reiterate Gandhian principles: unstinted integrity, a sense of comity and universal fellowship, in law as in life.

I have no doubt that this publication, brought out under the leadership of Mr. Shivaram and his committed team, will serve as a landmark, both to celebrate and reinforce 151 years of the Mahatma as well as to depict the dynamic march of the law over the past decades.

My congratulations to the Federation and to the research and editorial teams for the publication of this commemorative volume.

29th September, 2020

Dr. Justice Anita Sumanth

जस्टिस प्रदीप पी. भट्ट
(पूर्व न्यायाधीश गुजरात एवं झारखंड उच्च न्यायलय)
अध्यक्ष
आय-कर अपीलीय अधिकरण
Justice Pradeep P. Bhatt
(Former Judge, Hon'ble Gujarat
High Court and Jharkhand High Court)
President
Income Tax Appellate Tribunal

सत्यमेव जयते

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Message

I am very happy to learn that All India Federation of Tax Practitioners is proposing to release a book titled *"151 Landmark judgments of the Hon'ble Supreme Court of India - 151 years of Mahatma Gandhi"* on the auspicious occasion of 151st birth anniversary of the Father of our Nation.

I am delighted to know that the earlier publications have been received well by the readers and, similarly, this book shall also be of great help to the tax professionals.

I acknowledge the good work of the Federation in conducting free webinars on various subjects for the benefit of the tax professionals and the tax payers during this uncertain times of pandemic (Covid-19).

I appreciate the research team and the editorial team for their sincere efforts and convey my best wishes for the publication.

1st September, 2020

Justice P. P. Bhatt

PRESIDENT, MAHARASHTRA SALES TAX TRIBUNAL
सत्यमेव जयते
★ MUMBAI ★

MAHARASHTRA SALES TAX TRIBUNAL, MUMBAI

714, 7th Floor, Old Building,
G.S.T. Bhavan, Mazgaon,
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Phone No. : 022-2376 0733

Message

The main object of All India Federation of Tax Practitioners is to impart education and release publications for the benefits of Tax Professionals. During the crisis of novel coronavirus, AIFTP has conducted many webinars on various topics of Direct and Indirect taxation. I have had an opportunity to attend some of the webinars, in which the speakers gave erudite speech and presentations on the subject. In order to achieve its objectives, AIFTP has proposed to publish this book **"151 Landmark Judgments of the Hon'ble Supreme Court of India - 151 years of Mahatma Gandhi"** on the auspicious occasion of 151st birth anniversary of Father of our nation Mahatma Gandhi.

The work of research team indeed deserves compliments and appreciation. The research team of lawyers, Chartered Accountants and editorial team under the guidance of Dr. K. Shivaram, Senior Advocate has done the significant work of selection of landmark Judgments which will be beneficial to all Tax Professionals, tax payers and judicial fraternity; particularly in taxation laws. I am quite confident that the compilation will be of immense help to the readers.

My best wishes shall ever be with AIFTP to achieve its objectives and impart education as a light-house to Tax Practitioners and tax payers.

8th September, 2020

Prakash H. Mali
President, Maharashtra Sales Tax Tribunal

Foreword - Message
Honourable Justice Mr. S. C. Dharmadhikari

I am happy to forward a message for the publication of the All India Federation of Tax practitioners titled 151 landmark Judgements of the Supreme-151 years of Mahatma Gandhi. It is heartening to note that the Federation of Tax practitioners feel that the Life and message of the Father of the Nation inspires the legal fraternity even today. Gandhiji survived for barely four months post our Independence. Shortly, we would be celebrating seventy five years of our independence and in January-2023, seventy fifth death anniversary of the father of our Nation will be observed. It is imperative that Members of the Judiciary and lawyers in general perform their duty to fulfil his dream of social justice. The fact that his philosophy, thoughts and teachings are relevant even today is proved by several Judgments of the Hon'ble Supreme court from the 1970's till 2020. In these judgments there is extensive reference to the father of the nation, his concept of real freedom and independence. In *Sunil Batra's case (1978) 4 SCC 494*, the Hon'ble Supreme Court, speaking through Hon'ble Krishna Iyer J. Says "Karuna (Compassion)" is a component of Jail Justice. He further says in para 158 that Mahatma Gandhi regarded Jails as 'Social Hospitals'. In *Devidas Ramchandra Tuljapurkar v. State of Maharashtra (2015) 13 SCC 50* the Hon'ble Supreme Court referred to most of the earlier decisions in paras 109 to 129 and finally held that one cannot depict Gandhi as indulging in obscene acts. It upheld the FIR alleging offence punishable under section 292 of IPC. The sum and substance of the above is that not only Gandhi's views are widely quoted but they have been pressed into service to support the legal and factual conclusions. This is indicative of his influence on the Judgments of our highest court.

I am sure that your publication will go a long way in re-enforcing the belief that if one stands for Truth and Justice then it is impossible to ignore Gandhi. I wish the publication all success.

Mumbai
9th September, 2020

Justice Satyaranjan C. Dharmadhikari
Former Judge of Bombay High Court

Preface
From the Desk of the Editorial Board
Dr. K. Shivaram, Senior Advocate

Mohandas Karamchand Gandhi, popularly and respectfully known as Mahatma Gandhi or Gandhiji, studied law at the University of London from 1888 to 1891, and after keeping terms at the Inner Temple, he studied for 9 months and took all exams in one shot and passed the same to become a Barrister. He practiced law in Pretoria, South Africa for about 20 years and was successful in his practice. In his later years, on returning to India, after practicing for few years, he wound up his practice mainly due to his inclination to a higher call of duty - the independence of India, by becoming apostle of the non-violence revolution, *Satya* and *Ahimsa*.

Gandhiji's disenchantment with the system is nicely traced by Charles Disalvo in his recent book titled ***"M.K. Gandhi, Attorney at Law, the Man before Mahatma";*** it was the injustice of the South African legal system that turned Gandhi away from court. Gandhiji's training in law and his practice as a lawyer helped him in precisely shaping his approach to the freedom struggle. His respect for the rule of law was so strong that it remained with him till he uttered his last words… "Hey Ram".

Gandhiji believed that, ***"Justice should become cheap and expeditious. Today it is the luxury of the rich and the joy of the gambler."*** His belief in Sarvodaya (Welfare of all), inspired the research team at All India Federation of Tax Practitioners **(AIFTP)** to publish this book, firstly, to bring awareness amongst the professionals about the very important tenets of the law laid down by the

Hon'ble Supreme Court, and secondly, to remember the Father of our Nation on the occasion of his auspicious 151st birth anniversary. AIFTP takes immense pride in publishing this book in the year of 151st anniversary of his birth.

Justice in the sense and spirit of justice is possible only where the tax administration adopts Gandhiji's vision that, ***"All taxation to be healthy must return tenfold to the taxpayers in the form of necessary services"*** The tax administration should adopt the culture of service rather than that of a collector, and help the nation building process by inculcating in them the spirit of payment of taxes and assuring them that each rupee collected by way of taxes to spent for the Nation building.

Part V, Chapter IV of the Constitution of India, provides for the frame work of the Union Judiciary. Article 141 of the Constitution of India provides that the law declared by the Supreme Court shall be binding on all courts within the territory of India. The law pronounced by the Hon'ble Supreme Court becomes the law of the land and all the lower courts and the authorities implementing the law are bound to follow the same without any exception; not following the law pronounced by the Hon'ble Supreme Court may in some cases amount to the contempt of court. The doctrine of stare decisis provides for the binding nature of the decisions of the court in order to avoid confusion and uncertainty and to sub-serve the end of justice; a decision should not be ignored but be adhered to.

Hon'ble Chief Justice Shri Sabhyasachi Mukherjee in the case of ***Delhi Transport Corporations v. Mazdoor Congress AIR 1991 SC 101*** observed that under Article 141, the Courts are empowered to declare the law and announce the opinion and its powers were not fettered by the childish fiction holding that law is made by the legislature and not by the judiciary; the expression 'declare' is wider in the scope and authorizes the court to pronounce the law. With this, the court has risen above the literal interpretation and have since then, assumed the line that permits a purposive and progressive approach to meet the end of justice. The Hon'ble Supreme Court is no more an interpreter of the law but is the final arbiter on the interpretation of the Constitution and as a wing of the State is a source of law. The law is what the court says it is.

It is the duty of the subordinate courts, the tribunals and the authorities to respect and implement the principles laid down by the Supreme Court in administration of justice. Not doing so amounts to judicial impropriety, that renders an order passed to be a nullity. No order contrary to the order of the Hon’ble Supreme Court, would be valid or binding on a person in respect of whom such order is passed. Needless to say, that it is the principle laid down by the court that is binding and not every word and the sentence in a judgement.

“The principle of judicial discipline require that the order of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not ‘acceptable’ to the Department - in itself an objectionable phrase – and is the subject-matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws”. ***[UOI v. Kamalakshi Finance Corporation Ltd., AIR 1992 SC 711, 712].***

The Hon’ble Supreme Court of India in the case of ***Keshavanada Bharati Sripadalvaru v. State of Kerala AIR 1973 SC 1461***, has played a very proactive role in preserving the basic structure of the Constriction of India. On the occasion of release of the commemorative stamp of Padma Vibhushan Late Dr. N. A. Palkhivala, Senior Advocate on January 16, 2004 by then Prime Minster of India Late Hon’ble Shri Atal Bihari Vajpayee stated as under,

> ***“In those dark days, the battle for democracy was fought by many people in many different ways. Many of us in politics under the leadership of Jayaprakash Narayan fought in prisons. But I have no doubt that one of the finest battles was fought in the court rooms that fighter was Nani Palkhivala”***

When there was threat to the independency of the Appellate Tribunal, it was the Hon’ble Supreme Court which preserved the Independency of the Appellate Tribunal. ***[V. K Agarwal v. ITAT (1999) 235 ITR 175 (SC) and Ajay Gandhi v. B. Singh (2004) 265 ITR 451 (SC)]***

It was the Hon’ble Supreme Court came to the rescue of the tax payers when there was move to take away the powers of the High courts and constitute the

Notational Tax Tribunal to decide the substantial question of law as the provisions of the said Act was not in accordance with the basic structure of the Constitution. The substantial provisions of the Act were struck down as unconstitutional. ***[Madras Bar Association v. UOI (2014) 368 ITR 42/271 CTR 257/109 DTR 273/227 Taxman 151 (SC)]***

One of the objects of the AIFTP is promoting education of the Tax Practitioners and our Citizens by regular publications. AIFTP has published more than 41 publications to its name. This publication is a step forward to educate tax payers which will help to bring more tax payers under tax net and to achieve the desired goal.

It is an honour for AIFTP to release a publication titled, **"151 - land Mark judgements of the Hon'ble Supreme Court of India (Direct taxes, Indirect taxes and Allied laws) - 151 years of Mahatma Gandhi"** on the occasion of 151st birth anniversary of Father of the Nation Mahatma Gandhi. 151 quotations of Bapuji are cited in this publication, they will serve as an inspiration to the readers.

In ***CIT v. Sun Engineering Works (P) Ltd (1992) 198 ITR 297 (SC)*** the honourable Supreme Court held that the judgements to be read in the context in which it was delivered. It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete 'law' declared by this Court.

The Hon'ble Judges have provided their valuable messages. We are grateful for their words on this auspicious occasion.

This publication is dedicated to Honourable Justice late Dr. B. P. Saraf, former Chief Justice of the Hon'ble High Court of Jammu and Kashmir.

The members of the Editorial and Research team which consists of tax professionals who are appearing regularly before the High Courts and Appellate Tribunals have written editorial on the case laws and how it is applicable, which is a unique feature of this publication. The Editorial team and Research team deserves a special appreciation for devoting their time for contributing towards this publication.

Mrs. Nikita Badheka, National President of the AIFTP, Chairman of the Publication Committee, Mr. Mitesh Kotecha, Chairman of Journal Committee Mr. Janak Vaghani and their committee members also deserves a special appreciation. Special Thanks to Dr. Ashok Saraf, Senior Advocate for his whole hearted support for this prestigious publication.

Immense contribution CA. Mr. Pradip Kapasi, and Advocate Mr. Shashi Bekal who are involved in this publication from the beginning deserves to be acknowledged.

Special thanks to Advocate Ms. Neelam Jadhav for preparing subject wise and section wise index to this publication.

This publication is hosted on the website and is made available to all members of the AIFTP and also available to non-members on www.aiftponline.org and can be downloaded by anyone.

For Editorial Board.

Dr. K. Shivaram
Senior Advocate

1st October, 2020

ALL INDIA FEDERATION OF TAX PRACTITIONERS
AIFTP
संघशक्तिः
ESTD. 11th NOVEMBER 1976

President's Message

Mrs. Nikita Badheka, National President

Mahatma Gandhi is universally acknowledged as a person who has changed the world for all the time with his non-violence movement. However, Mohandas Karamchand Gandhi as a lawyer is not much known to the public at large. Mr. M. K. Gandhi born on 2nd October 1869 became the Barrister in the High Court of England on 10th June 1891. He practiced for 20 years as a lawyer - first in the High Court of Bombay and later in Rajkot. The hand of destiny guided him to South Africa where he made his mark as a lawyer and public worker. Valuable experience and skill which he acquired in the course of his large and lucrative practice in South Africa helped him in the days to come for public service. From 1910 onwards, Gandhij abandoned the practice of law and devoted his entire time and energy to the service of Community.

One of the interesting cases argued and successfully steered by Gandhiji in the year 1893 was the case of Sheth Dada Abdulla. The preparation in the matter involved much patient industry and close study of facts. Furthermore, it needed clear thinking and judgment. Gandhiji threw his heart and soul into the matter, gained complete confidence of both the parties i.e. plaintiff and the defendant and succeeded in persuading the party to submit the suit to an Arbitrator of their choice instead of continuing its expensive, prolonged and bitter litigation. Gandhiji thus succeeded in getting justice to his client who was awarded 37,000 pounds and cost by the Arbitrator. We are talking about the year 1893, the amount was enormous at that point of time. Gandhiji believed that "duty of an Advocate is not to exploit legal and advisory advantages but to promote compromise and reconciliation." It was this case that enabled Gandhiji to realize early in his career the paramount importance of facts. He has observed in his autobiography "Facts mean truth and once we adhere to truth, the law comes to our aid naturally." According to Gandhiji, facts constituted three-fourth of the law and if we take care of facts of the case, the law would take of care of itself. From this and several similar experiences Gandhiji learned to regard law not as an intellectual legerdemain to make black appear white and white black, but as codified ethics. The profession of law thus just became to him the means to enthrone justice, not "entangle justice' in the net of law. Throughout his practice of law Gandhiji maintained the highest tradition of the profession and did not swerve by a hairbreadth from the path of rectitude and integrity.

With this background, AIFTP decided to celebrate the completion of 150 years of legendary Advocate's birth anniversary with this unique publication. Chairman of Publication Committee, CA. Mr . Mitesh Kotecha who is a silent and dedicated solider of AIFTP, has been a strong backbone for majority of publications by AIFTP. Once a decision was taken to release this publication in the second Virtual National tax Conference by Northern Zone on 2nd October 2020, CA .Mr. Kotecha started with right earnest.

The challenge to design and plan this unique publication was accepted by our Senior Past President, Dr. K. Shivaram Senior Advocate who had his team ready to work for the herculean task. It was decided that the publication would contain gist of 151 landmark judgments of the Supreme Court which are applicable till date. The selection of only few from hundreds of Judgments was a bigger challenge under Direct and Indirect Tax.

The Indirect Tax has seen a makeover in the form of Goods & Service Tax Act. To find the judgments of the Supreme Court which can be applied under the GST regime was the challenge accepted by CA. Mr. Janak Vaghani.

Having shortlisted 151 judgments, it was important to give the task of preparing the gist to the expert team. I am happy to note that the team of experts have done gigantic job of completing the gist in time bound manner. The selected team of editors has edited the final work of the authors by giving their valuable time and inputs.

I put on record my sincere appreciation to the efforts by the chairman of Publication Committee and the entire team of this publication to make this publication possible during the trying time of pandemic.

I thank Senior Advocate Dr. K. Shivaram for his continuous guidance and support for all the publications till date including the present one. But for the initiation and zeal by Senior Advocate Dr. K. Shivaram this publication would not have been possible.

Our Immediate Past President Senior Advocate Dr. Ashok Saraf readily agreed to give financial support to the publication. This book is dedicated to his late father, Honourable Justice late Dr. B. P. Saraf, who was Chief Justice of Jammu & Kashmir High Court. Honourable Justice late Dr. B. P. Saraf had presided over the tax bench in Bombay High Court before he was elevated as Chief Justice of J & K

High Court. Many of the judgments pronounced by Honourable Justice late Dr. B. P. Saraf are upheld by the Hon’ble Supreme Court. He would be remembered for his landmark judgments for a long time to come.

I take this opportunity to thank the Hon’ble Judges who have spared their valuable time to give encouraging messages for the present publication.

AIFTP has during the pandemic continued to serve its members and public at large by holding more than 100 webinars and virtual National Tax Conferences to spread the knowledge and education.

One more aspect to make the release of this publication a rare moment is the fact that this Publication would be released at the hands of six Hon’ble Judges *viz*. 1) Hon’ble Mr. Justice Rajesh Bindal, Jammu and Kashmir High Court, 2) Hon’ble Mr. Justice Ujjal Bhuyan, Bombay High Court, Hon’ble Dr. Justice Anita Sumanth, Madras High Court, Hon’ble Mr. Justice Kalyan Rai Surana, Gauhati High Court, Hon’ble Mr. Justice Piyush Agarwal, Allahabad High Court and Hon’ble Mr. Justice Soumitra Saikia, Gauhati High Court, who were the gems of our Association before their elevation as Judge of respective High Courts.

This publication would be available on our website free to all concerned.

I am sure this publication would enrich the members and assist the members in their practice.

Happy Reading

Mrs. Nikita R. Badheka
National President

1st October, 2020

Chairman Message
CA Mitesh Kotecha, Publication Committee

"Live as if you were to die tomorrow. Learn as if you were to live forever" are the immortal words of our 'Father of the Nation', Mohandas Karamchand Gandhi, fondly known as Mahatma Gandhi or simply as Gandhiji.

Mahatma Gandhi lead India to independence and inspired movements of civil rights and freedom across the world with his simple principle of non-violence. He always viewed education as an all-round development of an individual. He believed that education should develop all the capacities of the child so that he becomes a complete human being.

One of the basic principles of education according to Gandhiji is that work and knowledge must never be separated. He maintained that education must be based on ethics and morality.

These simple teachings of Gandhiji have been our guiding pillars in our taxation practice. To be able to apply the laws to our work in the correct manner, we must have the requisite knowledge and be well versed with the broad spectrum of laws, rules and regulations that defines our profession. In addition to having the requisite knowledge and skill, one must pledge to carry out their work with the utmost sincerity and the highest levels of ethics and morality. To truly succeed in the profession, one must strive to constantly educate themselves on the nuances of the new laws that are passed, keep abreast with the amendments and constantly read and revise the existing laws. The desire to succeed should be intertwined with the thirst for knowledge and we must never stop learning to continue growing.

It is in our pursuit for being well versed on the subject and keeping in mind the indominable spirit of Mahatma Gandhi and his continuous pursuit of education, that on his 151st birth anniversary, AIFTP is proud to publish **'151 landmark judgments of the Hon'ble Supreme Court of India (Direct Taxes, Indirect Taxes and Allied laws) – 151 years of Mahatma Gandhi'**.

Taking inspiration from Gandhiji, we at AIFTP have highlighted the most important judgments relating to law, in our new publication, with the hope that everyone reading it will learn and benefit from it. Ones quest for knowledge and desire to learn and excel should never stop at any age. Staying relevant and being upto date with the latest laws and amendments is a must in our field and we hope that everyone reading our publication benefits from it immensely.

We thank all the contributors to this publication. We appreciate the efforts of the Editors for their time and valuable inputs.

We would also like to thank Dr. K. Shivaram, Senior Advocate, for his continued guidance and support in seeing this publication through.

We also thank Dr. Ashok Saraf, Senior Advocate for the financial support for the publication.

We take this opportunity to thank the Hon'ble Judges who have taken out time to give us their messages for the publication.

The publication is hosted on the website for all.

Happy Learning!

CA Mitesh Kotecha
Chairman, Publication Committee

1st October, 2020

Abbreviations

Journals, Reports and online	
All England Reporter	All E.R.
All India Reporter	AIR
Company cases	Comp.Case
Current Tax Reporter	CTR
Direct Taxes Reporter	DTR
Excise law Times	ELT
Goods and Service tax cases	GST
Income-tax Report	ITR
Indian Law Reports Karnataka	ILR KAR
Joint Director of Income-tax	JDI
Principal Chief Commissioner	PCIT
Principal Director General of Income-tax	PDGI
Supreme Court Cases	SCC
Supreme Court Almanac	SCALE
Sales Tax Cases	STC
SCC Supp Volume	SCC (Supp)
Taxman's Service Tax Today	STT
Taxman	Taxman
Tax law reporter	Tax L R
VAT and Service Tax cases	VST
Online	
www.itatonline.org	
www.manupatra .com	
www.tax Indiaonline.com - TIOL	
www.scconline.	
www.taxmann.com	

Authorities	
Additional Commissioners of Income-tax	Addi. CIT
Authority for Advance Rulings	AAR
Assistant Commissioner of Income-tax	ACIT
Assistant Directors of Income-tax	ADIT
Assessing Officer	AO
Appellate Tribunal	ITAT
Central Board of Direct Taxes	CBDT
Central Bureau of Investigation	CBI
Chief Commissioner of Income-tax	CCIT
Commissioner Central Excise	CCE
Commissioner of Income-tax	CIT
Commissioner of Income-tax (Appeals)	CIT(A)
Commissioner Sales tax	CST
Deputy Commissioner of Income-tax	Dy. CIT
Director of Income-tax	DIT
Director General of Income-tax	DGI
Income-tax Officer	ITO
Income-tax Settlement Commission	ITSC
Joint Commissioner of Income-tax	JCIT
Joint Directors of Income-tax	JDIT
Principal Chief Commissioner of Income Tax	PCIT
Principal Director General of Income Tax	PDGIT
Special Leave Petition	SLP
Supreme Court	SC
Tax Recovery Officer	TRO
Transfer Pricing Officer	TPO
Union of India	UOI
Courts	
Supreme Court	(SC)

High Court	(HC)
Allahabad	(All.)
Andhra Pradesh	(AP)
Assam	(Guwahati)
Bombay	(Bom.)
Bombay	(Aurangabad)
Bombay	(Nagpur)
Bombay	(Panaji-Goa)
Calcutta	(Cal.)
Chhattisgarh	(Chhattisgarh)
Delhi	(Delhi)
Gauhati	(Gauhati)
Gujarat	(Guj.)
Himachal Pradesh	(HP)
Jammu & Kashmir	(J&K)
Jharkhand	(Jharkhand)
Karnataka	(Karn.)
Kerala	(Ker.)
Madhya Pradesh	(MP)
Madhya Pradesh (Gwalior)	(MP)
Madras	(Mad.)
Orissa	(Orissa)
Patna	(Patna)
Punjab & Haryana	(P&H)
Rajasthan	(Raj.)
Sikkim	(Sikkim)
Telangana	TG
Uttarakhand	(Uttarakhand)
Uttar Pradesh	(UP)

Tribunal Benches	
Agra	(Agra)
Ahmedabad	(Ahd.)
Allahabad	(All.)
Amirtsar	(Asr.)
Bangalore	(Bang.)
Bilaspur	(Bilaspur)
Calcutta	(Kol.)
Chandigarh	(Chd.)
Chennai	(Chennai)
Cochin	(Cochin)
Cuttack	(Cuttack)
Delhi	(Delhi)
Guwahati	(Gau.)
Hyderabad	(Hyd.)
Indore	(Indore)
Jabalpur	(Jabalpur)
Jaipur	(Jaipur)
Jodhpur	(Jodh.)
Lucknow	(Luck.)
Mumbai	(Mum.)
Nagpur	(Nag.)
Panaji	(Panaji)
Patna	(Patna)
Pune	(Pune)
Raipur	(Raipur)
Rajkot	(Rajkot)
Ranchi	(Ranchi)
Surat	(Surat)
Vishakhapatnam	(Vishakha)

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1
S. 2(1A) : Agricultural income – Agriculture - cultivation of land - tilling of land, sowing of seeds etc - Certain other operations which are performed after produce sprouts from land, can also be regarded as agricultural operations - However spontaneous growth not involving any human labour or skill upon land are not products of agriculture - Income derived therefrom is not agricultural income. [S. 10(1), Indian Income-tax Act, 1922, S. 2(1), 4(3)(viii)].

Facts

The assessee owned an area of 6,000 acres of forest land assessed to land revenue and grown with *sal* and *piyasal* trees. The forest was originally of spontaneous growth. For the assessment year in question, the assessee filed its return. The assessment was made without including therein any forest income. Subsequently, the assessment was reopened u/s. 34 of 1922 Act. In response to a notice, the assessee submitted a return showing the gross receipt from the said forest. A claim was, however, made that the said income was not assessable under the Act as it was agricultural income and was exempt under section 4(3)(*viii*) of 1922 Act. The ITO rejected this claim and added a sum to the assessable income as income derived from the forest after allowing certain sum as expenditure. The AAC confirmed the assessment and the ITAT also was of opinion that the said income was not agricultural income but was income derived from the sale of jungle produce of spontaneous growth and as such was not covered by section 2(1) of the 1922 Act.

On reference, the Tribunal submitted a statement of case from which the following facts appeared to be admitted or established:

"(i) The area covered by the forest is about 6,000 acres, trees growing being sal and piyasal;

(ii) It is of spontaneous growth being about 150 years old. It is not a forest grown by the aid of human skill and labour;

(iii) The forest is occasionally parcelled out for the purposes of sale and the space from which trees sold are cut away is guarded by forest guards to protect offshoots;

(iv) It has been satisfactorily proved that considerable amount of human labour and care is being applied year after year for keeping the forest alive as also for reviving the portions that get denuded as a result of destruction by cattle and other causes;

(v) The staff is employed by the assessee to perform the following specific operations:

(a) Pruning,

(b) Weeding,

(c) Felling,

(d) Clearing,

(e) Cutting of channels to help the flow of rain water,

(f) Guarding the trees against pests and other destructive elements,

(g) Sowing of seeds after digging of the soil in denuded areas".

The High Court held that actual cultivation of the land was not required and as human labour and skill were spent for the growth of the forest the income from the forest was agricultural income.

The Revenue preferred appeal to the Supreme Court.

Issue

Whether income derived from the sale of *sal* and *piyasal* trees in the forest owned by the assessee which was originally a forest of spontaneous growth "not grown by the aid of human skill and labour" but on which forestry operations described in the statement of case had been carried on by the assessee involving considerable amount of expenditure of human skill and labour is agricultural income within the meaning of section 2(1) and as such exempt from payment of tax under section 4(3)(*viii*) of the Indian Income-tax Act.

View

The Court observed that the terms "agriculture" and "agricultural purpose" not having been defined in the Indian Income-tax Act, therefore the Court has to fall back upon the general sense in which they have been understood in common parlance. The Court also referred to dictionary meaning and various other legislation where the term has been defined or interpreted. It may be noted that the definition of "agricultural income" given in section 2(1) of the Indian Income-tax Act is in identical terms with the definitions of that term as given in the various Agricultural Income-tax Acts passed by the several States. The primary sense in which the term agriculture is understood is agar—field and cultra—cultivation, i.e., the cultivation of the field, and if the term is understood only in that sense, agriculture would be restricted only to cultivation of the land in the strict sense of the term meaning thereby, tilling of the land, sowing of the seeds, planting and similar operations on the land. These would be the basic operations and would require the expenditure of human skill and labour upon the land itself. There are however other operations which have got to be resorted to by the agriculturist and which are absolutely necessary for the purpose of effectively raising the produce from the land. They are operations to be performed after the produce sprouts from the land, i.e., weeding, digging the soil around the growth, removal of undesirable under growths and all operations which foster the growth and preserve the same not only from insects and pests but also from depredation from outside, tending, pruning, cutting, harvesting, and rendering the produce fit for the market. The latter would all be agricultural operations when taken in conjunction with the basic operations above described, and it would be futile to urge that they are not agricultural operations at all.

However, the mere performance of these subsequent operations on the products of the land, where such products have not been raised on the land by the performance of the basic operations which have been described above would not be enough to characterize them as agricultural operations. In order to invest them with the character of agricultural operations, these subsequent operations must necessarily be in conjunction with and a continuation of the basic operations which are the effective cause of the products being raised from the land. It is only if the products are raised from the land by the performance of these basic operations that the subsequent operations attach themselves to the products of the land and acquire the characteristic of agricultural operations. The cultivation of the land does not comprise merely of raising the products of the land in the narrower sense of the term like tilling of the land, sowing of the seeds, planting, and similar work done on the land but also includes the subsequent operations set out above all of which operations, basic as well as subsequent, form one integrated activity of the agriculturist and the term ‘agriculture’ has got to be understood as connoting this integrated activity of the agriculturist. One cannot dissociate the basic operations from the subsequent operations and say that the subsequent operations, even though they are divorced from the basic operations can constitute agricultural operations by themselves. If this integrated activity which constitutes agriculture is undertaken and performed in regard to any land that land can be said to have been used for ‘agricultural purposes’ and the income derived therefrom can be said to be ‘agricultural income’ derived from the land by agriculture.

The mere fact that an activity has some connection with or is in some way dependent on land is not sufficient to bring it within the scope of the term and such extension of the term ‘agriculture’ is unwarranted. The term ‘agriculture’ cannot be dissociated from the primary significance thereof which is that of cultivation of the land and even though it can be extended in the manner stated before both in regard to the process of agriculture and the products which are raised upon the land, there is no warrant at all for extending it to all activities which have relation to the land or are in any way connected with the land. The use of the word agriculture in regard to such activities would certainly be a distortion of the term.

It the term 'agriculture' is understood as comprising within its scope the basic as well as subsequent operations in the process of agriculture and the raising on the lands of products which have some utility either for consumption for trade and commerce, it will be seen that the term 'agriculture' receives a wider interpretation both in regard to its operations as well as the results of the same. Nevertheless there is present all throughout the basic idea that there must be at the bottom of its cultivation of land in the sense of tilling of the land, sowing of the seeds, planting, and similar work done on the land itself.

This basic conception is the essential sine qua non of any operation performed on the land constituting agricultural operation. If the basic operations are there, the rest of the operations found themselves upon the same. But if these basic operations are wanting the subsequent operations do not acquire the characteristic of agricultural operations.

All these operations no doubt require the expenditure of human labour and skill but the human labour and skill spent in the performance of the basic operations only can be said to have been spent upon the land. The human labour and skill spent in the performance of subsequent operations cannot be said to have been spent on the land itself, though it may have the effect of preserving, fostering and regenerating the products of the land.

This distinction is not so important in cases where the agriculturist performs these operations as a part of his integrated activity in cultivation of the land. Where, however, the products of the land are of spontaneous growth, unassisted by human skill and labour, and human skill and labour are spent merely in fostering the growth, preservation and regeneration of such products of land, the question falls to be considered whether these subsequent operations performed by the agriculturist are agricultural operations and enjoy the characteristic of agricultural operations.

It is agreed on all hands that products which grow wild on the land or are of spontaneous growth not involving any human labour or skill upon the land are not products of agriculture and the income derived therefrom is not agricultural income. There is no process of agriculture involved in the raising of these products from the land. There are no agricultural operations performed by the assessee in respect of the same, and the only work which the assessee performs here is that of collecting the produce and consuming and marketing the same. No agricultural operations have been performed and there is no question at all of the income derived therefrom being agricultural income within the definition given in section 2(1) of 1922 Act. Where, however, the assessee performs subsequent operations on these products of land which are of wild or spontaneous growth, the nature of those operations would have to be determined in the light of the principles enunciated above.

Held

Applying the above principles to the facts of the instant case, it was held that the forest in question was of spontaneous growth. If there were no other facts found, that would entail the conclusion that the income was not agricultural income. But then, it had also been found by the Tribunal that the forest was more than 150 years old, though portions of the forest had from time to time been denuded, trees had completely fallen and the proprietors had planted fresh trees in those areas, and they had performed operations for the purpose of nursing the trees planted by them. It could not be denied that so far as those trees were concerned, the income derived therefrom would be agricultural income. In view of the fact that the forest was more than 150 years old, the areas which had thus become denuded and replanted could not be considered to be negligible. The position therefore was that the whole of the income derived from the forest could not be treated as non-agricultural income. If the enquiry had been directed on proper lines, it would have been possible for the Income-tax authorities to ascertain how much of the income was attributable to forest of spontaneous growth and how much to trees planted by the proprietors. But no such enquiry had been directed and in view of the long lapse of time, the Court observed that it was not desirable to direct any such enquiry at this stage. The expenditure shown by the assessee for the maintenance of the forest was about Rs. 17,000 as against a total income of about Rs. 51,000. Having regard to the magnitude of this figure, it could be held that a substantial portion of the income must have been derived from trees planted by the proprietors themselves. As no attempt had been made by the Department to establish which portion of the income was attributable to forest of spontaneous growth, there were no materials on which it could be said that the judgment of the Court below was wrong. Accordingly the revenue appeal was dismissed. (AY. 1944-45) (CA No. 165 of 1954 dt. 23-5-1957)

CIT v. Raja Benoy Kumar Sahas Roy (1957) 32 ITR 466 (SC)

Editorial : Subsequent decisions of various High Courts/Tribunal on the on the issue may be referred:

Jugal Kishore Arora v. Dy. CIT (2004) 269 ITR 133 (All.)(HC)

CIT v. Namdhari Seeds (P) Ltd. (2011) 341 ITR 342 (Karn.)(HC)

Puransingh M. Verma v. CIT (2015) 230 Taxman 470 (Guj.)(HC)

DCIT v. Inventaa Industries Private Limited (2018) 168 DTR 81/172 ITD 1/65 ITR 625 (Hyd)(Trib.)(SB).

> *"Our greatest ability as humans is not to change the world; but to change ourselves."*
>
> \- Mahatma Gandhi

2
S. 2(12A): Books of account - Entries in loose papers/sheets are irrelevant and inadmissible as evidence - Offences and prosecution- Settlement Commission - Investigation could not have been directed in case of high public functionaries on basis of legally inadmissible evidence in form of loose papers [S. 69A, 132, 143(3), 245D; Constitution of India 1950, Art. 32; Code of Criminal Procedure, 1973, S. 155(2), 156(1); Indian Evidence Act, 1872, S. 34]

Facts

A search was conducted on the Birla and Sahara Groups of Companies and incriminating materials in form of random sheets and loose papers, computer prints, hard disk, pen drives etc. were found. On the basis of this material the income was assessed was made. The assessees approached the Settlement Commission. Settlement Commission passed an order observing that the scrutiny of entries on loose papers, computer prints, hard disk, pen drives etc. have revealed that the transactions noted on documents were not genuine and have no evidentiary value and that details in these loose papers, computer print outs, hard disk and pen drive etc. do not comply with the requirement of the Indian Evidence Act and are not admissible evidence. It further observed that the department has no evidence to prove that entries in these loose papers and electronic data were kept regularly during the course of business of the concerned business house and the fact that these entries were fabricated, and non-genuine. It held as well that the PCIT/DR have not been able to show and substantiate the nature and source of receipts as well as nature and reason of payments and have failed to prove evidentiary value of loose papers and electronic documents within the legal parameters. The Commission has also observed that department has not been able to make out a clear case of taxing such income in the hands of the applicant firm on the basis of these documents. The Settlement Commission has recorded a finding that transactions noted in the documents were not genuine and thus has not attached any evidentiary value to the pen drive, hard disk, computer loose papers, computer printouts.

A writ petition was filed by the Common Cause (A registered Society) and others for issuance of appropriate writ for directing to make investigation in the case of high public functionaries on basis of incriminating materials in form of random sheets and loose papers, computer prints, hard disk, pen drives etc.

Issue

Question arises as to whether a case was made out on the basis of above materials, to constitute Special Investigation Team (SIT) and direct investigation against the various functionaries/officers and further monitor the same?

Views

In the case of ***State of Haryana v. Bhajan Lal 1992 Supp (1) SCC 335,*** this Court has laid down principles in regard to quashing the F.I.R. The Court can quash FIR also if situation warrant even before investigation takes place in certain circumstances.

Held

Dismissing the petition the Court held that, the entries in loose papers/sheets are irrelevant and inadmissible as evidence. Such loose papers are not "books of account" and the entries therein are not sufficient to charge a person with liability. Even if books of account are regularly kept in the ordinary course of business, the entries therein shall not alone be sufficient evidence to charge any person with liability. It is incumbent upon the person relying upon those entries to prove that they are in accordance with facts. Finding of Settlement Commission disregarding such evidence as inadmissible and unreliable. The materials in question were not good enough to constitute offences to direct the registration of a first information report and investigation therein. (WP No. 505 of 2015 / IA Nos. 3 & 4 of 2017 dt. 11-01-2017)

Common Cause (A Registered Society) v. UOI (2017) 394 ITR 220 / 245 Taxman 214 (SC)/ (2018) 9 SCC 382

Editorial : Followed, ***CB I. v. V. C. Shukla (1998)3 SCC 410.*** Ratio is very relevant while dealing with matters relating to Search and seizure, Survey where loose sheets or dumb documents are found or impounded.

> *"It does not require money, to live neat,*
> *clean and dignified."*
>
> \- Mahatma Gandhi

3

S. 2(22)(e): Deemed dividend – Share holder means a registered share holder and not beneficial owner [Indian Income-tax Act, 1922, S. 2(6A)]

Facts

The assessee is the HUF of M/s Rameshwarlal Sanwarmal consisting of S. M. Saharia as manager and Karta and his wife and a minor son. During the relevant assessment year, the assessee was the beneficial owner of certain shares in a private limited company called Shyam Sundar Tea Co. (P.) Ltd. These shares, though beneficially owned by the assessee stood in the name of S. M. Saharia in the register of shareholders of the company. The assessee also owned business concerns, namely, Milmony Shop, Saharia & Co. and Saharia Industrial Corporation. The company advanced loans to these business concerns during the relevant assessment year and since it was a company in which the public were not substantially interested, a question arose in the assessment of the assessee to income-tax, whether the loans advanced to these business concerns could be regarded as “deemed dividend” of the assessee under S.. 2(6A)(e) of the Act ? The ITO took the view that the loans advanced to the business concerns were attributable to the accumulated profits of the company to the extent of Rs. 4,48,045 and since the assessee which owned the business concerns was the beneficial owner of the shares standing in the name of S. M. Saharia, the conditions of S. 2(6A)(e) were satisfied and the loans were liable to be regarded as “deemed dividend” taxable in the hands of the assessee under S. 2(6A)(e). On appeal the AAC agreed with the view taken by the ITO and held that since S. M. Saharia held shares in the company as representing the assessee and the loans were advanced to the three business concerns belonging to the assessee out of the accumulated profits of the company, the ITO was justified in treating the loans as “deemed dividend” under S. 2(6A)(e) and taxing them in the hands of the assessee. The matter was carried in further appeal to the Tribunal. The assessee contended first, that since the assessee was not a registered holder of shares in the company, the loans advanced to the three business concerns of the assessee could not be regarded as loans advanced to a shareholder so as to attract the applicability of S. 2(6A)(e); and, secondly, even if the loans could be treated as deemed dividend under S. 2(6A)(e), they could be taxed only in the hands of S. M. Saharia, the registered shareholder, and not in the hands of the assessee. Both these arguments were negatived by the Tribunal and so also were the other subordinate arguments and the appeal was rejected and the assessment confirmed. This led to a reference by the assessee to the High Court. Inter alia amongst other questions raised the important questions related to the taxability of the loans advanced to the three business concerns of the assessee as deemed dividend under S. 2(6A)(e) and each of these questions brought in issue different aspects of taxability. The first of these questions which is material is reproduce as follows:

> "Whether, on the facts and in the circumstances of the case, and on a true interpretation of the terms of s. 2(6A)(e) of the Indian IT Act, 1922, the Tribunal was right in holding that the amounts of Rs. 2,21,702 (gross) and Rs. 3,43,505 (net) were taxable as dividends in the hands of the applicant, HUF, for the asst. yrs. 1955-56 and 1956-57, respectively, when the shares were registered in the name of Sri S. M. Saharia, the Karta of the family?"

The, two distinct aspects in this question were argued before the High Court. One was whether the loans advanced to the three business concerns of the assessee could be regarded as "deemed dividend" within the meaning of S. 2(6A)(e) and the other was whether these loans, even if regarded as "deemed dividend", could be taxed in the hands of the assessee. The High Court decided both these aspects of the question in favour of the assessee and held that the word "shareholder" in S. 2(6A)(e) meant a registered shareholder or, in other words, a shareholder whose name is recorded in the register of the company as the holder of the shares and since the advance in the present case was made to the assessee which was not a registered shareholder, it could not be regarded as "deemed dividend" within the meaning of S. 2(6A)(e) and that even if it be assumed that the advance was liable to be regarded as "deemed divided" under S. 2(6A)(e), it could be taxed as dividend income only of the registered shareholder and not of the assessee. The result of this decision was that the assessment made by the Revenue authorities was set aside in so far as it included the loans advanced by the company to the three business concerns of the assessee as deemed dividend and taxed it in the hands of the assessee.

The Revenue preferred an appeal before Supreme Court. The Revenue attacked only that part of the order of the High Court which held that the "deemed dividend" could be assessed to tax only in the hands of S. M. Saharia, the registered shareholder, and not in the hands of the assessee which was merely the beneficial owner of the shares. The result was that the only question that came to be considered by SC was whether the "deemed dividend" under S. 2(6A)(e) could be taxed in the hands of the beneficial owner of the shares or it could be brought to tax only in the assessment of the registered shareholder and the view taken was that where the shares acquired with the funds of one person are held in the name of another, it is the former who is assessable to tax on the dividend on those shares and this principle would apply equally to the "deemed dividend" under S. 2(6A)(e). The Supreme Court did not consider whether the loans granted to the three business concerns of the assessee could at all be regarded as "deemed dividend" within the meaning of S. (6A)(e) when the assessee was not a registered shareholder and the decision of the High Court to the effect that assessee not being a registered shareholder, the loans advanced to it could not be regarded as "deemed dividend" under S. 2(6A)(e) remained undisturbed.

Since the first question relating to the AY.1956-57 was answered by this Court in favour of the Revenue, the reference went back to the High Court for consideration of the remaining questions that had not been answered by the High Court. The High Court answered two questions in favour of the Revenue and against the assessee. The assessee thereupon preferred the present appeal before Supreme Court. There was only one contention advanced on behalf of the assessee in support of this appeal, namely, that the amounts of the loans advanced to the three business concerns of the assessee could not be regarded as "deemed dividend" within the meaning of S. 26A(e) since the assessee was not a registered shareholder of the company. This contention was sought to be supported by the decision of this Court in ***CIT v. C. P. Sarathy Mudaliar (1972) 83 ITR 170 (SC)***.

The Court observed that it did not decide the question whether a loan advanced to a beneficial owner of the shares can be regarded as "deemed dividend" within the meaning of S. 2(6A)(e) and the answer given by the Court in favour of the Revenue cannot be said to extend to this aspect of the question. Therefore, the Court held that the first question still remains to be answered so far as this aspect of the question is concerned and it is open to the assessee to contend that the amounts of loans advanced to the three business concerns of the assessee could not be regarded as "deemed dividend" under S. 2(6A)(e), since the assessee was not a registered shareholder.

The question whether, on a proper construction of S. 2(6A)(e), a loan advanced to a beneficial owner of the shares would be liable to be regarded as "deemed dividend" was not raised or argued before this Court in ***CIT v. Rameshwarlal Sanwarmal 1972 CTR (SC) 300*** and this Court was not called upon to decide it and hence there is no discussion about it in the judgment of this Court nor is there any decision on it. It is only in the subsequent decision on ***CIT v. C. P. Sarathy Mudaliar (supra)*** that this question came up for the first time before this Court for consideration and this Court held that when S. 2(6A)(e) speaks of a "shareholder" it refers to the registered shareholder and not to the beneficial owner and hence a loan granted to a beneficial owner of the shares who is not a registered shareholder cannot be regarded as a loan advanced to a "shareholder" of the company so as to be within the mischief of S. 2(6A)(e). There is thus no conflict at all between the decisions in ***CIT v. C. P. Sarathy Mudaliar (supra)*** and ***CIT v. Rameshwarlal Sanwarmal (supra)***

Issue

The appeal by special leave raises a question of law relating to the interpretation of S. 2(6A)(e) of the Indian IT Act, 1922.

View

What S. 2(6A)(e) is designed to strike at is advance or loan to a "shareholder" and the word "shareholder" can mean only a registered shareholder. It is difficult to see how a beneficial owner of shares whose name does not appear in the register of shareholders of the company can be said to be a shareholder. He may be beneficially entitled to the share but he is certainly not a "shareholder". It is only the person whose name is entered in the register of shareholders of the company as the holder of the shares who can be said to be a shareholder qua the company, and not the person beneficially entitled to the shares. It is the former who is a "shareholder" within the matrix and scheme of the company law and not the latter. It is only where a loan is advanced by the company to a registered shareholder and the other conditions set out in S. 2(6A)(e) are satisfied that the amount of the loan would be liable to be regarded as "deemed dividend" within the meaning of S. 2(6A)(e). The amount of the loan would not fall within the mischief of this section if it is granted to a beneficial owner of the shares who is not the registered shareholder. Now, in the present case, it was common ground that the loans were advanced to the three business concerns of the assessee which was an HUF and this HUF was not the registered holder of any shares in the company but it was the beneficial owner of certain shares which stood in the name of the manager and *Karta*. The loans were thus advanced to the beneficial owner of the shares and not to the registered shareholder and hence they could not be regarded as loans advanced to a "shareholder" of the company within the meaning of S. 2(6A)(e) of the Act.

Held

Section 2(6A)(e) was accordingly not attracted and the amounts of the loans could not be taxed as deemed dividends in the hands of the assessee The decision in ***CIT v. C.P. Sarathy Mudaliar (supra)*** does, lay down the correct interpretation of S. 2(6A)(e) of the Act.

The amount of loan would not fall within the mischief of S. 2(6A)(e) if it is granted to a beneficial owner of shares who is not the registered shareholder. (AY. 1956-57) (CA No. 133 of 1973 dt. 5-12-1979)

CIT v. Rameshwarlal Sanwarmal (1980) 122 ITR 1/14 CTR 372 (SC)

Editorial : Subsequent decisions on the issue may be referred ***CIT v. Madhur Housing and Development Co (2018) 401 ITR 152 (SC); National Travel Service v. CIT (2018) 401 ITR 154/162 DTR 201/300 CTR 582/253 Taxman 243 (SC)***

> *"Speak only if it improves upon the silence."*
>
> \- Mahatma Gandhi

4

S. 2(43): Tax – Interest and penalty is not tax [Special Court (Trial of Offences relating to Transactions in Securities) Act, 1992, S. 3, 4, 11]

Facts

The Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 ('the Act') is a Special Act. The offences it deals with involve amounts of unusual magnitude procured by brokers from banks and financial institutions. Unfortunately, the proceedings before the Special Court, which was set up for a quick prosecution or adjudication of claims have been trapped in unusual legal and interpretational difficulties generated by the casual drafting of the Act that leaves much to the skills and good sense of the courts.

The Special Court has observed that it has been functioning since June 1992. In respect of two notified parties, namely, the Harshad Mehta Group & Fairgrowth Financial Services Ltd., the time is approaching for distribution of their assets under section 11. In view of the different possible interpretations of the provisions of section 11, the Special Court has raised certain questions of law. After hearing all concerned parties, the Special Court has answered these questions in the impugned judgment, somewhat in the fashion of an Originating Summons. The custodian has raised certain additional questions which arise in interpreting and implementing section 11.

Issue

Whether the phrase 'taxes' as used in section 11 of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 can only mean amounts due as and by way of taxes or whether it would also include penalties and interest, if any.

View

Tax, penalty and interest are different concepts under the Act. The definition of 'tax' under section 2(43) does not include penalty or interest. Similarly, under section 157, it is provided that when any tax, interest, penalty, fine or any other sum is payable in consequence of any order passed under this Act, the Assessing Officer shall serve upon the assessee a notice of demand as prescribed. Provisions for imposition of penalty and interest are distinct from the provisions for imposition of tax. Learned Special Court Judge, after examining various authorities in paragraphs 51 to 70 of his Judgment, has come to the conclusion that neither penalty nor interest can be considered as tax under section 11(2)(a).

Held

Tax, penalty and interest are different concepts under the Income-tax Act. The definition of "tax" under section 2(43) of the Income-tax Act, 1961, does not include penalty or interest. Neither penalty nor interest can be considered as tax under section 11(2)(a) of the Special Court (Trial of Offences relating to Transactions in Securities) Act, 1992. (CA No. 5326 of 1995 dt. 13-05-1998)

Harshad Shantilal Mehta v. Custodian (1998) 231 ITR 871/99 Taxman 216 (SC)/ (1998) 5 SCC 1

Editorial: As per section 249(4)(a) of the Income-tax Act, 1961 the shall not be admitted unless the assessee has paid the tax due on the income returned by him. Accordingly if interests have not been paid the appeal cannot be dismissed.

> *"Relationships are based on four principles: respect, understanding, acceptance and appreciation."*
>
> \- Mahatma Gandhi

5

S.4: Charge of income-tax – Cash credits – Assessee must prove the source of receipt – In the absence of such proof the Assessing Officer is entitled to treat it as taxable income – Cash credits could be assessed as undisclosed income [S. 147, Indian Income-tax Act, 1922, S. 34]

Facts

The assessee is a trader carrying on two businesses, namely, manihari (general merchandise) and *bidis*. He had also certain income from property which is was not relevant in these appeals. For each of the assessment years concerned, the assessee had submitted a return but as his accounts were not found complete and reliable, the Income-tax Officer had assessed the gross profits of the businesses on the basis of certain percentages of the total sales which had also to be fixed by estimates. No question arose in these appeals as to the correctness of these assessments.

Subsequently, while dealing with the assessment for the year 1948-49, the Income-tax Officer noticed various credit entries in the assessee’s books of account which had all escaped his attention at the time of the assessment for the years 1945-46 and 1947-48 earlier mentioned. The ITO thereupon, with the sanction of the Commissioner re-opened the assessments for these years.

Issue

Whether the burden of proving the source of the cash credits was on the assessee? And the fact that the ITO assessed the income on a percentage basis, was he justified in treating the said sums as profits from an undisclosed source?

View

It appears from the judgment of the High Court that the reason given in support of the suggestion was that if that income was held to be income of an undisclosed source, the result would be double taxation of the same income which the Income-tax Act does not contemplate. The contention was that there would be double taxation because it was assumed that the same income had once been earlier taxed on the basis of an estimate. This reason is obviously fallacious, for if the income is treated as one from an undisclosed source which the question postulates, it is not treated as income of the disclosed source which had previously been assessed to tax and, therefore, there is in such a case no double taxation. It is not a case where the income sought to be taxed was held to be undisclosed income of a disclosed source, the income of which source had previously been taxed on the basis of an estimate. If it were so, the question of double taxation might have been legitimately raised. That, however, is clearly not the case here as the question as framed itself shows.

Held

It is well established that the onus of proving the source of a sum of money found to have been received by the assessee is on him. If he disputes liability for tax, it is for him to show either that the receipt was not income or that if it was, it was exempt from taxation under the provisions of the Act. In the absence of such proof, the Income-tax Officer is entitled to treat it as taxable income. Further, taxing authorities were not precluded from treating the amounts of the credit entries as income from undisclosed sources simply because the entries appear in the books of a business whose income, they had previously computed on a percentage basis. (AY. 1945-46, 1947-48) (CA No. 151 & 152 of 1961 dt. 8-2-1963.)

Kale Khan Mohammad Hanif v. CIT (1963) 50 ITR 1 (SC)

Editorial: In ***Janki Ram Bahadur Ram v. CIT (1965) 57 ITR 21 (SC),*** the Court held that it is for the revenue to establish that the profit earned in transaction is taxable as income.

In ***CIT v. Bikaner Trading Co. Ltd. (1970) 78 ITR 12 (SC),*** the onus is on the department to prove that the amount is taxable as income in the relevant accounting period.

In ***Kalwa Devadattam v. UOI (1963) 49 ITR 165 (SC),*** liability to tax arises on accrual of income and not on the basis of computation by the tax authorities.

> *"It's easy to stand with the crowd. It takes courage to stand alone."*
>
> \- Mahatma Gandhi

6

S. 4: Charge of income-tax - Hindu undivided family - Sole surviving coparcener – Assessable as Hindu undivided family [Indian Income-tax Act, 1922, S. 3]

Facts

One Buddappa, his wife, his two unmarried daughters and his adopted son Buddanna were members of a Hindu undivided family. Buddappa died on July 9, 1952. In respect of the business dealings of the family, Buddappa was assessed during his lifetime in the status of a manager of the Hindu undivided family. For the assessment year 1951-52 the Income-tax Officer, assessed Buddanna in respect of the income of the previous year, as a Hindu undivided family under the title "Sri Gowli Buddappa (deceased) represented by his legal successor Sri Gowli Buddanna, Oil Mills Owner, Raichur."

Issue

Whether the sole male surviving coparcener of the Hindu joint family, his widowed mother and sisters constitute a Hindu undivided family within the meaning of the Income-tax Act? And whether the assessment of the income in the hands of the Hindu undivided family was correct?

View

Under section 3 of the Income-tax Act, not a Hindu coparcenary but a Hindu undivided family is one of the assessable entities. A Hindu joint family consists of all persons, lineally descended from a common ancestor, and includes their wives and unmarried daughters. A Hindu coparcenary is a much narrower body than the joint family: it includes only those persons who acquire by birth an interest in the joint or coparcenary property, these being the sons, grandsons and great-grandsons of the holder of the joint property for the time being. Therefore, there may be a joint Hindu family consisting of a single male member and widows of deceased coparceners. The plea that there must be at least two male members to form a Hindu undivided family as a taxable entity also has no force. The expression "Hindu undivided family" in the Income-tax Act is used in the sense in which a Hindu joint family is understood under the personal law of Hindus. Under the Hindu system of law a joint family may consist of a single male member and widows of deceased male members, and apparently the Income-tax Act does not indicate that a Hindu undivided family as an assessable entity must consist of at least two male members.

Held

Property of a joint family, therefore, does not cease to belong to the family merely because the family is represented by a single coparcener who possesses rights which an owner of property may possess. In this case the property which yielded the income originally belonged to a Hindu undivided family. On the death of Buddappa, the family which included a widow and females born in the family was represented by Buddanna alone, but the property still continued to belong to that undivided family and income received therefrom was taxable as income of the Hindu undivided family. (AY. 1951-52) (CA No. 328 of 1965 dt. 10-01-1966)

Gowli Buddanna v. CIT (1966) 60 ITR 293 (SC)

Editorial: This decision should be read with the decisions in, ***Attorney-General of Ceylon v. Arunachalam Chettiar [1957] AC 540/[1958] 34 ITR (ED) 42, Kalyanji Vithaldas v. CIT (1937) 5 ITR 90 (PC), T.S. Srinivasan v. CIT (1966). 60 ITR 36 (SC), N. V. Narendra Nath v. CWT (1969) 74 ITR 190 (SC), C. Krihana Prasad v. CIT (1974) 97 ITR 493 (SC), Chandresen v. CWT (1986) 161 ITR 370 (SC)***

> *"Strength does not come from winning. When you go through hardships and decide not to surrender, that is strength."*
>
> \- Mahatma Gandhi

7

S. 4 :Charge of income-tax - Accrual of income - Mercantile system of accounting - Accounting principle of real income - Enhanced rates shown as receipts in accounts but amounts not realised due to litigation and subsequent takeover of undertaking by Government - Amount due on such enhancement had not accrued and was not assessable [S. 145]

Facts

On 19-11-1922 the then Government of Bombay granted a licence under the Indian Electricity Act, 1910 to Lady Sulochana Chinubhai & Co. authorising it to generate and supply electricity to the consumers in Godhra area. The assessee-company was the successor of the said licensee. On the recommendations of a Rating Committee constituted under section 57(2) of the Electricity (Supply) Act, 1948 the State Government had fixed the charges for supply of electricity and motive power by the assessee-company with effect from 1-2-1952. After the amendment of the Electricity (Supply) Act, in 1956 the assessee-company increased the charges for motive power from 1-1-1963 to 35 np. per unit with a maximum of Rs. 7 per month for every installation and a few months thereafter on 22-6-1963 the assessee-company increased the rates for electricity supplied for lights and fans to 70 np. per unit with a minimum of Rs. 5 of every installation with effect from 1-7-1963. This unilateral increase in the rates for supply of motive power as well as electricity for lights and fans led to the institution of two representative suits by the consumers in the Court of Civil Judge (Senior Division) at Godhra wherein unilateral increase was challenged. The said suits were decided by the trial court in favour of the consumers and the decree of the trial court was affirmed in appeal by the Assistant Judge, Panchmahals at Godhra. The second appeals filed by the assessee-company were dismissed by the learned single Judge of the Gujarat High Court but the letters patent appeals filed by the assessee-company were allowed by the Division Bench of the High Court by judgment dated 3-12-1968 and both the representative suits filed by the consumers were dismissed. The said judgment of the Division Bench of the Gujarat High Court was affirmed by Supreme Court by judgment dated 26-2-1969. During the pendency of this litigation in the various Courts the assessee-company was not able to realise the enhanced charges from the consumers. After the decision of Supreme Court on 26-2-1969 some of the citizens of Godhra met the Minister of Industries, Mines and Power, Government of Gujarat, with a view to persuading him to intervene and restrict the assessee-company from recovering the enhanced rates from the consumers. Thereafter the Under Secretary to the Government of

Gujarat in the Industries, Mines and Power Department, addressed a letter dated 19-3-1969 to the assessee-company suggesting that the company may be advised to maintain the *status quo* for the rates to the consumers and also to continue the existing street light agreement for at least six months. The Chief Electrical Inspector was requested to go through the accounts of the assessee-company for year to year and report to the Government the actual position about the reasonable return earned by the assessee-company. Thereafter on 16-5-1969 some of the consumers filed another representative suit against the assessee-company in the Court of Civil Judge (Junior Division) at Godhra challenging the right of the assessee-company to recover the consumption charges at the enhanced rates. The said suit was decreed in favour of the consumers by the Civil Judge by his judgment dated 20-6-1974 and a declaration was granted to the effect that the assessee-company shall not recover the charges exceeding 31 np. per unit for lights and fans and 20 np. per unit for motive power.

Up to the assessment year 1963-64 the assessee-company was assessed on the basis of the accounts maintained according to the mercantile system. For the subsequent assessment years, i.e., from 1964-65 to 1967-68, the assessee-company deducted a total amount of Rs. 10,87,828 from the total earnings in respect of sale of electrical energy on the ground that the said amount was not actually recovered by it from the consumers since the consumers had filed a suit against the assessee-company and had obtained interim relief in that behalf. The disputed amounts were shown by the assessee-company on the liability side in the balance sheet under the head 'Disputed increase in rates charged to customers (consumers), carried forward pending settlement of disputes in the District Court'. In the assessment year 1968- 69 there was an adjustment of the claim amounting to Rs. 3,54,152 due to settlement of dispute with the railway authorities and the disputed balance stood reduced to Rs. 7,33,676. While making the assessment for the assessment year 1969-70 the ITO included the said amount of Rs. 7,33,676 on the ground that the suit filed against the assessee-company by the consumers was decided in favour of the assessee-company by Supreme Court during the accounting year 1968-69 and the assessee-company has the legal right to recover the said amount and on the basis of the accountancy followed by the assessee-company the amount of Rs. 7,33,676 will have to be taxed as the income that has accrued to the assessee-company on account of the decision of Supreme Court in the assessment year 1969-70. The said addition made by the ITO was, however, deleted by the AAC, on appeal, on the view that no legally enforceable claim had accrued to the assessee-company during the previous year by which it could recover the arrears of the earlier years for enhanced charges/rates in respect of motive power and electricity for lights and fans from the consumers. The Tribunal, on further appeal, held that the question of fixing a reasonable return was still an open issue since it was a subject-matter of further litigation wherein as a result of the decision of Civil Judge, Junior Division, Godhra the assessee-company was restrained from recovering the charges more than the 31 paise per unit for lights and fans and 20 paise per unit for motive power from the customers and that the right to receive the increased rates had not crystallized. According to the Tribunal the claim at the increased rates as made by the assessee-company and on the basis of which necessary entries were made in the books, represented only hypothetical income and the impugned amount as brought to tax by the ITO did not represent the income which had accrued to the assessee-company during the relevant previous year. Similarly, in respect of the assessment years 1970-71, 1971-72 and 1972-73, the ITO included the certain sums as income.

On an application by the revenue the Tribunal referred question of law for the opinion of the Gujarat High Court as to whether the amount which had accrued to the assessee, did not represent the income and therefore be excluded from the computation of total income. All the three references were disposed of by the High Court by a common judgment. In view of the decision of the Division Bench of the High Court allowing the letters patent appeals of the assessee-company, which judgment was affirmed by Supreme Court on 26-2-1969, the High Court held that the assessee-company had a legal right to recover the consumption charge at the enhanced rate from the consumers. As regards the letter from the Under Secretary to the Government of Gujarat, Industries, Mines and Power Department, dated 19-3-1969, the High Court has observed that the letter was directive in nature and did not take away the right of the assessee to recover consumption charges at the enhanced rates from its consumers. As regards the representative suit which was filed by the consumers in the Court of Civil Judge (Junior Division) at Godhra, the High Court observed that the said suit concerned the recovery of enhanced charges for the period subsequent to 31st March, 1969 and not prior thereto. The High Court rejected contention urged on behalf of the assessee-company that no real income had accrued to the assessee-company in the facts and circumstances of this case since the assessee-company was legally entitled to recover the consumption charges from the consumers at the enhanced rates and at no point of time had the assessee-company forgone or given up its right to recover the enhanced rates from its consumers. On that view of the matter, the High Court answered against the assessee-company and in favour of the revenue. Thereafter, the High Court granted certificate of fitness to appeal to Supreme Court against the said judgment.

Issues

The issue before the Supreme Court was, where assessee was not able to collect enhanced charges, in lieu of various disputes and pending litigations, whether entries made in its books of account represented only hypothetical income and hence could not be taxed as these charges never accrued to the assessee in spite of the fact that assessee company followed mercantile system of accounting.

Views

Considering the principles laid down in various decisions of the Court held that even though the assessee-company was following the mercantile system of accounting and had made entries in the books regarding enhanced charges for the supply made to the consumers, no real income had accrued to the assessee-company in respect of those enhanced charges in view of the fact that soon after the assessee-company decided to enhance the rates in 1963 representative suits were filed by the consumers which were decreed by the trial court and which decree was affirmed by the appellate court and the learned single Judge of the High Court and it was only on 3-12-1968 that the letters patent appeals filed by the assessee-company were allowed by the Division Bench of the High Court and the said suits were dismissed. But appeals were filed against the said judgment by the consumers in Supreme Court and the same were dismissed by the judgment dated 26-2-1969. Shortly thereafter, on 19-3-1969, the Under Secretary to the Government of Gujarat wrote a letter advising the assessee-company to maintain the status quo for the rates to the consumers for at least six months and the Chief Electrical Inspector was directed to go through the accounts of the assessee-company from year to year and to report to the Government about the actual position about the reasonable returns earned by the assessee-company. On 16-5-1969 another representive suit was filed by the consumers wherein interim injunction was granted by the Court and which was finally decreed in favour of the consumers on 23-6-1974. It would thus appear that after the decision was taken by the assessee-company to enhance the charges it was not able to realise the enhanced charges on account of pendency of the earlier representative suits of the consumers followed by the letter of the Under Secretary to the Government of Gujarat and the subsequent suit of the consumers and during the pendency of the subsequent suit the management of the undertaking of the assessee-company was taken over by the Government of Gujarat under the Defence of India Rules, and the undertaking was subsequently transferred to the Gujarat State Electricity Board.

No doubt that the letter addressed by the Under Secretary to the Government of Gujarat to the assessee-company had no legally binding effect but one has to look at things from practical point of view. The assessee-company, being a licensee, could not have ignored the direction of the State Government which was couched in the form of an advice, whereby the assessee-company was asked to maintain the status quo for at least six months and not to take steps to recover the dues towards enhanced charges from the consumers during that period. Before the expiry of the period of six months the subsequent suit had been filed by the consumers and during the pendency of the said suit the undertaking of the assessee-company was taken over by the Government of Gujarat under the Defence of India Rules, and subsequently it was transferred to the Gujarat State Electricity

Board and, as a result, the assessee-company was not in a position to take steps to recover the enhanced charges.

The High Court observed that the subsequent suit that was filed on 16-5-1969 related to recovery of enhanced charges for the period subsequent to 31-3-1969 and not prior thereto. Refuting the said findings the Supreme Court held that the suit was not confined to the period subsequent to 31-3-1969. On the other hand, the plaintiffs in that suit were challenging the enhancement in charges made in 1963 and had sought a declaration that the assessee-company was not entitled to recover more than 31 paise per unit for lights and fans and 20 paise per unit for motive power and the trial court, while decreeing the said suit had given a declaration in these terms.

The Court observed that the question whether there was real accrual of income to the assessee-company in respect of the enhanced charges for supply of electricity has to be considered by taking the probability or improbability of realisation in a realistic manner.

Held

Allowing the appeal of the assessee the Court held that; even though the assessee-company was following the mercantile system of accounting and had made entries in the books regarding enhanced charges for the supply made to the consumers, no real income had accrued to the assessee-company in respect of those enhanced charges. The Tribunal had rightly held that the claim at the increased rates as made by the assessee-company on the basis of which necessary entries were made, represented only hypothetical income, and the amounts in question brought to tax by the Income-tax Officer did not represent income which had really accrued to the assessee-company during the relevant previous years. Court also observed that , no doubt, the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a hypothetical income, which does not materialise. The judgement of the High Court was thus reversed. (AY. 1969-70, 1970-71, 1971-72, 1972-73) (CA No. 5638/83 dt. 3-4-1997)

Godhra Electricity Co. Ltd v. CIT (1997) 225 ITR 746/139 CTR 564/91 Taxman 351 (SC)

Editorial: Decision of the Gujarat High Court in ***CIT v. Godhra Electricity Co. Ltd. (1983) 140 ITR 657(Guj) (HC)*** is reversed. Refer ***CIT v. Shoorji Vallbhdas & Co (1962) 46 ITR 144 (SC)***

> *"Carefully watch your thoughts, for they become your words. Manage and watch your words, for they will become your actions. Consider and judge your actions, for they have become your habits. Acknowledge and watch your habits, for they shall become your values. Understand and embrace your values, for they become your destiny."*
>
> \- Mahatma Gandhi

8
S. 4: Charge of income-tax – Legislative power of retrospective amendment – Legislature cannot by way of introducing an amendment overturn a judicial pronouncement to declare it to be wrong or nullity – Rather Legislature can amend provisions of any statute to remove basis of judgment – Clause in statute – Prohibiting payment of interest on amount of security deposit is not arbitrary or violative of Article 14 of the Constitution of India. [Constitution of India, Art. 14]

Facts

The State of Karnataka enacted the Karnataka Money Lenders Act, 1961 (for short the M.L. Act) with a view to regulate and control transactions of money lending in the State. Section 5 of the M.L. Act makes it obligatory for any person carrying on the business of money lending to procure license before carrying on the business of money lending.

The State of Karnataka simultaneously enacted the Karnataka Pawn Brokers Act, 1961 (for short the P.B Act) to regulate and control the business of pawn brokers. Section 3 of the P.B. Act makes it obligatory for every person desirous of carrying on the business as a pawn broker to conduct his business only after he obtains a license in accordance with the provisions of the Act.

The main business of both money lenders and pawn brokers is to advance or lend money to individuals who approach them for loans. The only difference is that a pawn broker is authorized to accept valuable articles like gold, gold ornaments etc. as pledge for security of the payment.

The Hon’ble High Court in the case of ***Manakchand Motilal v. State of Karnataka I.L.R 1991 KAR 1928*** held that the State Government was entitled to introduce a condition for payment of deposit. The Court, however, felt that for the provision to be constitutionally valid, the deposit must carry interest.

In the year 1985, amendments were brought out to both the Acts. Section 7-A & 7-B were introduced in the M.L. Act and corresponding Sections 4-A & 4-B were introduced in the P.B. Act. These amendments provided that the persons desirous of obtaining a licence had to deposit a security and the rate of security was fixed slab-wise in relation to the extent of business carried on by the licensee. These amendments were challenged by a large number of pawn brokers and money lenders.

Issue

Whether the amendments brought into sections 7-A and 4-A of M.L. Act and P.B. Act, respectively providing that the security deposit would not carry any interest is contrary to precedent laid down in Manakchand Motilal's case and State of Karnataka was not competent to introduce such amendments?

Views

The main issue raised in Manakchand Motilal's case (supra) was with regard to the validity of Section 7-A and 4-A of the M.L. Act and the P.B. Act respectively, in so far as they made a provision for deposit of security as a pre-requisite to the grant of licence. At that time, there was no provision with regard to the payment of interest. The Court held that the State Government was entitled to introduce a condition for payment of deposit. The Court, however, felt that for the provision to be constitutionally valid, the deposit must carry interest.

That under the Arbitration Act of 1940, this Court held that the arbitrator could award pendente lite interest ***Secretary, Irrigation Department, Government of Orissa v. G.C. Roy [1992] 1 SCC 508*** but under the Arbitration and Conciliation Act, 1996 the arbitrator cannot award interest prior to the date of award ***Sayeed Ahmed & Co. v. State of Uttar Pradesh [2009] 12 SCC 26, Sree Kamatchi Amman Constructions v. Divisional Railway Manager (Works), Palghat [2010] 8 SCC 767, Union of India v. Bright Power Projects (India) (P.) Ltd., [2015] 9 SCC 69.*** The clause for non-payment of interest has not been held void in any case. Therefore, the Court was clearly of the view that the impugned provisions prohibiting payment of interest on the amount of security deposits cannot be said to be arbitrary or violative of Article 14 of the Constitution of India.

Held

Legislature by way of introducing an amendment can overturn a judicial pronouncement and declare it to be wrong or a nullity and the same would not be violative of Article 14 of the Constitution. (CA Nos. 5793 of 2008, 2874-2878 of 2018 dt. 15-3-2018)

State of Karnataka v. Karnataka Pawn Brokers Association (2018) 255 Taxman 12 (SC)

Editorial: Refer, for the doctrine of promissory estoppel, ***Motilal Padampat Sugar Mills Co Ltd v. State of Uttar Pradesh (1979) 118 ITR 326 (SC)***

> *"There are two days in the year that we cannot do anything, yesterday and tomorrow."*
>
> \- Mahatma Gandhi

9

S.4: Charge of income-tax – Mutuality – Receipts by Co-operative society form its members i.e. Non-occupancy charges, transfer charges common amenity fund charges and other charges, are exempt from income-tax Act based on the principle of mutuality [S. 2(24)(vii); Maharashtra Co-operative Societies Act, 1960 S. 79A]

Facts

The assessing officer held that receipt of non-occupancy charges by the society from its members, to the extent that it was beyond 10% of the service charges/ maintenance charges permissible under the notification dated 09.08.2001, stands excluded from the principle of mutuality and was taxable. The order was upheld by the Commissioner of Income Tax (Appeals). The Income Tax Appellate Tribunal held that the notification dated 09.08.2001 was applicable to co-operative housing societies only and did not apply to a premises society. It further held that the transfer fee paid by the transferee member was exigible to tax as the transferee did not have the status of a member at the time of such payment and, therefore, the principles of mutuality did not apply. The High Court set aside the finding that payment by the transferee member was taxable while upholding taxability of the receipt beyond that specified in the government notification.

Issue

whether certain receipts by co-operative societies, from its members i.e. non-occupancy charges, transfer charges, common amenity fund charges and certain other charges, are exempt from income tax based on the doctrine of mutuality.

View: The Court did not find any reason to take a view different from that taken by the High Court, that the notification dated 09.08.2001 is applicable only to co-operative housing societies and has no application to a premises society which consists of non-residential premises.

Held

Dismissing the appeal of the revenue the Court held that; Receipts by Co-operative society from its members i.e.. Non-occupancy charges, transfer charges common amenity fund charges and other charges are exempt from income-tax Act based on the principle of mutuality. The notification dated 9, 2001 issued under section 79A of the Maharashtra Co-operative Societies Act, 1960 is applicable only to co-operative housing societies and has no application to premises society which consist of non-residential premises. (CA Nos. 2706 of 2018 dt. 12-3-2018)

ITO v. Venkatesh Premises Co-operative Society Ltd. (2018) 402 ITR 670/163 DTR 465/301 CTR 514/254 Taxman 313 (SC)

Editorial: From the judgement of Bombay High Court in ***ITO v. Venkatesh Premises Co-operative Society Ltd (ITA No 680 of 2009 dt. 11-1-2010)***

Mittal Court Premises Co-operative Society Ltd. v. ITO (2010) 320 ITR 414 (Bom.) (HC), and ***CIT v. Shree Parleshwar Co-op-Housing Society Ltd (2017) 10 ITR-OL 202 (Bom.) (HC) is affirmed.***

CIT v. Bankipur Club Ltd. (1997) 226 ITR 97 (SC), Chemsford Club v. CIT (2000) 243 ITR 89 (SC), CIT v. Cawnpore Club Ltd. (2004) 140 Taxman 378/184 Taxation 205 (SC)/Chelmsford Club v. CIT (2000) 243 ITR 89/109 Taxman 215/159 CTR 235 (SC)

Refer: ***Yum! Restaurants (Marketing) Pvt Ltd v. CIT (2020) 116 taxmann.com 374 (SC); (2020) 424 ITR 630/189 DTR 1/313 CTR 37/116 taxmann.com 374 (SC)***

> *"Happiness is when what you think, what you say, and what you do are in harmony."*
>
> \- Mahatma Gandhi

10

S. 4: Charge of income tax – Capital or revenue- Business income - Receipts from Construction company – Netting of receipts and payments- Receipts from the Construction Company being intrinsically connected with construction of assessee's plant, would be considered as a capital receipt and not income of assessee from any independent source-Amounts received by the assessee would go to reduction of cost of construction. [S. 28(i), 56, 145]

Facts

The assessee is a corporation wholly owned by the Government of India. It was assessed in the status of a company. The assessee-company, Bokaro Steel Ltd., was incorporated in January 1964. Its object was to construct and own an integral iron and steel works. During the assessment years under consideration, the work of construction of the company's factory and installation of the plant was in the process of completion. During the year, the assessee received certain amounts from the contractors for housing accommodation for construction workers, hire charges of plant and machinery, interest on advance, and royalty for excavation and use of stone found on the assessee's land. The Tribunal held that, all of amounts received by the assessee would go to reduction of cost of construction.

Issue

Whether receipts from the Construction Company being intrinsically connected with construction of assessee's plant, will it be considered as a capital receipt and not income of assessee from any independent source?

View

These are the rent charged by the assessee to its contractors for housing workers and staff employed by the contractor for the construction work of the assessee, including certain amenities granted to the staff by the assessee. Secondly, hire charges for plant and machinery which was given to the contractors by the assessee for using the construction work of the assessee, and thirdly, interest from advances made to the contractors by the assessee, for the purpose of facilitating the work of construction. The activities of the assessee in connection with all these three receipts are directly connected with or are incidental to the work of construction of its plant undertaken by the assessee. Broadly speaking, these pertain to the arrangements made by the assessee with its contractors pertaining to the work of construction. To facilitate the work of the contractor, the assessee permitted the contractor to use the premises of the assessee, for housing its staff and workers engaged in the construction activity of the assessee's plant. This was clearly to facilitate the work of construction. Had this facility not been provided by the assessee, the contractors would have had to make their own arrangements, and this would have been reflected in the charges of the contractors for the construction work. Instead, the assessee has provided these facilities. The same is true of the hire charges for plant and machinery which was given by the assessee to the contractors for the assessee's construction work. The receipts in this connection also go to compensate the assessee for the wear and tear of the machinery. The advances which the assessee made to the contractors, to facilitate the construction activity of putting together a very large project, was as much to ensure that the work of the contractors proceeded without any financial hitches as to help the contractors.

Held

The arrangements which were made between the assessee-company and the contractors pertaining to these three receipts are arrangements which are intrinsically connected with the construction of its steel plant. The receipts have been adjusted against the charges payable to the contractors and have gone to reduce the cost of construction. They have, therefore, been rightly held as capital receipts and not income of the assessee from any independent source. (AY. 1965-66 to 1971-72) (CA No. 2544-45 of 1988 dt. 18-12-1988)

CIT v. Bokaro Steel Ltd. (1999) 236 ITR 315/102 Taxman 94/151 CTR 276 (SC)

Editorial: Also refer ***Challapalli Sugars Ltd. v. CIT [1975] 98 ITR 167 (SC) followed, CIT (Addl.) v. Indian Drugs and Pharmaceuticals Ltd. [1983] 141 ITR 134 (Delhi),*** Patna High Court in ***CIT v. Bokaro Steel Ltd. (No. 1) [1988] 170 ITR 522*** and ***Bokaro Steel Ltd. v. CIT(No.2) [1988] 170 ITR 545 (Pat.)*** affirmed.

Also refer ***Roads and Bridges Development Corporation v. ACIT (257 Taxman 392) (Kerala HC), CIT v. Karnal Co-operative Sugar Mills Ltd. [2000] 243 ITR 2/[2001] 118 Taxman 489 (SC)*** which have given similar proposition.

> *"Those who know how to think need no teachers."*
>
> \- Mahatma Gandhi

11

S. 5: Scope of total Income - Accrual of income of discretionary trust – Income retained by the trustee cannot be brought tax in the assessment of beneficiary. [Wealth-tax Act, 1957, S. 3]

Facts

The ex-Ruler of Gondal, Shri Vikramsinhji executed three deeds of settlements (trust deeds) in the United States of America (USA), in 1963 and two deeds in the United Kingdom (UK), in 1964, all executed in identical terms for the benefit of the settler and the members of his family. The settler and post settler's death, the assessee (the eldest son of Vikramsinhji), were declaring the entire trust's income as taxable in India for initial years up to AY.1970-71. Post AY.1970-71, the assessee took the stand that, the income of the trusts need not be subject to tax in the hands of the taxpayer and no income was reported thereafter. The assessee also took the stand that, declaration of income for previous years was a mistake.

The assessee then, approached the Settlement Commission with an application for settlement relating to income from the UK trusts and the US trusts. The Settlement Commission held that the US trusts were discretionary, but the UK ones were specific and therefore, its income is liable to tax in the hands of the assessee in India. Against Settlement commission's order the taxpayer preferred an appeal to the Supreme Court of India (SC). The Supreme Court observed that, both the settlor and the Shri Vikramsinhji have been receiving the income from these trusts during the several assessment years. It would have been unlikely that, they would have so included them unless it were really received. Hence the SC held that USA trusts were discretionary and since the assessee himself had declared the income with regard to UK trusts, the question was more of academic in nature and did not decide on it.

The eight appeals before the Supreme Court related to income tax assessment years 1984-85 to 1991-92.

For subsequent years post AY 1970-71, the taxpayer put a note to his Statement of Income stating that the UK and the US trusts were discretionary, and no remittances were made by the trusts to the taxpayer. The Assessing Officer (AO), however passed an order taxing the income of the trusts in the hands of the taxpayer like the previous years. On appeal, CIT(A) held that, US trusts were discretionary trust whereas UK trusts were specific trusts.

The Tribunal, relying on the previous orders by the Settlement Commission and the Supreme Court of India in its support, held that the disputed UK trusts were specific trusts especially due to clauses 3(2) and 4 of the UK trust deeds and further held that, even assuming the UK trusts were discretionary, such income of the trusts were taxable in the hands of the assessee as per section 166 of the Income-tax Act, 1961 which allows to tax the income of the trust in the hands of the trustee or the beneficiary.

On appeal by the taxpayer against the order of the ITAT to the Gujarat High Court (HC), the HC held that section 166 of the Act can be invoked only when the income of the trust is received by the assessee, who is the beneficiary to the trust. The HC noted that, when no remittance was made by the UK trusts and that the entire income was retained by it and not distributed, such income cannot be taxable in the hands of the taxpayer in India. Further, the HC noted that Revenue had not produced any documents to establish that the taxpayer had received income from the UK trusts. Whereas, the taxpayer had produced statements from the trust to the effect that the income had been retained by trust and not distributed to the assessee. Therefore, the court held that, no income is taxable in the hands of the beneficiary/assessee. Aggrieved by the order of the High Court the Revenue preferred an appeal to the Supreme Court.

Issue

Whether income was taxable in the hands of the beneficiary given the fact that no income was distributed by the trust.

View

The Supreme Court observed that for the assessment years under consideration, the High Court noted the following distinguishing features, namely,

(i) the assessee has not admitted having received the income,

(ii) the assessee has not received the said income, and

(iii) the assessee has not shown as taxable income in the returns of all the years under appeal.

Having observed these distinguishing features, the High Court was also of the view that, on interpretation of the relevant clauses of the deeds of settlement executed in UK, character of the trusts appears to be discretionary and not specific.

The Supreme Court was of the view that a discretionary trust is one which gives a beneficiary no right to any part of the income of the trust property, but vests in the trustees a discretionary power to pay him, or apply for his benefit, such part of the income as they think fit. The trustees must exercise their discretion as and when the income becomes available, but if they fail to distribute in due time, the power is not extinguished so that they can distribute later. They have no power to bind themselves for the future. The beneficiary thus, has no more than a hope that the discretion will be exercised in his favour.

Held

The Supreme Court upheld the Gujarat High Court's view (based on Snell's Principles of Equity) that, the trusts were discretionary and not specific. The Court observing the fact that the income has been retained and not disbursed to the beneficiaries, held that the view taken by the High Court cannot be said to be legally flawed. Merely because the Settlor and after his death, his son did not exercise their power to appoint the discretion exercisers, the character of the subject trusts does not get altered. Considering the facts, Supreme Court held that, the two UK trusts continued to be 'discretionary trust' for the assessment years. This position regarding the discretionary trust was equally applicable to the controversy in appeals under the Wealth-tax Act. The High Court took correct view that the value of the assets cannot be assessed on the estate of the deceased Settlor. Department appeals were thus dismissed. (AY. 1970-71 to 1976-77 and 1978-79 to 1989-90) (CA Nos. 2312 of 2007/329 of 2009/200 to 2004/199/198 & 2158 of 2010/4561/4562/4564 to 4568 of 2014 dt. 16-04-2014)

CWT v. Estate of HMM Vikramsinhji of Gondal (2014) 363 ITR 679/225 Taxman 166/268 CTR 232/103 DTR 211 (SC)

Editorial: The principal laid down in is that, if the deeds state that, trustee has discretionary powers to distribute trust's income, that is enough to say that the trusts are discretionary, and also that if the trustee did not exercise his power to distribute the income among the beneficiaries, doesn't mean that his power is extinguished and he can do it later on. Further the following judgements should have followed in the case of ***Deepak B. Shah 174 ITD 237 (Mum) (Trib).*** Also refer the Supreme Court decision in the case of ***CIT v. Smt. Kamalini Khatau [1994] 209 ITR 101 (SC)***

> *"It is health that is real wealth and*
> *not pieces of gold and silver."*
>
> \- Mahatma Gandhi

12

S. 5: Scope of total income - liaison office of the non-resident - A liaison office which is only carrying on such activity of a "preparatory or auxiliary" character is not a Permanent Establishment in terms of Article 5 of the Double taxation Avoidance Agreement - The deeming provisions in Sections 5 and 9 of the 1961 Act can have no bearing whatsoever - DTAA-India-UAE [S. 2(24), 4, 9(1)(i), 90, Art. 5, 7]

Facts

The Assessee was a limited company incorporated in the United Arab Emirates (UAE). It was engaged in offering, among others, remittance services for transferring amounts from UAE to various places in India. It had applied for a permission under section 29(1)(a) of the Foreign Exchange Regulation Act, 1973, ('FERA') pursuant to which approval was granted by the Reserve Bank of India ('RBI') with certain conditions.

Assessee set up its first liaison office in Cochin, Kerala (India) and thereafter, in Chennai, New Delhi, Mumbai and Jalandhar in India. The activities carried on by the Assessee from the said liaison offices were in conformity with the terms and conditions prescribed by the RBI. The entire expenses of the are met liaison offices in India exclusively out of funds received from UAE through normal banking channels. Indisputably, the liaison offices did not undertake any trading, commercial or industrial activity. Further, Assessee had no immovable property in India otherwise than by way of lease for operating the liaison offices. No fee/commission was charged or received in India by any of the liaison offices for services rendered in India. The remittance services were offered by the Assessee to Non-Resident Indians ('NRIs') in UAE. The contract pursuant to which the funds were handed over by the NRI to the Assessee in UAE, was entered with the NRI remitter in UAE. The funds are collected from the NRI remitter in UAE by charging one-time fee in Dirhams. After collecting the funds from the NRI remitter, Assessee made an electronic remittance of the funds on behalf of its NRI customer in two ways: —

(i) By telegraphic transfer through bank channels; or

(ii) On the request of the NRI remitter, Assessee sends instruments/cheques through its liaison offices to the beneficiaries in India, designated by the NRI remitter.

Assessee had filed its returns of income showing NIL income, on the ground that no income had accrued or deemed to have accrued to it in India, both under the 1961 Act, as well as, the agreement entered into between the Government of the Republic of India and the Government of the UAE, which is known as Double Taxation Avoidance Agreement ('DTAA'). Returns filed on regular basis were accepted by the Department. However certain doubt arose in respect of the second mode of remittance through the liaison offices in India more particularly on account of the activity undertaken in the liaison office in India of downloading the particulars of remittances through electronic media and printing cheques/ drafts drawn on the banks in India, which, in turn, are couriered or dispatched to the beneficiaries in India, in accordance with the instructions of the NRI remitter. While doing this, the liaison office of the Assessee remains connected with its main server in UAE, as the information is contained in the main server there, which could be accessed by the liaison office in India for the purpose of remittance of funds to the beneficiaries in India by the NRI remitters. Hence Assessee filed an application u/s 245Q(1) of the Act before the Authority for Advance Rulings ('AAR'), and sought ruling on the question as to whether any income is accrued/deemed to be accrued in India from the activities carried out by the Company in India.

The Authority, *vide* its ruling answered the question in the affirmative, namely, "Income shall be deemed to accrue in India from the activity carried out by the liaison offices of the applicant in India." For holding so, the AAR opined that in view of the deeming provision in Sections 2(24), 4 and 5 read with Section 9 of the 1961 Act, the Assessee would be liable to pay tax under the 1961 Act, as it had carried on business in India through a "permanent establishment" ('PE') situated in India and the profits of the enterprise needed to be taxed in India, but only so much of that, as is attributable to the liaison offices in India (PE). The Authority observed that it was evident that all the operations of the business of the respondent were not carried out in India. In such a situation, to attract the provisions, it must be shown that - (i) the Assessee has 'business connections' in India; and (ii) the income of the business can be deemed to accrue or arise in India from such operations, as are carried out in India. After analyzing this aspect and Explanation 2 to Section 9(1)(i) inserted by the Finance Act, 2003, it noted the decision of this Court in ***CIT v. R. D. Aggarwal & Company [1965] 56 ITR 20 (SC)*** that culled out the essential features of expression "business connection". AAR observed that in cases where the applicant has to remit the amounts to the beneficiaries in India, as per the directions of the NRIs, the liaison offices download the information from the internet, print cheques/drafts in the name of the beneficiaries in India send them through couriers to various places in India. Without the latter activity, the transaction of remittance of the amounts in terms of the contract with the NRIs would not be complete. The commission which the applicant receives for remitting the amount covers not only the business activities carried on in UAE but also the activity of remittance of the amount to the beneficiary in India by cheques/drafts through courier which is being attend to by the liaison offices. There was a real relation between the business carried on by the Assessee for which it receives commission in UAE and the activities of, the liaison offices, which contributes directly or indirectly to the earning of the income by the Assessee by way of commission. There is also continuity between the business of the applicant in UAE and the activities carried on by the liaison offices. However, the deemed accrual of income to the applicant from the business connection in India in view the *Explanation (I)* would be only such part of the income as is reasonably attributable to the operations which are carried out in India. AAR also took note of Articles 5 and 7 of DTAA and observed that clause (e) of para 3 says that the expression 'permanent establishment' shall be deemed not to include the maintaining of a fixed place of business solely for the purpose of carrying on for an enterprise any other activity of a preparatory or auxiliary character. It held that as far as first mode is concerned, the amount is remitted telegraphically by transferring directly from UAE through bank channel to various places in India and in such remittances the liaison offices have no role to play except attending to the complaints, if any, in India regarding the remittances in cases of fraud etc. This was undoubtedly a work of auxiliary character. However, where the applicant adopts the second mode for remitting the amounts in India -an activity approved by the RBI - the liaison offices of the applicant play an important role. The role of liaison offices in remitting the amounts by adopting the second mode, is nothing short of performing the contract of remitting the amounts at least in part. So, the activities of the liaison offices in the second mode remittance, cannot be said to be work of auxiliary character. It was a significant part of the main work of UAE establishment. The AAR accordingly concluded that so much of the profits as shall be deemed to accrue or arise to the respondent in India, which were attributable to the PE, namely, the liaison offices in India, would be taxable in India even under the DTAA, and answered the question affirmatively against the Assessee.

Following the ruling of AAR, the Department issued notices under Section 148. The Assessee, therefore, carried the matter before the High Court for quashing of the AAR ruling and quashing of reopening notices.

The High Court noted that the Authority committed manifest error in appreciating the relevant facts and materials on record. The High Court adverted to the exposition in ***UOI v. Azadi Bachao Andolan [2003] 263 ITR 706 (SC)*** and observed that the liability to tax under the DTAA is governed by article 7. The provisions of Section 5(2)(b) and Section 9(1)(i) of the Act would have no applicability. Discussion with respect to the 'business connection' in the AAR ruling was unnecessary. The Court observed that AAR came to the conclusion that the activity carried on by the liaison offices in India did have an 'auxiliary' character in terms of Article 5(3)(e) of the Act as the option of remitting of funds through the liaison offices in India was exercised by the NRI remitter which was nothing short of, as in the words of the parties, performing contract of remitting the amounts, and without remittances of funds to the beneficiaries in India performance under the contract would not have been complete.

High Court held that the activity of the liaison offices in India was simply auxiliary in character. The activity was in 'aid' or 'support' of the main activity. The error into which, AAR had fallen was in reading article 5(3)(e) as a clause which permits making a value judgment as to whether the transaction would or would not have been complete till the role played by liaison offices in India was fulfilled as represented by the Assessee to their NRI remitter. To say that a particular activity was necessary for completion of the contract is, in a sense saying the obvious as every other activity which an enterprise undertakes in earning profits is with the ultimate view of giving effect to the obligations undertaken by an enterprise vis-a-vis its customer. If looked at from that point of view, then, no activity could be construed as preparatory or of an 'auxiliary' character. Accordingly, the High Court held that the nature of activities carried on by the respondent-assessee in the liaison offices being only of preparatory and auxiliary character, were clearly excluded by virtue of deeming provision.

Feeling aggrieved, the Department filed an appeal before the Supreme Court.

Issue

Whether the activities of the Assessee as discussed in the facts above, would qualify the expression "of preparatory or auxiliary character"?

Views

In view of the exposition, that provisions of DTAA override the provision of Income Tax Act, in the matter of ascertainment of chargeability to income tax and ascertainment of total income, to the extent of inconsistency with the terms of DTAA, the Court proceeded to answer the question in light of the purport of provisions in DTAA, which has been executed by the Government of India and the Government of UAE. Based on the findings recorded by the High Court, the Court proceeded on the basis that the Assessee had a fixed place of business through which the business of the Assessee was being wholly or partly carried on. That, however, would not be conclusive until a further finding is recorded that the Assessee had a PE, in terms of Article 5, situated in India, so as to attract Article 7 dealing with business profits to become taxable in India, to the extent attributable to the PE of the Assessee in India. The Court observed that Article 5(3) of the DTAA opens with a non- obstante clause and also contains a deeming provision. It predicates that notwithstanding the preceding provisions of the concerned article, which would mean clauses 1 and 2 of article 5, it would still not be a PE, if any of the clauses in article 5(3) are applicable. For that, the functional test regarding the activity in question would be essential. The Court observed that since Assessee argued that the activities of the liaison offices of are of preparatory or auxiliary character, the same would fall within the excepted category under Article 5(3)(e) of the DTAA. Resultantly, it cannot be regarded as a PE within the sweep of Article 7 of DTAA. The expression "preparatory" is not defined in the 1961 Act or the DTAA. The dictionary meaning of that expression can be traced to term "preparatory work" and "travaux preparatoires", which in the Black's Law Dictionary (Eleventh Edition), read thus: —

> "preparatory work. See TRAVAUX PREPARATOIRES.
>
> travaux preparatoires. Materials used in preparing the ultimate form of an agreement or statute, and esp. of an international treaty; the draft or legislative history of a treaty."

The expression "auxiliary" is also not defined in the 1961 Act or the DTAA. In common parlance, the meaning of that expression is predicated in Concise Oxford English Dictionary (Twelfth Edition), which reads thus: —

> "Auxiliary- adj. providing additional help or support. n. an auxiliary person or thing. N. Amer. A group of volunteers who assist a church, hospital, etc. with charitable activities."

In Black's Law Dictionary (Eleventh Edition), the term "auxiliary" is defined as follows: —

> "Auxiliary adj. 1. Aiding or supporting. 2. Subsidiary. 3. Supplementary."

The Court referred to the limited permission given by the RBI to the Assessee under section 29(1)(a) of FERA. From the stated permission, it was evident that the RBI had agreed for establishing a liaison office of the Assessee at Cochin, initially for a period of three years to enable the Assessee to

(i) respond quickly and economically to enquiries from correspondent banks with regard to suspected fraudulent drafts;

(ii) undertake reconciliation of bank accounts held in India;

(iii) act as a communication centre receiving computer (via modem) advices of mail transfer T.T. stop payments messages, payment details etc., originating from Assessee's several branches in UAE and transmitting to its Indian correspondent banks;

(iv) printing Indian Rupee drafts with facsimile signature from the Head Office and counter signature by the authorized signatory of the Office at Cochin; and

(v) following up with the Indian correspondent banks.

These were limited activities which the Assessee has been permitted to carry on within India. This permission does not allow the Assessee to enter into a contract with anyone in India, but only to provide service of delivery of cheques/ drafts drawn on the banks in India. Notably, the permitted activities are required to be carried out by the Assessee subject to conditions specified in clause 3 of the permission, which includes not to render any consultancy or any other service, directly or indirectly, with or without any consideration and further that the liaison office in India shall not borrow or lend any money from or to any person in India without prior permission of RBI. The conditions make it amply clear that the office in India will not undertake any other activity of trading, commercial or industrial, nor shall it enter into any business contracts in its own name without prior permission of the RBI. The liaison office of the Assessee in India cannot even charge commission/fee or receive any remuneration or income in respect of the activities undertaken by the liaison office in India. From the onerous stipulations specified by the RBI, the Court opined that the activities in question of the liaison office(s) of the Assessee in India are circumscribed by the permission given by the RBI and are in the nature of preparatory or auxiliary character.

The Court was of the view that no income as specified in section 2(24) of the 1961 Act was earned by the liaison office in India and moreso because, the liaison office is not a PE in terms of article 5 of DTAA (as it is only carrying on activity of a preparatory or auxiliary character). The concomitant is - no tax can be levied or collected from the liaison office of the Assessee in India in respect of the primary business activities consummated by the Assessee in UAE. The activities carried on by the liaison office of the Assessee in India as permitted by the RBI, clearly demonstrate that the Assessee must steer away from engaging in any primary business activity and in establishing business connection as such. It can carry on activities of preparatory or auxiliary nature only. In that case, the deeming provisions in sections 5 and 9 of the 1961 Act can have no bearing whatsoever.

The meaning of expressions “business connection” and “business activity” has been articulated. However, even if the stated activity(ies) of the liaison office of the Assessee in India is regarded as business activity, as noted earlier, the same being “of preparatory or auxiliary character”; by virtue of Article 5(3)(e) of the DTAA, the fixed place of business (liaison office) of the Assessee in India otherwise a PE, is deemed to be expressly excluded from being so. And since by a legal fiction it is deemed not to be a PE of the Assessee in India, it is not amenable to tax liability in terms of article 7 of the DTAA.

Held

Dismissing the appeal of the revenue the Court held that the activities carried on by the liaison office of the non-resident in India as permitted by the RBI, demonstrate that the liaison office must steer away from engaging in any primary business activity and in establishing business connection as such. It can carry on activities of preparatory or auxiliary nature only. A liaison office which is only carrying on such activity of a "preparatory or auxiliary" character is not a PE in terms of Article 5 of the DTAA. The deeming provisions in Sections 5 and 9 of the 1961 Act can have no bearing whatsoever. (CA No. 9775 of 2011 dt. 24.04.2020)

UOI v. U.A.E. Exchange Centre (2020) 425 ITR 30/315 CTR 129/273 Taxman 122 (SC)

Editorial: Functional and factual analysis of the activities of the MNCs is the prime factor to decide that whether it is involved in the core activities or the preparatory and auxiliary activities. PE analysis is a mixed question of facts and law. These ruling once again highlights the extent to which tax authorities examine facts; they do not limit their review only to the intra-group contractual arrangements but go far beyond it to understand the factual matrix. One will also have to analyse the effect of Treaties which India has signed with the respective countries in each case (including the protocol and MFN clause, if any).

> *"Each night, when I go to sleep, I die. And the next morning, when I wake up, I am reborn."*
>
> \- Mahatma Gandhi

13

S. 9(1)(i): Income deemed to accrue or arise in India - Business connection – Income attributable to permanent establishment – For applicability of article 5(1) of DTAA it should be an establishment through which business of an enterprise is wholly or partly carried on and further profits of foreign enterprise are taxable only where said enterprise carries on its 'core business' through PE - Project office in India cannot be construed as fixed place as no core activity took place from its office in India Deletion of addition by the High Court is affirmed - DTAA - India - Republic of Korea [Art. 5(1), 7]

Facts

In 2006, The Oil and Natural Gas Company (ONGC) awarded a turnkey contract to a consortium comprising of Larsen & Toubro Limited (L&T) and Samsung Heavy Industries Co. Ltd (Samsung), a company incorporated in South Korea, for carrying out complete work for Vasai East Development Project (VEDP). Samsung, the assessee, then set up a project office in Mumbai for coordination and execution of work for the turnkey project via a Board Resolution. Subsequently, in AY 2007-08, Samsung filed a NIL return in accordance with India-South Korea DTAA. Disagreeing with the return, the Income Tax Department issued a show cause notice to the assessee, post which a draft assessment order that was passed which went into the terms of the agreement in great detail, and concluded that the Project in question was a single indivisible "turnkey" project, whereby ONGC was to take over a project that was completed only in India. Resultantly, profits arising from the successful commissioning of the Project would also arise only in India. The AO held that the work relating to fabrication and procurement of material was very much a part of the contract for execution of work assigned by ONGC. The work was wholly executed by a Permanent Establishment (PE) in India and it would be absurd to suggest that PE in India was not associated with the designing or fabrication of materials. The Assessing officer went on to attribute 25% of the revenues allegedly earned outside India as being the income of the assessee eligible to tax.

The application to Dispute Resolution Panel (DRP) was dismissed as the DRP concurred with the AO and held that the nature of activities undertaken by Samsung in India showed that it had a PE in India.

The matter then moved to ITAT where after referring to Samsung's Board resolution and its application to RBI for opening the Project office, the ITAT concluded that the Project office was Samsung's fixed place PE in India, to carry out the contract wholly or partly, as under article 5(1), DTAA. Assessee had argued before the ITAT that the project office was not involved in any core business activity and that the Project office was just an auxiliary office. Books of Accounts that were maintained by the Samsung which did not show any expenditure related to the ONGC turnkey project were also produced before the ITAT. The ITAT rejecting these arguments observed that the terms in the contract, and the way in which the work was executed, showed that the project office had a vital role to be played in the execution of the entire contract by acting has a channel between ONGC and Samsung Heavy Industries Co. Ltd Korea. The ITAT also held that onus was on the Assessee to prove that the activities undertaken by its Indian PE are auxiliary or preparatory in nature. Since the onus was not discharged, the Project office fell under article 5(4), of the Tax Treaty. ITAT further held that the mode of maintaining accounts alone cannot determine the character of the PE.

The assessee then challenged the ITAT order before the High Court which ruled in the favour of the assessee. The High court noted that there was no finding on record that the revenue had been earned or said to have been on account of India activity of the Project office. It also observed that the DTAA did not permit the Tax Authorities to arbitrarily fix a part of the revenue to the PE of the assessee in India. Lastly, the High court also noted that neither the AO nor the ITAT established or had made any effort to bring on record any evidence to justify that the business was actually carried out by the project office and that 25 percent of the gross revenue is attributable to such Project office. The revenue then challenged the decision of the High Court before the Supreme Court.

Issue

The issue before the Supreme court was with regard to taxability of income attributable to a "permanent establishment" set up in a fixed place in India, arising from the India-Korea DTAA.

Views

In ***DIT (International Taxation), Mumbai v. M/s Morgan Stanley & Co. Inc., [2007] 7 SCC 1,*** went on to hold that activities performed by stewards who were deployed by the American Company to work in India as employees of the Indian company were so employed merely to protect the American companies' interests in a competitive world, by ensuring quality and confidentiality of services performed in India. It was therefore found that so far as stewardship was concerned, this activity would fall within Article 5(2)(l) of the US-India treaty, and therefore would be outside the term "permanent establishment" as defined. On the deputation of certain employees of the American Company to work as employees of the Indian Company, it was found, however, that the American Company was rendering services through its employees to the Indian Company, as a result of which a "service" permanent establishment would stand established on this count.

In ***ADIT v. E-Funds IT Solution Inc. [2018] 13 SCC 294,*** the Court while dealing with ‘support services’ rendered by an Indian Company to American Companies, held that the outsourcing of such services to India would not amount to a fixed place permanent establishment under Article 5 of the aforesaid treaty.

Held

Supreme Court held that when it comes to “fixed place” permanent establishments under double taxation avoidance treaties, the condition precedent for applicability of Article 5(1) of the double taxation treaty and the ascertainment of a “permanent establishment” is that it should be an establishment “through which the business of an enterprise” is wholly or partly carried on. Further, the profits of the foreign enterprise are taxable only where the said enterprise carries on its core business through a permanent establishment. What is equally clear is that the maintenance of a fixed place of business which is of a preparatory or auxiliary character in the trade or business of the enterprise would not be considered to be a permanent establishment under Article 5. Also, it is only so much of the profits of the enterprise that may be taxed in the other State as is attributable to that permanent establishment.

The Supreme Court upheld the High Courts’ decision and ruled that the project office of Samsung Korea did not constitute a PE in India in terms of Article 5 of the Tax Treaty given the nature of the activities carried out by such Project Office.

To determine the nature of activities and auxiliary nature of the Project office, the Supreme court delved deeper into the documents relied upon by ITAT and looked at various other factors which the ITAT had either ignored or dismissed. It observed that the Board Resolution submitted to RBI for registration of the Project office showed that it was established to co-ordinate and execute “delivery of documents in connection with construction of offshore platform modification of existing facilities for ONGC”. The Court held that ITAT wrongly jumped to the conclusion that the Mumbai office was for coordination and execution of the project itself and the finding, therefore, that the Mumbai office was not a mere liaison office, but was involved in the core activity of execution of the project itself is therefore clearly perverse. Further when the Assessee pointed out that the accounts of the Mumbai office showed that no expenditure relating to the execution of the contract was incurred, the ITAT rejected the argument, stating that as accounts are in the hands of the Assessee, the mere mode of maintaining accounts alone cannot determine the character of permanent establishment. This as per the Court was another perverse finding.

The Court relied on the fact that the accounts of the Project office showed no expenditure incurred in relation to execution of the contract, and that the only two people employed in the Project office were not qualified to carry out any core activity of the Assessee. The Court thus dismissed the department appeal. (AY. 2007-08) (CA No. 12183 of 2016 dt. 24-07-2020).

DIT (IT) v. Samsung Heavy Industries Co. Ltd. (2020) 426 ITR 1/192 DTR 1/315 CTR 622/272 Taxman 366 (SC)

Editorial: This Supreme Court decision has spelled a wave of relief for the Tax payers (especially MNC's) and iterates an important principle that instead of general perceptions and sweeping assumptions (that a project office would generally execute a project), a deep, factual enquiry into the determination of existence of the PE is required and tax liability to be imposed based on actual activities carried out by a taxpayer. Also, the supreme court has clearly underlined the fact that the initial burden lies on the Indian Revenue, and not the assessee, to prove that there is a PE of the foreign enterprise in India, before moving further to determine the Indian tax liability of that enterprise.

Samsung Heavy Industries Co. Ltd. v. DIT (IT) & Anr. (2014) 221 Taxman 315/265 CTR 109/98 DTR 89 (Uttarakhand)(HC), affirmed

Reference can also be drawn to the following judgements; ***Ishikawajma-Harima Heavy Industries Ltd. [2007] 288 ITR 408 (SC), LG Cable Ltd. (2011) 237 CTR 438 (Delhi) HC)***

> *"Look at the sparrows; they do not know what they will do in the next moment. Let us literally live from moment to moment."*
>
> \- Mahatma Gandhi

14

S. 9(1)(i) : Income deemed to accrue or arise in India – Indirect transfers – Transfer of shares – Foreign company – Jurisdiction – Off shore transaction tax authorities in India has no jurisdiction to tax such share transfer – Tax planning vs. Tax avoidance – Subsidiary and Holding company relationships – Other business considerations [S. 2(14, 2(47), 5(2), 163, 195]

Facts

Hutchison Group of Companies (Hong Kong) had acquired interest in the Indian telecom business in the year 1992, when the group invested in Hutchison Max Telecom Limited (HTML) (later known a Hutchison Essar Limited (HEL), which acquired a cellular license in Mumbai circle in the year 1994 and commenced its operation in the year 1995. Hutchison Group, with the commercial purpose of consolidating its interest in various countries, incorporated CGP Investments Holding Limited (for short "CGP") in Cayman Islands as a WOS on 12.01.1998 as an Exempted Company for offshore investments. CGP held shares in two subsidiary companies, namely Array Holdings Limited (for short Array) and Hutchison Teleservices (India) Holding Ltd. [HTIH(M)] both incorporated in Mauritius. CGP(India) Investment (CGPM) was incorporated in Mauritius in December 1997 for the purpose of investing in Telecom Investment (India) Pvt. Limited (for short TII), an Indian Company. CGPM acquired interests in four Mauritian Companies and entered into a Shareholders' Agreement (SHA) on 02.05.2000 with Essar Teleholdings Limited (ETH), CGPM, Mobilvest, CCII (Mauritius) Inc. and few others, to regulate shareholders' right inter se. Agreement highlighted the share holding pattern of each composition of Board of Directors, quorum, restriction on transfer of ownership of shares, Right of First Refusal (ROFR), Tag Along Rights (TARs) etc.

HTIL, a part of Hutchison Whampoa Group, incorporated in Cayman Islands in the year 2004 was listed in Hong Kong (HK) and New York (NY) Stock Exchanges. In the year 2005, as contemplated in the Term Sheet Agreement dated 05.07.2003, HTIL consolidated its Indian business operations through six companies in a single holding company HMTL, later renamed as Hutchison Essar Ltd. (HEL).

HEL shareholding was then restructured through TII and an Shareholder's agreement (SHA) was executed on 01.03.2006 between Centrino Trading Company Pvt. Ltd. (Centrino), an Asim Ghosh (Group) [for short (AG)], ND Callus Info Services Pvt. Ltd. (NDC), an Analjit Singh (Group) [for short (AS)], Telecom Investment India Pvt. Ltd. (TII), and CGP India (M). Further, two Framework Agreements (FWAs) were also entered into with respect to the restructuring.

Vodafone Group Plc. came to know of the possible exit of Hutch from Indian telecom business and on behalf of Vodafone Group made a non-binding offer on 22.12.06. Vodafone and HTIL then entered into a Share and Purchase Agreement (SPA) on 11.02.2007 where under HTIL had agreed to procure the transfer of share capital of CGP by HTIBVI, free from all encumbrances and together with all rights attaching or accruing together with assignments of loan interest. HTIL on 11.02.2007 issued a side letter to Vodafone *inter alia* stating that, out of the purchase consideration, up to US$80 million could be paid to some of its Indian Partners. On 11.02.2007, HTIL also sent a disclosure letter to Vodafone in terms of Clause 9.4 of SPA - Vendor warranties relating to consents and approvals, wider group companies, material contracts, permits, litigation, arbitration and governmental proceedings to limit HTIL liability.

Vodafone on 20.02.2007 filed an application with Foreign Investment Promotion Board (FIPB) requesting it to take note of and grant approval under Press note no. 1 to the indirect acquisition by Vodafone of 51.96% stake in HEL through an overseas acquisition of the entire share capital of CGP from HTIL.

The Joint Director of Income Tax (International Taxation), in the meanwhile, issued a notice dated 15.03.2007 under Section 133(6) of the Income Tax Act calling for certain information regarding sale of stake of Hutchison group HK in HEL, to Vodafone Group Plc.

HEL on 22.3.2007 replied to the letter of 15.03.2007, issued by the Joint Director of Income Tax (International Taxation) furnishing requisite information relating to HEL clarifying that it was neither a party to the transaction nor would there be any transfer of shares of HEL.

HEL received a letter dated 23.3.2007 from the Additional Director Income Tax (International Taxation) intimating that both Vodafone and Hutchison Telecom Group announcements/press releases/declarations had revealed that HTIL had made substantive gains and consequently HEL was requested to impress upon HTIL/Hutchison Telecom Group to discharge their liability on gains, before they ceased operations in India. HEL attention was also drawn to Sections 195, 195(2) and 197 of the Act and stated that under Section 195 obligations were both on the payer and the payee.

HEL on 5.4.2007 wrote to the Joint director of Income Tax stating that it has no liabilities accruing out of the transaction, also the department has no locus standi to invoke Section 195 in relation to non-resident entities regarding any purported tax obligations.

The Income Tax Department on 06.08.2007 issued a notice to VEL under Section 163 of the Income Tax Act to show cause why it should not be treated as a representative assessee of Vodafone. The notice was challenged by VEL in Writ Petition No. 1942 of 2007 before the Bombay High Court. The Assistant Director of Income Tax (Intl.) Circle 2(2), Mumbai, issued a show cause notice to Vodafone under Section 201(1) and 201(1A) of the I.T. Act as to why Vodafone should not be treated a assessee-in-default for failure to withhold tax. Vodafone then filed a Writ Petition 2550/2007 before the Bombay High Court for setting aside the notice dated 19.09.2007. Vodafone had also challenged the constitutional validity of the retrospective amendment made in 2008 to Section 201 and 191 of the I.T. Act. On 03.12.2008 the High Court dismissed the Writ Petition No.2550 of 2007 against which Vodafone filed SLP No.464/2009 before this Court and this Court on 23.01.2009 disposed of the SLP directing the Income Tax Authorities to determine the jurisdictional challenge raised by Vodafone as a preliminary issue. On 30.10.2009 a 2nd show cause notice was issued to Vodafone under Section 201 and 201(1A) by the Income Tax authorities. Vodafone replied to the show cause notice on 29.01.2010. On 31.05.2010 the Income Tax Department passed an order under Section 201 and 201(1A) of the I.T. Act upholding the jurisdiction of the Department to tax the transaction. A show cause notice was also issued under Section 163(1) of the I.T. Act to Vodafone as to why it should not be treated as an agent/representative assessee of HTIL.

Vodafone then filed Writ Petition No. 1325 of 2010 before the Bombay High Court on 07.06.2010 challenging the order dated 31.05.2010 issued by the Income Tax Department on various grounds including the jurisdiction of the Tax Department to impose capital gains tax to overseas transactions. The Assistant Director of Income Tax had issued a letter on 04.06.2010 granting an opportunity to Vodafone to address the Department on the question of quantification of liability under Section 201 and 201(1A) of the Income Tax Act. Notice was also challenged by Vodafone in the above writ petition by way of an amendment. The Bombay High Court dismissed the Writ Petition on 08.09.2010 against which the SLP was filed.

The High Court upheld the jurisdiction of the Revenue to impose capital gains tax on Vodafone as a representative assessee after holding that the transaction between the parties attracted capital gains in India.

Issue

The issue before the Supreme court was whether acquisition by Vodafone International Holdings BV [for short "VIH"], a company resident for tax purposes in the Netherlands, of the entire share capital of CGP Investments (Holdings) Ltd. [for short "CGP"], a company resident for tax purposes in the Cayman Islands ["CI" for short], which gave acquisition of 67% controlling interest in HEL, being a company resident for tax purposes in India gave rise to a taxable event. In other words, can capital gains arising from the sale of the share capital of CGP be taxed in India?

View

1. Conflict between

The Department had argued that decision ***Union of India v. Azadi Bachao Andolan (2003) 263 ITR 706 (SC)*** be reconsidered as it was in conflict with the decisions of ***McDowell and Co. Ltd. v. CTO (1985) 154 ITR 148) (SC).*** The Court referring to certain tests laid down in the judgments of the English Courts subsequent to ***Commissioners of Inland Revenue v. His Grace the Duke of Westminster 1935 All E.R. 259*** and ***W.T. Ramsay Ltd. v. Inland Revenue Commissioners [1981] 1 All E.R. 865***, held that there is no conflict between ***McDowell and Azadi Bachao. Court referred to decisions of Furniss (Inspector of Taxes) v. Dawson (1984) 1 All E.R. 530*** and ***Craven (Inspector of Taxes) v. White (Stephen) (1988) 3 All. E.R. 495.***

2. Ownership Structure

It cannot be said that all tax planning is illegal/illegitimate/impermissible. Every strategic foreign direct investment coming to India, as an investment destination, should be seen in a holistic manner. While doing so, the Revenue/Courts should keep in mind the following factors:

a) the concept of participation in investment,

b) the duration of time during which the Holding Structure exists;

c) the period of business operations in India;

d) the generation of taxable revenues in India;

e) the timing of the exit;

f) the continuity of business on such exit.

The onus will be on the Revenue to identify the scheme and its dominant purpose. The corporate business purpose of a transaction is evidence of the fact that the impugned transaction is not undertaken as a colourable or artificial device. The stronger the evidence of a device, the stronger the corporate business purpose must exist to overcome the evidence of a device.

3. Whether Section 9 is a "look through" provision as submitted on behalf of the Revenue?

One of the arguments of the revenue was income from the sale of CGP share would nonetheless fall within Section 9 of the Income Tax Act, 1961 as that Section provides for a "look through". In this connection, it was submitted that the word "through" in Section 9 *inter alia* means "in consequence of". It was, therefore, argued that if transfer of a capital asset situate in India happens "in consequence of" something which has taken place overseas (including transfer of a capital asset), then all income derived even indirectly from such transfer, even though abroad, becomes taxable in India. That, even if control over HEL were to get transferred in consequence of transfer of the CGP Share outside India, it would yet be covered by Section 9. The Court did not find merits in the above submission of the Revenue. Last sub-clause of section 9(1)(i) refers to income arising from "transfer of a capital asset situate in India". The said sub-clause consists of three elements, namely, transfer, existence of a capital asset, and situation of such asset in India. All three elements should exist in order to make the last sub-clause applicable. In the case of a non-resident, unless the place of accrual of income is within India, he cannot be subjected to tax. In other words, if any income accrues or arises to a nonresident, directly or indirectly, outside India is fictionally deemed to accrue or arise in India if such income accrues or arises as a sequel to the transfer of a capital asset situate in India. A legal fiction has a limited scope. A legal fiction cannot be expanded by giving purposive interpretation particularly if the result of such interpretation is to transform the concept of chargeability which is also there in Section 9(1)(i), particularly when one reads Section 9(1)(i) with Section 5(2)(b) of the Act. Section 9(1)(i) cannot by a process of interpretation be extended to cover indirect transfers of capital assets/ property situate in India.

4. Transfer of HTIL's property rights by Extinguishment?

The department argued that HTIL had, under the SPA, directly extinguished its rights of control and management, which are property rights, over HEL and its subsidiaries and, consequent upon such extinguishment, there was a transfer of capital asset situated in India. As a holder of 100% shares of downstream subsidiaries, HTIL possessed de facto control over such subsidiaries. Such *de facto* control was the subject matter of the SPA. The Court was of the view that the issue was sale of shares and not sale of assets. The Court was in favour of applying "look at" test instead of "dissecting approach" as forwarded by the Department, The Court observed that the structure existed for a considerable length of time generating taxable revenues right from 1994 and the transaction satisfies all the parameters of "participation in investment". In such a case there was no need to delve upon the questions such as *de facto* control vs. legal control, legal rights vs. practical rights, etc. However, the Court went further to observe that the fact that the parent company exercises shareholder's influence on its subsidiaries cannot obliterate the decision-making power or authority of its (subsidiary's) directors. They cannot be reduced to be puppets. The decisive criteria is whether the parent company's management has such steering interference with the subsidiary's core activities that subsidiary can no longer be regarded to perform those activities on the authority of its own executive directors. It also appreciated the reason for execution of the SPA. Exit is an important right of an investor in every strategic investment, and the present case concerns transfer of investment in entirety. The Court held that under the HTIL structure, as it existed in 1994, HTIL occupied only a persuasive position/influence over the downstream companies qua manner of voting, nomination of directors and management rights. That, the minority shareholders/investors had participative and protective rights (including RoFR/TARs, call and put options which provided for exit) which flowed from the CGP share. That, the entire investment was sold to the VIH through the investment vehicle (CGP). Consequently, there was no extinguishment of rights as alleged by the Revenue.

5. Role of CGP in the transaction

The main contention of the Revenue was that CGP stood inserted at a late stage in the transaction in order to bring in a tax-free entity (or to create a transaction to avoid tax) and thereby avoid capital gains. Refuting this argument raised by Revenue, the Court observed that, firstly, the tier I (Mauritius companies) were the indirect subsidiaries of HTIL who could have influenced the former to sell the shares of Indian companies in which event the gains would have arisen to the Mauritius companies, who are not liable to pay capital gains tax under the Indo-Mauritius DTAA. That, nothing prevented the Mauritius companies from declaring dividend on gains made on the sale of shares. There is no tax on dividends in Mauritius. Thus, the Mauritius route was available but it was not opted for because that route would not have brought in the control over GSPL. Secondly, if the Mauritius companies had sold the shares of HEL, then the Mauritius companies would have continued to be the subsidiaries of HTIL, their accounts would have been consolidated in the hands of HTIL and HTIL would have accounted for the gains in exactly the same way as it has accounted for the gains in the hands of HTIHL (CI) which was the nominated payee. Thus, in our view, two routes were available, namely, the CGP route and the Mauritius route. It was open to the parties to opt for any one of the two routes. Thirdly, as stated above, in the present case, the SPA was entered into inter alia for a smooth transition of business on divestment by HTIL. As stated, transfer of the CGP share enabled VIH to indirectly acquire the rights and obligations of GSPL in the Centrino and NDC Framework Agreements. Apart from the said rights and obligations under the Framework Agreements, GSPL also had a call centre business. VIH intended to take over from HTIL the telecom business. It had no intention to acquire the business of call centre. Moreover, the FDI norms applicable to the telecom business in India were different and distinct from the FDI norms applicable to the call centre business. Consequently, in order to avoid legal and regulatory objections from Government of India, the call centre business stood hived off. In our view, this step was an integral part of transition of business under SPA.

Held

Applying the look at test in order to ascertain the true nature and character of the transaction, the Court held that the Offshore Transaction i.e. sale of shares, was a *bonafide* structured FDI investment into India which fell outside India's territorial tax jurisdiction, hence not taxable. The said Offshore Transaction evidences participative investment and not a sham or tax avoidant preordained transaction. The said Offshore Transaction was between HTIL (a Cayman Islands company) and VIH (a company incorporated in Netherlands). The subject matter of the Transaction was the transfer of the CGP (a company incorporated in Cayman Islands). Consequently, the Indian Tax Authority had no territorial tax jurisdiction to tax the said Offshore Transaction. (CA No. 733 of 2012 dt. 20-1-2012)

Vodafone International Holdings B.V. v. UOI (2012) 341 ITR 1/204 Taxman 408/247 CTR 1/66 DTR 265/6 SCC 613/Vol. 42 Tax L R 305 (SC)

Editorial: Review petition is dismissed, ***UOI v. Vodafone International Holding (Review Petition) (SC)***

Amendment to section 9(1) and other sections with regards to taxability of Indirect transfer of shares;

Retrospective amendment made for taxability of indirect transfer of shares along with the following consequent amendments to other sections:-

- Amendment to definition of the words 'transfer' under section 2 (Refer Explanation 2 to section 2(47)) – Finance Act, 2012
- Meaning of the word through used in section 9(1) – Introduction of Explanation 4 to section 9(1) by Finance Act, 2012 w.r.e.f. 1.4.1962
- Deemed location of asset in India – Introduction of Explanation 5 to section 9(1) by Finance Act, 2012 w.r.e.f. 1.4.1962
- Definition of the word substantial – Explanation 6 to section 9(1) inserted by Finance Act, 2015
- Section 195 for applicability of withholding on such transactions - Explanation 2 to section 195 inserted by Finance Act, 2012

Accordingly, as on date such indirect transfer will also be taxable in India under the Act subject to Treaty provision applicable (including the protocol and the MFN clause if any available)

> *"Do not judge others. Be your own judge and you will be truly happy.*
> *If you will try to judge others, you are likely to burn your fingers."*
>
> - Mahatma Gandhi

15

S. 9(1)(vii): Income deemed to accrue or arise in India – Fees for technical services – Validity challenged – Parliament's power to legislate having extra – territorial effect.

Facts

Assessee company was incorporated with the purpose of setting up a gas based power project in Andhra Pradesh. With the intention to utilize expert services of a qualified and experienced professionals who could prepare a scheme for raising the required finance and tie up the required loan, it sought services of a consultant and eventually entered into an agreement with ABB – Projects & Trade Finance International Ltd., Zurich, Switzerland, ('ABB'). ABB rendered professional services from Zurich by correspondence as to how to execute the documents for sanction of loan by the financial institutions within and outside the country. After successful rendering of services ABB sent invoice to Assessee company. After receipt of the invoice Assessee company approached the concerned Income Tax Officer ('ITO') to issue a 'No Objection Certificate' to remit the said sum duly pointing out that the ABB had no place of business in India; that all the services rendered by it were from outside India; and that no part of fee could be said to arise or accrue or deemed to arise or accrue in India attracting the liability under the Income-tax Act, 1961 ('the Act'). It was also stated as the ABB had no business connection s. 9(1)(i) is not attracted and further as NRC had rendered no technical services s. 9(1)(vii) is also no attracted. However ITO rejected the application.

Assessee thereafter filed a revision application before the Commissioner of Income Tax ('CIT'). CIT permitted the Assessee to remit the said sum to ABB by furnishing a bank guarantee for the tax amount. However after six months the CIT revoked the earlier order and directed the Assessee to deduct tax and pay the amount as a condition precedent for issuance of 'No objection certificate'.

Being aggrieved the Assessee approached the High Court by filing a writ, praying to quash the orders. The department argued that services rendered by ABB fell within the ambit of managerial as well as consultancy services as per section 9(1)(vii)(b). The Court upheld that section 9(1)(i) did not apply in the present facts however, held that services come within the scope of technical services section 9(1)(vii) and hence Assessee was not entitled to 'No objection certificate'. The Assessee had also challenged constitutional validity of section 9(1)(vii)(b) on the ground of legislative competence and violation of Article 14 of Constitution. The Court relied on ***Electrical Corporation of India Ltd. ('ECIL') v. CIT rendered in WP. No. 105/1987 on 24 March 1987, approved in (1990) 183 ITR 43 (SC)*** and rejected the contention.

Thereafter the Assessee company approached the Supreme Court. When the matter came up before two-Judge Bench of Supreme Court, the bench took note of the far-reaching issues of constitutional purport and referred it to larger bench. When the matter came before three-Judge bench they referred it to Constitution bench.

Before the Constitution Bench the Assessee withdrew its challenge to the constitutional validity of Section 9(1)(vii)(b) of the Act and elected to proceed on the factual matrix as to the applicability of the said provision. However, Attorney General pressed upon for reconsideration, the decision in three-Judge Bench in ECIL case, the larger Bench considered the validity of the requirement of a relationship to or nexus with territory of India as a limitation on the powers of Parliament to enact laws pursuant to clause (1) of Article 245 of the Constitution.

Issue

Two divergent, and dichotomous, views were before the Constitution Bench. First one was whether Parliament powers to legislate, incorporate only a competence, to enact laws with respect to aspects or causes that occur, arise or exist, or may be expected to do so, solely within India. A slightly weaker form of the foregoing strict territorial nexus restriction would be that the Parliament’s competence to legislate with respect to extra-territorial aspects or causes would be constitutionally permissible if and only if they have or are expected to have significant or sufficient impact on or effect in or consequence for India. An even weaker form of the territorial nexus restriction would be that as long as some impact or nexus with India is established or expected, then the Parliament would be empowered to enact legislation with respect to such extra-territorial aspects or causes. The polar opposite of the territorial nexus theory, was whether the Parliament has inherent powers to legislate “for” any territory, including territories beyond India, and that no court in India may question or invalidate such laws on the ground that they are extra-territorial laws. Such a position incorporates the views that Parliament may enact legislation even with respect to extra-territorial aspects or causes that have no impact on, effect in or consequence for India, any part of it, its inhabitants or Indians, their interests, welfare, or security, and further that the purpose of such legislation need not in any manner or form be intended to benefit India. Juxtaposing these two divergent views the Bench framed following questions:

1) Is the Parliament constitutionally restricted from enacting legislation with respect to extra-territorial aspects or causes that do not have, nor expected to have any, direct or indirect, tangible or intangible impact(s) on, or effect(s) in, or consequences for:

    a. the territory of India, or any part of India; or

    b. the interests of, welfare of, well being of, or security of inhabitants of India, and Indians?

2) Does the Parliament have the powers to legislate "for" any territory, other than the territory of India or any part of it?

View

The Court observed that in ECIL decision it was concluded that the Parliament does not have the powers to make laws that bear no relationship to or nexus with India. The Court was of the opinion that the distinction drawn in ECIL between "make laws" and "operation" of law is a valid one, and leads to a correct assessment of the relationship between Clauses (1) and (2) of Article 245.

Because of interdependencies and the fact that many extra-territorial aspects or causes have an impact on or nexus with the territory of the nation-state, it would be impossible to conceive legislative powers and competence of national parliaments as being limited only to aspects or causes that arise, occur or exist or may be expected to do so, within the territory of its own nation-state. Indian Constitution has to be necessarily understood as imposing affirmative obligations on all the organs of the State to protect the interests, welfare and security of India. Consequently, the Parliament has been constituted, and empowered to, and that its core role would be to, enact laws that serve such purposes. Hence even those extra-territorial aspects or causes, provided they have a nexus with India, should be deemed to be within the domain of legislative competence of the Parliament, except to the extent the Constitution itself specifies otherwise. The Parliament's powers to enact legislation, pursuant to Clause (1) of Article 245 may not extend to those extra-territorial aspects or causes that have no impact on or nexus with India.

To enact legislation with respect to extra-territorial aspects or causes, without any nexus to India, would in many measures be an abdication of the responsibility that has been cast upon Parliament as above. International peace and security has been recognized as being vital for the interests of India. This is to be achieved by India maintaining just and honourable relations, by fostering respect for international and treaty obligations etc., as recognized in Article 51. It is one matter to say that because certain extra-territorial aspects or causes have an impact on or nexus with India, Parliament may enact laws with respect to such aspects or causes.

The Court was unable to agree with the view that Parliament, on account of an alleged absolute legislative sovereignty being vested in it, should be deemed to have the powers to enact any and all legislation, *de hors* the requirement that the purpose of such legislation be for the benefit of India. The absolute requirement is that all legislation of the Parliament has to be imbued with, and at the core only be filled with, the purpose of effectuating benefits to India. This is not just a matter of the structure of our Constitution; but the very foundation.

List I -Union List of the Seventh Schedule clearly lists out many matters that could be deemed to implicate aspects or causes that arise beyond the territory of India. In particular, but not limited to, note may be made of Entries 9 through 21 thereof. Combining the fact that the Parliament has been granted residuary legislative powers and competence with respect to matters that are not enumerated in Concurrent and State Lists, *vide* Article 248, the fact that Parliament has been granted legislative powers and competence over various matters, as listed in List I of the Seventh Schedule, many of which may clearly be seen to be falling in the class of extra-territorial aspects or causes, *vide* Article 246, and the powers to make laws "for the whole or any part of the territory of India", *vide* Article 245, the Court concluded that, contrary to the rigid reading of the ratio in ECIL, Parliament's legislative powers and competence with respect to extra-territorial aspects or causes that have a nexus with India was considered and provided for by the framers of the Constitution. Further, in as much as Article 245, and by implication Articles 246 and 248, specify that it is "for the whole or any part of the territory of India" that such legislative powers have been given to the Parliament, it logically follows that Parliament is not empowered to legislate with respect to extra-territorial aspects or causes that have no nexus whatsoever with India.

Article 260, in Chapter II of Part XI is arguably the only provision in the Constitution that explicitly deals with the jurisdiction of the Union in relation to territories outside India, with respect to all three functions of governance - legislative, executive and judicial. It is clear from the text of Article 260 that it is the Government of India which may exercise legislative, executive, and judicial functions with respect of certain specified foreign territories, the Governments of which, and in whom such powers have been vested, have entered into an agreement with Government of India asking it do the same. Indeed, from Article 260, it is clear that Parliament may enact laws, whereby it specifies the conditions under which the Government of India may enter into such agreements, and how such agreements are actually implemented.

Held

As per the Court, the answer to the first question was affirmative. However, Parliament may exercise its legislative powers with respect to extra-territorial aspects or causes—events, things, phenomena (howsoever commonplace they may be), resources, actions or transactions, and the like—that occur, arise or exist or may be expected to do so, naturally or on account of some human agency, in the social, political, economic, cultural, biological, environmental or physical spheres outside the territory of India, and seek to control, modulate, mitigate or transform the effects of such extra-territorial aspects or causes, or in appropriate cases, eliminate or engender such extra-territorial aspects or causes, only when such extra-territorial aspects or causes have, or are expected to have, some impact on, or effect in, or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, well-being of, or security of inhabitants of India, and Indians.

It further held that whether a particular law enacted by Parliament does show such a real connection, or expected real connection, between the extra-territorial aspect or cause and something in India or related to India and Indians, in terms of impact, effect or consequence, would be a mixed matter of facts and of law. Obviously, where Parliament itself posits a degree of such relationship, beyond the constitutional requirement that it be real and not fanciful, then the courts would have to enforce such a requirement in the operation of the law as a matter of that law itself, and not of the Constitution.

The answer to second question was negative. The Court held that it was obvious that Parliament is empowered to make laws with respect to aspects or causes that occur, arise or exist, or may be expected to do so, within the territory of India, and also with respect to extra-territorial aspects or causes that have an impact on or nexus with India. Any laws enacted by Parliament with respect to extra-territorial aspects or causes that have no impact on or nexus with India would be *ultra vires*, and would be laws made "for" a foreign territory.

GVK Industries Ltd. v. ITO (2011) 332 ITR 130/239 CTR 113/197 Taxman 337/52 DTR 1/162 Comp. Case 574 (SC) (Constitution Bench – i.e. Bench of 5 Judges)

Editorial:

- ***GVK Industries v. ITO (2015) 371 ITR 453 (SC)*** have explained difference between "*situs of residence*" and "*situs of source of income*" also held that source rule is in consonance with the nexus theory and does not fall of the said doctrine on the ground of extraterritorial operations. Apex Court relies on Constitution bench judgment in GVK, observes "what is prohibited by international taxation law is imposition of sovereign act of a State on a sovereign territory. This principle of formal territoriality applies in particular, to acts intended to enforce internal legal provisions abroad.
- ***Vodafone International Holdings BV v. UOI (2012) 341 ITR 1 (SC)***

  Substantial territorial nexus between the income and the territory which seeks to tax that income, is of prime importance to levy tax.
- Useful reference may also be made to the following decisions:
  - ***CIT v. Havells India Ltd (2012) 352 ITR 376 (Delhi) (HC)***
  - ***DIT v. Lufthansa Cargo India (2015) 375 ITR 85 (Delhi) (HC)***

> *"To lose patience is to lose the battle."*
>
> \- Mahatma Gandhi

16

S. 11: Property held for charitable purposes – Application of income – Any excess expenditure incurred by the trust/ charitable institution in earlier assessment year could be allowed to be set off against income of subsequent years. [S. 11(1)(a)]

Facts

Certain petitions and appeals were filed by the Income Tax Department against the orders passed by various High Courts granting benefit of depreciation on the assets acquired by the assessees. All the assessees were charitable institutions registered under Section 12A of the Income Tax Act (hereinafter referred to as 'Act'). In the previous year to the year with which the Court was concerned and in which year the depreciation was claimed, the entire expenditure incurred for acquisition of capital assets was treated as application of income for charitable purposes under Section 11(1)(a) of the Act. The view taken by the Assessing Officer in disallowing the depreciation which was claimed under Section 32 of the Act was that once the capital expenditure is treated as application of income for charitable purposes, the assessees had virtually enjoyed a 100 per cent write off of the cost of assets and, therefore, the grant of depreciation would amount to giving double benefit to the assessee. In most of these cases, the CIT (Appeals) had affirmed the view, but the ITAT reversed the same and the High Courts have accepted the decision of the ITAT thereby dismissing the appeals of the Income Tax Department. From the judgments of the High Courts, it was discerned that the High Courts have primarily followed the judgment of the Bombay High Court in ***'Commissioner of Income Tax v. Institute of Banking Personnel Selection (IBPS)' [(2003) 131 Taxman 386 (Bom)(HC)]*** which was in favour of the Assessee.

The Court was of the opinion that the view taken by the Bombay High Court correctly stated the principles of law and there is no need to interfere with the same. It was mentioned that most of the High Courts had taken the aforesaid view with only exception by the High Court of Kerala which has taken a contrary view in ***'Lissie Medical Institutions v. Commissioner of Income Tax'***. It was further observed by the Court that the legislature, realising that there was no specific provision in this behalf in the Income Tax Act, has made amendment in Section 11(6) of the Act *vide* Finance Act No. 2/2014 which became effective from the Assessment Year 2015-2016. The Court affirming the view observed that the Delhi High Court had rightly held that the said amendment is prospective in nature. It was specifically stated that once assessee is allowed depreciation, he shall be entitled to carry forward the depreciation as well. The Court thus confirmed the view of the High Courts and dismissed departmental appeals.

However, an application was filed by the Income-tax Department wherein it was stated that one CA No. 5171 of 2016 was tagged with other appeals and the batch matters were decided by Supreme Court via above judgement on 13-12-2017. However, one questions was left out with regards to excess expenditure being set off in subsequent year.

Issue

The issue of depreciation was already decided by the Court vide its judgement date 13-12-2017. The only issue raised in the miscellaneous application was whether any excess expenditure incurred by the trust/charitable institution in earlier assessment year could be allowed to be set off against income of subsequent years by invoking Section 11 of the Income-tax Act, 1961.

View

Though the Supreme Court accepted that there was mistake and the issue was not address in the earlier decision. However, after hearing on the issue, the Court did not find any merit and hence dismissed the miscellaneous application.

Held

Affirming Delhi High Court's view, in Subros Educational Society (IT No. 382 of 2015 dt. 23rd September 2015), that any excess expenditure incurred by the trust/charitable institution in earlier assessment year could be allowed to be set off against income of subsequent years, the Supreme Court dismissed the Miscellaneous Application of the Revenue. (MA No. 941/2018 (CA No. 5171/2016 dt. 16-4-2018)

CIT (E) v. Subros Educational Society (2018) 303 CTR 1/166 DTR 257 (SC)

Editorial: The ratio of judgment was followed by the Tribunals in the following;

(a) ***ITO v. Shri Sushilaben Ramniklal Jhaveri Charitable Trust [IT Appeal No. 4131 (Mum.) of 2017, order dt. 28-9-2018];***

(b) ***Love in Action Society v. ITO [IT Appeal No.459 (Coch) of 2018, order dt. 4-2-2019];***

(c) ***Dy. CIT v. J.R.D. Tata Trust [IT Appeal No. 7122 (Mum.) of 2017, dt. 13-2-2019];***

(d) ***KSD Charitable Trust v. Asstt. CIT [IT Appeal No. 3033 (Delhi) of 2015, dt. 13-12-2015].***

In ***CIT v. Rajasthan & Gujarati Charitable Foundation Poona [2018] 89 taxmann.com 127/253 Taxman 165/402 ITR 441 (SC),*** the Supreme Court held that even though expenditure incurred for acquisition of capital assets was treated as application of income for charitable purposes under section 11(1)(a), yet depreciation would be allowed on assets so purchased. The Supreme Court also observed as follows, *"It also follows that once assessee is allowed depreciation, he shall be entitled to carry forward the depreciation as well"*

Thus, the above observation suggests that it is possible for the charitable institution to carry forward deficit to subsequent years. The decision of the Supreme Court was also followed in ***J.R.D. Tata Trust (supra) and Medical Trust of Seventh Day Adventists v. Dy. DIT [IT Appeal No. 1708 (Chny) of 2015, dated 4-9-2018].***

> *"Many people, especially ignorant people, want to punish you for speaking the truth, for being correct, for being you."*
>
> \- Mahatma Gandhi

17

S. 14A : Disallowance of expenditure – Exempt income – Stock in trade – Controlling interest – Principle of apportionment – Only that expenditure which is "in relation to" earning dividends can be disallowed – AO has to record proper satisfaction on why the claim of the assessee as to the quantum of *suo moto* disallowance is not correct. [S. 36(1)(iii), Rule 8D]

Facts

There were certain batch of appeals which were before the Supreme Court. The Delhi High court in case of Maxopp Investment Ltd. was against the assessee hence Assessee had filed appeals before Supreme Court. However, Punjab and Haryana High Court in case of ***Pr. CIT v. State Bank of Patiala [2017] 391 ITR 218 (Punj. & Har.)(HC)*** had taken a view contrary to view taken by the Delhi High Court. The Punjab and Haryana High Court followed, with approval, the judgment of the High Court of ***Karnataka in CCI Ltd. v. Jt. CIT [2012] 206 Taxman 563 (Karn) (HC).*** The Revenue had filed appeals in such cases challenging the correctness of said decisions.

Facts of Delhi High Court decision Maxopp Investment Ltd.:

> The company was engaged, *inter alia*, in the business of finance, investment and dealing in shares and securities. The Assessee held shares/securities in two portfolios, viz. (a) as investment on capital account; and, (b) as trading assets for the purpose of acquiring and retaining control over investee group companies, particularly Max India Ltd., a widely held quoted public limited company. Any profit/loss arising on sale of shares/securities held as 'investment' was returned as income under the head 'capital gains', whereas profit/loss arising on sale of shares/securities held as 'trading assets' (i.e. held, *inter alia*, with the intention of acquiring, exercising and retaining control over investee group companies) has been regularly offered and assessed to tax as business income under the head 'profits and gains of business or profession'. Consistent with the aforesaid treatment regularly followed, the Assessee filed return for the previous year relevant to the Assessment Year 2002-03, declaring income of Rs.78,90,430/-. No part of the interest expenditure of Rs.1,16,21,168/- debited to the profit and loss account, to the extent relatable to investment in shares of Max India Limited, yielding tax free dividend income, was considered disallowable under Section 14A of the Act on the ground that shares in the said company were acquired for the purposes of retaining controlling interest and not with the motive of earning dividend.

According to the Assessee, the dominant purpose/intention of investment in shares of Max India Ltd. was acquiring/retaining controlling interest therein and not earning dividend and, therefore, dividend of Rs.49,90,860/- earned on shares of Max India Ltd. during the relevant previous year was only incidental to the holding of such shares. The Assessing Officer (AO), while passing the assessment order, under Section 143(3) worked out disallowance under Section 14A of the Act at Rs.67,74,175/- by apportioning the interest expenditure of Rs.1,16,21,168/- in the ratio of investment in shares of Max India Ltd. (on which dividend was received) to the total amount of unsecured loan. The AO, however, restricted disallowance under that Section to Rs.49,90,860/- being the amount of dividend received and claimed exempt.

In appeal, the CIT(A) upheld the order of the AO. Assessee herein carried the matter in further appeal to the ITAT. In view of the conflicting decisions of various Benches by the ITAT with respect to the interpretation of Section 14A of the Act, a Special Bench was constituted in the matter of ***ITO v. Daga Capital Management (P.) Ltd. [2009] 117 ITD 169 (SB) (Mum.)(Trib).*** The appeal of the Assessee company was also tagged and heard by the aforesaid Special Bench.

The Special Bench of the ITAT in the case of Daga Capital Management (P.) Ltd. (supra), dismissing the appeal of the Assessee, *inter alia*, held that investment in shares representing controlling interest did not amount to carrying on of business and, therefore, interest expenditure incurred for acquiring shares in group companies was hit by the provisions of Section 14A of the Act. The Special Bench further held that holding of shares with the intention of acquiring/retaining controlling interest would normally be on capital account, i.e. as investment and not as 'trading assets'. For that reason too, the Special Bench held that there existed dominant connection between interest paid on loan utilized for acquiring the aforesaid shares and earning of dividend income. Consequently, the provisions of Section 14A of the Act were held to be attracted on the facts of the case.

Against the aforesaid order of the Special Bench, Assessee preferred appeal to the High Court. The Delhi High Court held that the expression 'in relation to' appearing in Section 14A of the Act was synonymous with 'in connection with' or 'pertaining to', and, that the provisions of that Section apply regardless of the intention/motive behind making the investment. As a consequence, proportionate disallowance of the expenditure incurred by the assessee was maintained.

Taking note of certain judgments, the High Court observed that prior to the insertion of Section 14A in the Act, the law was that when an assessee had a composite and indivisible business, which had elements of both taxable and non-taxable income, the entire expenditure in respect of the said business was deductible and, in such a case, the principle of apportionment of the expenditure relating to the non-taxable income did not apply. However, where the business was divisible, the principle of apportionment of the expenditure was applicable and the expenditure apportioned to the 'exempt' income or income not exigible to tax, was not allowable as a deduction. The High Court, then, took cognizance of the legislative intent and objective behind the insertion of Section 14A and disagreed with the propositions advanced by the Assessee, that if the dominant and main objective of spending was not the earning of 'exempt' income then, the expenditure could not be disallowed under section 14A. Likewise, explaining the meaning of 'expenditure incurred', the High Court agreed that this expression would mean incurring of actual expenditure and not to some imagined expenditure. At the same time, observed the High Court, the 'actual' expenditure that is in contemplation under section 14A(1) of the said Act was the 'actual' expenditure in relation to or in connection with or pertaining to exempt income. The corollary to this is that if no expenditure is incurred in relation to the exempt income, no disallowance can be made under section 14A of the said Act.

Facts of Punjab and Haryana High Court decision in case of State Bank of Patiala:

In this case exempt income in the form of dividend was earned by the Bank from securities held by it as its stock in trade. The assessee filed its return declaring an income of about Rs.670 crores which was selected for scrutiny. The return showed dividend income exempt under section 10(34) and (35) of about Rs.11.07 crores and net interest income exempt under section 10(15)(iv) (h) of about Rs.1.12 crores. The total exempt income claimed in the return was, therefore, Rs.12,19,78,015/-. The assessee while claiming the exemption contended that the investment in shares, bonds, etc. constituted its stock-in-trade; that the investment had not been made only for earning tax free income; that the tax free income was only incidental to the assessee's main business of sale and purchase of securities and, therefore, no expenditure had been incurred for earning such exempt income; the expenditure would have remained the same even if no dividend or interest income had been earned by the assessee from the said securities and that no expenditure on proportionate basis could be allocated against exempt income. The assessee also contended that in any event it had acquired the securities from its own funds and, therefore, section 14A was not applicable. The AO restricted the disallowance to the amount which was claimed as exempt income by applying the formula contained in Rule 8D holding that Section 14A would be applicable.

The CIT(A) issued notice of enhancement under Section 251 of the Act and held that in view of Section 14A of the Act, the assessee was not to be allowed any deduction in respect of income which is not chargeable to tax. Therefore, he disallowed the entire expenditure claimed instead of restricting the disallowance to the amount which was claimed as exempt income as done by the AO.

The ITAT set aside the order of the AO as well as CIT(A). It referred to a CBDT Circular No.18/2015 dated 02.11.2015 which states that income arising from investment of a banking concern is attributable to the business of banking which falls under the head "Profits and gains of business and profession". The circular states that shares and stock held by the bank are 'stock-in-trade' and not 'investment'. Referring to certain judgments and the earlier orders of the Tribunal, it was held that if shares are held as stock-in-trade and not as investment even the disallowance under rule 8D would be nil as rule 8D(2)(i) would be confined to direct expenses for earning the tax exempt income.

On further appeal by the Revenue, the High Court accepted the contention of the Assessee that the assessee was engaged in the purchase and sale of shares as a trader with the object of earning profit and not with a view to earn interest or dividend. The assessee does not have an investment portfolio. The securities constitute the assessee's stock-in-trade. The Department, accepted as a matter of fact, that the dividend and interest earned was from the securities that constituted the assessee's stock-in-trade. The Court further observed that as a banking institution, the assessee was also statutorily required to place a part of its funds in approved securities. The Court followed the judgment of the High Court of Karnataka in ***CCI Ltd. v. Jt. CIT [2012] 206 Taxman 563 (Karn.) (HC).***

Issue

The question arose under varied circumstances where the shares/stocks were purchased of a company for the purpose of gaining control over the said company or as 'stock-in-trade'. However, incidentally income was also generated in the form of dividends as well. On this basis, the assessees contended that the dominant intention for purchasing the share was not to earn dividends income but control of the business in the company in which shares were invested or for the purpose of trading in the shares as a business activity etc. In this backdrop, the issue was as to whether the expenditure incurred can be treated as expenditure 'in relation to income' i.e. dividend income which does not form part of the total income. To put it differently, was the dominant or main object would be a relevant consideration in determining as to whether expenditure incurred is 'in relation to' the dividend income. Though in some other cases, there were little difference in fact situation. However, all these cases pertained to dividend income, whether it was for the purpose of investment in order to retain controlling interest in a company or in group of companies or the dominant purpose was to have it as stock-in-trade.

View

On the interpretation of the expression 'in relation to', the majority opinion of the Special Bench was that the requirement of there being direct and proximate connection between the expenditure incurred and exempt income earned could not be read into the provision. According to the majority view, 'what is relevant is to work out the expenditure in relation to the exempt income and not to examine whether the expenditure incurred by the assessee has resulted into exempt income or taxable income'. As per the minority view, however, the existence of dominant and immediate connection between the expenditure incurred and dividend income was a condition precedent for invoking the provisions of Section 14A of the Act. It was accordingly held, as per the minority, that mere receipt of dividend income, incidental to the holding of shares, in the case of a dealer in shares, would not be sufficient for invoking provisions of Section 14A of the Act.

The Supreme Court observed that in the first instance, it needs to be recognized that as per section 14A(1) of the Act, deduction of that expenditure is not to be allowed which has been incurred by the assessee "in relation to income which does not form part of the total income under this Act". Axiomatically, it is that expenditure alone which has been incurred in relation to the income which is includible in total income that has to be disallowed. If an expenditure incurred has no causal connection with the exempted income, then such an expenditure would obviously be treated as not related to the income that is exempted from tax, and such expenditure would be allowed as business expenditure. The Court then proceeded to state that there was no quarrel in assigning this meaning to section 14A of the Act. In fact, all the High Courts, whether Delhi High Court on the one hand or Punjab and Haryana High Court on the other hand, had agreed in providing this interpretation to section 14A of the Act. The entire dispute was, what interpretation is to be given to the words 'in relation to' in the given scenario, viz. where the dividend income on the shares is earned, though the dominant purpose for subscribing in those shares of the investee company was not to earn dividend. The Court had two scenarios in these sets of appeals. In one group of cases the main purpose for investing in shares was to gain control over the investee company. Other cases were those where the shares of investee company were held by the assessees as stock-in-trade (i.e. as a business activity) and not as investment to earn dividends. In this context, it is to be examined as to whether the expenditure was incurred, in respective scenarios, in relation to the dividend income or not.

Thus the first and foremost issue that falls for consideration was as to whether the dominant purpose test, which was pressed into service by the assessees would apply while interpreting Section 14A of the Act or have to go by the theory of apportionment. The Court was of the opinion that the dominant purpose for which the investment into shares is made by an assessee may not be relevant. Court observed that no doubt, the assessee like Maxopp Investment Limited may have made the investment in order to gain control of the investee company. However, that does not appear to be a relevant factor in determining the issue at hand. Fact remains that such dividend income is non-taxable. In this scenario, if expenditure is incurred on earning the dividend income, that much of the expenditure which is attributable to the dividend income has to be disallowed and cannot be treated as business expenditure. Keeping this objective behind Section14A of the Act in mind, the said provision has to be interpreted, particularly, the word ‘in relation to the income’ that does not form part of total income. Considered in this hue, the principle of apportionment of expenses comes into play as that is the principle which is engrained in Section 14A of the Act.

The Court affirmed the observation of Delhi High Court that prior to introduction of Section 14A of the Act, the law was that when an assessee had a composite and indivisible business which had elements of both taxable and non-taxable income, the entire expenditure in respect of said business was deductible and, in such a case, the principle of apportionment of the expenditure relating to the non-taxable income did not apply. The principle of apportionment was made available only where the business was divisible. It is to find a cure to the aforesaid problem that the Legislature has not only inserted Section 14A by the Finance (Amendment) Act, 2001 but also made it retrospective, i.e., 1962 when the Income Tax Act itself came into force. The aforesaid intent was expressed loudly and clearly in the Memorandum explaining the provisions of the Finance Bill, 2001. The Court, thus, agreed with the view taken by the Delhi High Court, and was not inclined to accept the opinion of Punjab & Haryana High Court which went by dominant purpose theory.

Post dominance purpose test, the other question that arose before the Court was what happens when the shares are held as ‘stock-in-trade’ and not as ‘investment’, particularly, by the banks? On this specific aspect, CBDT had issued circular No. 18/2015 dated November 02, 2015. This Circular took note of the judgment in ***CIT v. Nawanshahar Central Co-operative Bank Ltd. [2007] 289 ITR 6 (SC)*** wherein it was held that investments made by a banking concern are part of the business or banking. Therefore, the income arises from such investments is attributable to business of banking falling under the head ‘profits and gains of business and profession’. Plain reading of the circular would make it clear that the issue was as to whether income by way of interest on securities shall be chargeable to income tax under the head ‘income from other sources’ or it is to fall under the head ‘profits and gains of business and profession’. The Board, going by the decision in Nawanshahar case, clarified that it has to be treated as income falling under the head ‘profits and gains of business and profession’. The Board also went to the extent of saying that this would not be limited only to co-operative societies/ Banks claiming deduction under Section 80P(2)(a)(i) of the Act but would also be applicable to all banks/commercial banks, to which Banking Regulation Act, 1949 applies. Punjab and Haryana High Court pointed out that this circular carves out a distinction between 'stock-in-trade' and 'investment' and provides that if the motive behind purchase and sale of shares is to earn profit, then the same would be treated as trading profit and if the object is to derive income by way of dividend then the profit would be said to have accrued from investment. The Court to this extent, confirmed High Court's view. However at the same time, Court did not agree with the test of dominant intention applied by the Punjab and Haryana High Court. In that event, the question was as to on what basis those cases are to be decided where the shares of other companies are purchased by the assessees as 'stock-in-trade' and not as 'investment'. The Supreme Court observed that where shares are held as stock-in-trade, the main purpose is to trade in those shares and earn profits therefrom. Those profits which would naturally be treated as 'income' under the head 'profits and gains from business and profession'. What happens is that, in the process, when the shares are held as 'stock-in-trade', certain dividend is also earned, though incidentally, which is also an income. However, by virtue of Section 10 (34) of the Act, this dividend income is not to be included in the total income and is exempt from tax. As per the Supreme Court this triggers the applicability of Section 14A of the Act which is based on the theory of apportionment of expenditure between taxable and non-taxable income as held in ***CIT v. Walfort Share and Stock Brokers (P) Ltd (2010) 326 ITR 1 (SC)***. Therefore, to that extent, depending upon the facts of each case, the expenditure incurred in acquiring those shares will have to be apportioned.

The Court further noted from the facts in the State Bank of Patiala cases that the AO, while passing the assessment order, had already restricted the disallowance to the amount which was claimed as exempt income by applying the formula contained in Rule 8D of the Rules and holding that section 14A of the Act would be applicable. In spite of this exercise of apportionment of expenditure carried out by the AO, CIT(A) disallowed the entire deduction of expenditure. Confirming the AO's action of restricting the disallowance to exempt income the Court held that the view of the CIT(A) was clearly untenable and rightly set aside by the ITAT.

Having regard to the language of Section 14A(2) of the Act, read with Rule 8D of the Rules, the Court made it clear that before applying the theory of apportionment, the AO needs to record satisfaction that having regard to the kind of the assessee, *suo moto* disallowance under Section 14A was not correct. It will be in those cases where the assessee in his return has himself apportioned but the AO was not accepting the said apportionment. In that eventuality, it will have to record its satisfaction to this effect. Further, while recording such a satisfaction, nature of loan taken by the assessee for purchasing the shares/making the investment in shares is to be examined by the AO.

Held

Court held that; The argument that S. 14A & Rule 8D will not apply if the "dominant intention" of the assessee was not to earn dividends but to gain control of the company or to hold as stock-in-trade is not acceptable. S. 14A applies irrespective of whether the shares are held to gain control or not. However, where the shares are held as stock-in-trade, the expenditure incurred for earning business profits will have to be apportioned and allowed as a deduction. Only that expenditure which is "in relation to" earning dividends can be disallowed u/s 14A & Rule 8D. Further disallowance cannot be more that exempt income. In case where the Assessee has made *suo moto* disallowance, the AO has to record proper satisfaction on why the claim of the assessee as to the quantum of *suo moto* disallowance is not correct. (AY. 2002-03, 2008-09, 2009-10) (CA Nos. 104-109 of 2015 dt. 12-2-2018)

Maxopp Investment Ltd. v. CIT (2018) 402 ITR 640/164 DTR 1/254 Taxman 325/301 CTR 489(SC)

PCIT v. State Bank of Patiala (2018) 402 ITR 640/164 DTR 1/254 Taxman 325/301 CTR 489 (SC)

Editorial: Maxopp Investment Ltd. v. CIT (2012) 347 ITR 272 (Delhi) (HC) is affirmed. Decision of special Bench in ***ITO v. Daga Capital Management (2009) 312 ITR (AT) 1 (Mum.) (SB)*** is referred. In ***Godrej & Boyce Manufacturing Co Ltd v. DCIT(2017) 394 ITR 449/247 Taxman 361/151 DTR 89/295 CTR 121 (SC)*** the Court held that disallowance cannot be made in the absence of proof that expenditure has actually been incurred in earning dividend income. If the AO has accepted in earlier years he cannot take a contrary stand if the facts and circumstances have not changed. In ***PCIT v. Oil Industries Development Board (2019) 262 Taxman 102 (SC),*** the Court held that In the absence of any exempt income, no disallowance is permissible (***CIT v. Essar Teleholdings Ltd (2018) 401 ITR 445 (SC)*** followed, ***Cheminvest Ltd v. CIT (2015) 378 ITR 33 (Delhi)(HC)*** approved). (SLP No. 2755/2019, dt. 16.02.2018)

After considering the aforesaid Supreme Court decision in case of Maxopp Investment and Punjab and Haryana High Court decision in case of State Bank of Patiala, the Hon'ble Delhi Tribunal in case of ***Nice Bombay Transport (P.) Ltd. [2019] 103 taxmann.com 338 (Delhi-Trib.)*** held that disallowance under Section 14A does not apply to Stock in trade and has held the following:

- Though the Hon'ble Apex Court has rejected the dominant purpose theory relied upon by the Hon'ble Punjab and Haryana High Court in the aforesaid decision but has clearly made distinction between dividend earned in respect of shares acquired to retain the controlling interest in the investee company and the shares purchased for the purpose of liquidation or for trading, whenever the price goes up in order to earn profits.

- Further it held that in Maxopp's case the assessee continued to hold shares as it wanted to retain control over the investee company and whenever dividend income is declared by the investee company that would necessarily be earned by assessee and assessee alone and even at the time of investing into those shares the assessee knows that it will earn dividend income on the same.
- Therefore, even in the present case of the taxpayer, the shares are held as stock in trade thus, the main purpose is to liquidate the shares whenever price goes up, in order to earn profits. The Tribunal has thus held that the shares held as stock in trade stood on a different pedestal than the shares that were acquired with an intention to acquire and retain controlling interest in the investee company and thereby no disallowance could be made u/s. 14A of the Act and the addition made by the AO was not tenable.

> *"Never apologize for being correct, or for being years ahead of your time. If you're right and you know it, speak your mind."*
>
> \- Mahatma Gandhi

18

S. 22: Income from house property-Business income-The objects clause is not determinative- Income earned from sub-licenses is required to be taxed under the head "Income from House Property". [S. 27(iii)(b), 28(i), 269UA(f)]

Facts

The assessee was a partnership firm. It was constituted under the deed of Partnership and main object was that it shall take premises on rent and sub-let them or any of business mutually agreed by the parties from time to time. The Maharashtra Housing and Developing Authority ("MHADA") had constructed buildings known as Shyam Sunder Cooperative Society, Ram Darshan Cooperative Society and Sindhu Cooperative Society at Jariwala Compound Market, Opposite Navjivan Post Office, Lamington Road, Mumbai-400088. However, there was a reservation for Municipal retail market on the plot on which MHADA had put up the construction. Therefore, MHADA handed over the ground floor [stilt portion] of the above said buildings and admeasuring around 17,925 sq. ft. ("market portion") to Market Department of Municipal Corporation Greater Bombay ("MCGB"). This land was acquired by the MCGB from the MHADA by recovering the necessary cost.

In 1993, the Market Department of the MCGB auctioned the market portion on a monthly license [stallage charges] basis to run municipal market. Assessee firm participated in the auction to acquire the right to conduct the market on the market portion. Assessee was the successful bidder and was handed over possession of the market portion on 28.05.1993. The terms and conditions subject to which the Assessee was given the said market portion to run and maintain municipal market contained in the terms and conditions of the auction dated 11.03.1993. The premises allotted to the Assessee firm was a bare structure, on stilt, that is, pillar/column, sans even four walls. In terms of the auction, it was the Firm who had to make the entire premises fit to be used a market, including construction of walls, construction of entire common amenities like toilet blocks, etc. Accordingly, after taking possession of the premises, the Firm spent substantial amount on additions/alternations of the entire premises, including demolishing the existing platform and, thereafter, reconstructing the same according to the new plan sanctioned by the MCGB. [Rs. 1,83,61,488/- spent from Financial Year 1993-1994 to 2001-2002]. Assessee constructed 95 shops and 30 stalls of different carpet areas on the premises under the market name "Saibaba Shopping Centre". The firm also obtained, in terms of the conditions of the auction, necessary registration certificate for running a business under the Shop and Establishment Act and other licenses/permissions from MCGB and other Government and semi-Government bodies for carrying on trading activities on the said premises. Assessee firm was responsible for day-to-day maintenance, cleanliness and upkeep of the market premises. It also had to incur/pay water charges, electricity charges, taxes and repair charges.

Essentially, Assessee collected the following types of receipt from the sub-licensees:

a. Compensation from sub-licensees [same rate of stallage charges and on the same terms and condition as given to the appellant the MCGB].

b. Leave & License fees.

c. Service Charges for providing various services, including security charges, utilities, etc.

Assessee filed the returns of income and right from the year 1999 till 2004, it had been offering the income from the aforesaid shops and stalls sub-licensed by it under the head "Profits and Gains of Business or Profession" of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'). The income was also assessed accordingly. However, the case of the Assessee for the Financial Year 1999-2000 was reopened by the Assessing officer by issuing notice under Section 148 of the Act and in response to the same the appellant filed its return on 12.12.2003. Thereafter, notice under Section 143(2) of the Act dated 10.01.2005 was issued and served by the respondent. Reassessment order was framed, computed the income from the shops, and the stalls under head "Income from House Property" of the Act. The reasons given by Assessing officer for so computing the income under the head "Income from House Property" were:

i. By virtue of Section 27(iiib) of the Act, Assessee firm was "deemed owner" of the premises as it had acquired leasehold right in the land for more than 12 years;

ii. In agreements for sub-licensing the words "lease compensation" were used instead of "license fees" and deposits were referred as "sub-lease deposits". Further, in some correspondence, like loan application, etc., the words, "lease" were used;

iii. Property tax has been levied on the Assessee firm.

Accordingly, assessing officer held that the income received by the Firm from the market stalls was assessable as "Income from House Property" under the Act.

Being aggrieved by the reassessment order, Assessee filed an appeal before the Commissioner of Income Tax (Appeals) ['CIT(A)']. The CIT (A) allowed the appeal and reversed the action of the Assessing officer. Aggrieved by the order, Department as well as Assessee filed appeals before the Income Tax Appellate Tribunal ('ITAT'). The ITAT reversed the order of the CIT (A) and confirmed the action of the Assessing Officer. Being aggrieved by the order of the ITAT, Assessee preferred further appeal before the High Court. The High Court, by the impugned order dated 19.09.2014, dismissed the appeal filed by the Assessee.

Issue: Following issues were raised before the Supreme Court;

1. Whether the High court erred in holding that the Assessee firm was owner of the shopping centre within the meaning of Section 22 read with Section 27 of the Income Tax Act, 1961?

2. Whether the High Court was right in holding that the income earned by the Assessee firm from the shopping centre was required to be taxed under the head "income from House Property" instead of the head "Profits and Gains from the Business or Profession".

Views

The Supreme Court observed that there was no dispute that having regard to the terms and conditions on which the leasehold rights were taken by the Assessee firm in auction, constructed the market area thereupon and gave the same to various persons on sub-licensing basis, the Firm would be treated as deemed owner of these premises in terms of Section 27(iiib) of the Act. The Court took note of the findings of High Court referring to the provisions of Section 27(iiib) as well as Section 269UA(f) of the Act. The Court referred to High Court's conclusion that reading of various clauses harmoniously as per the which the rights were given to the assessee firm in the said property, pointed out towards the firm's acquiring rights in or in respect of the building or part thereof, which rights were clearly traceable to Section 269UA(f) of the Act. This conclusion was not disputed by assessee. However the assessee's contention was even if the it was deemed owner of the premises in question, since the letting out the place and earning rents therefrom was the main business activity of the firm, then the income generated from sub-licensing the market area and earned by it should be treated as income from business and not income from the house property. The submission was that the dominant test has to be applied and once it is found that dominant intention behind the activity was that of a business, the rental income would be business income. Reliance was placed on the decisions of

(i) ***Chennai Properties & Investments Ltd. v. CIT [2015] 373 ITR 673 (SC)***

(ii) ***Rayala Corporation (P.) Ltd. v. Asstt. CIT [2016] 386 ITR 500 (SC)***

The observed that there may be instances where a particular income may appear to fall in more than one head. On the facts of a particular case, income has to be either treated as income from the house property or as the business income. Tests which are to be applied for determining the real nature of income are laid down in judicial decisions, on the interpretation of the provisions of these two heads. What is the test which has to be applied to determine whether the income would be chargeable under the head “income from the house property” or it would be chargeable under the head “Profits and gains from business or profession”, was the question. The Court was of the view that merely because there is an entry in the object clause of the business showing a particular object, would not be the determinative factor to arrive at a conclusion that the income is to be treated as income from business. Such a question would depend upon the circumstances of each case as also held by the Constitution Bench of this Court in ***Sultan Bros. (P) Ltd. v. CIT [1964] 51 ITR 353 (SC)***

Basis this, the Court observed that, reading of the object clause brought out two discernible facts, which are as follows:

a) The firm has to take the premises on rent and to sub-let those premises. Thus, the business activity is of taking the premises on rent and sub-letting them.

   To this the Court observed that by legal fiction contained in Section 27(iiib) of the Act, the Assessee is treated as “deemed owner”.

b) The aforesaid clause also mentions that partnership firm may take any other business as may be mutually agreed upon by the partners.

The Court observed that apart from relying upon the aforesaid clause in the partnership deed to show its objective, Assessee firm had not produced or referred to any material. This aspect was dealt with the ITAT who relied on the decision of ***Shambu Investment Pvt. Ltd. (2003) 263 ITR 143 (SC).*** Observation of Tribunal was that the assessee had not established that it was engaged in any systematic or organized activity of providing service to the occupiers of the shops/ stalls so as to constitute the receipts from them as business income. ITAT being the last forum insofar as factual determination is concerned, these findings had attained finality.

Supreme Court was of the view that decisions of ***Chennai Properties & Investments Ltd. and Rayala Corporation (P) Ltd v. Asstt. CIT [2016] 386 ITR 500 (SC).*** would not be applicable to the present case. In ***Chennai Properties & Investments Ltd v. CIT [2015] 373 ITR 673 (SC).*** the entire income of the Assessee was through letting out of the two properties it owned and there was no other income of the assessee except the income from letting out of the said properties, which was the business of the assessee. The Court held that situation was just reverse. The judgment in ***East India Housing and Land Development Trust Ltd. v. CIT [1961] 42 ITR 49 (SC)***] were rather applicable. That was a case where the company was incorporated with the object of buying and developing landed properties and promoting and developing markets. Thus, the main objective of the company was to develop the landed properties into markets. It so happened that some shops and stalls, which were developed by it, had been rented out and income was derived from the renting of the said shops and stalls.

In those facts, the question which arose for consideration was: whether the rental income that is received was to be treated as income from the house property or the income from the business? The Court while holding that the income shall be treated as income from the house property, rested its decision in the context of the main objective of the company and took note of the fact that letting out of the property was not the object of the company at all. The Court was therefore, of the opinion that the character of that income which was from the house property had not altered because it was received by the company formed with the object of developing and setting up properties.

In Rayala Corporation (P) Ltd. fact situation was identical to the case of Chennai Properties & Investments Ltd. and for this reason, even Rayala Corporation (P) Ltd. was inapplicable to the facts of the Assessee Firm

Held

Dismissing the appeal of the assessee, the Supreme Court held that the object clause, as contained in the partnership deed, would not be the conclusive factor to determine under which head the income would be taxable. Matter has to be examined on the facts of each case. Even otherwise, the object clause which is contained in the partnership firm was to take the premises on rent and to sub-let. (AY. 2000-01) (CA Nos. 6455-6460 of 2017 (Arising out of SLP (C) (Nos). 17277-17282 of 2015 dt. 9-5-2017).

Raj Dadarkar & Associates v. ACIT (2017) 394 ITR 592/248 Taxman 1/298 CTR 117/157 DTR 225 (SC)

Editorial: In case of ***Chennai Properties & Investments [2015] 373 ITR 673 (SC),*** the SC held that in case of bare letting of property by construing the object clause of the company (and not the circumstance of bare letting) as relevant factor to determine the head of taxation. In this case, the main object of the memorandum made specific reference, by name, to two different properties from which rental income was earned. There was also no dispute that the entire income of the taxpayer was from letting of properties. Due to this the SC held the rental income from property was assessable under the head PGBP. In this case the SC tried to distinguish the cases of Sultan Brothers (supra) and East India Housing (supra) without clearly bringing out the distinguishing features.

The ruling of Chennai Properties and Investments (supra) was followed in the case of ***Rayala Corporation Pvt. Ltd. [2016] 386 ITR 500 (SC).*** In this case the business of the assessee was to deal into real estate and also to earn rental income by letting out the properties (though, it appears that this was not the main object). It was noted by the SC that taxpayer was stopped its other business activity and letting out of the properties was the sole business of the taxpayer. The taxpayer earned only rental income during the year. SC observed that the facts being similar as in the case of Chennai Properties (supra), it was held that the rental was to be taxed under the head PGBP.

Thus, SC decisions in the case of Chennai Properties and Rayala Corporation (supra) appear to support business taxation if the taxpayer in involved only in business of bare letting supported by object clause and actual conduct of the taxpayer.

Hence the ruling in the case of Raj Dadarkar (supra) has created some uncertainty on this issue and has made it difficult to reconcile with the earlier rulings of Chennai Properties and Rayala Corporation as the SC did not deal with the findings of the Tribunal nor did it deal with the nature of business activity and its requirement to constitute a 'business'. Instead, the SC appears to have concluded that the rental income is taxable under IFHP on the basis that the taxpayer failed to establish that the entire or substantial income of the taxpayer was from letting out of properties which was the principal activity of the taxpayer.

"Speak your mind. Even if you are a minority of one, the truth is still the truth."

- Mahatma Gandhi

19

S. 28(i): Business income – Adventure in nature-of-trade - Division of land into plots and sale to various purchasers - Test to be applied for considering the nature of trade [S. 2(13), Indian Income-tax Act, 1922, S. 10(1)]

Facts

The assessee was assessed for the AY: 1956-57 on a total income of Rs. 8,400. The ITO later on came to know that the assessee's income from the sale of estates had escaped assessment. The ITO took action u/s. 34(1)(a) of the 1922 Act for the AY: 1956-57 on 13-8-1959.

Under an agreement dated 18th May, 1955, a company called Mundakayam Valley Rubber Co. Ltd. sold and delivered an estate called Kuttikal Estate to one Mr. A.V. George. The area of the estate was 477 acres and 71 cents. Mr. A.V. George had entered into the agreement in his own name and on behalf of another company called the Kailas Rubber Co. Ltd. It was agreed that the vendor would execute the necessary conveyance in favour of Mr. A.V. George or his nominees. On 15th August, 1955, the assessee entered into an agreement with Mr. A.V. George whereby the assessee agreed to purchase 447.71 acres forming part of Kuttikal Estate for Rs. 6 lakhs. An advance of Rs. 11,000 was paid by the assessee. The balance of Rs. 5,89,000 was to be paid by the assessee on or before 25th September, 1955. It was agreed that Mr. A.V. George should execute a sale deed himself or cause it to be executed by Kailas Rubber Co. Ltd. on whose behalf he was acting in favour of the assessee or his nominees. The assessee subsequently divided the area of 477.71 acres into 23 plots and found purchasers for 22 of these plots. The total extent of 22 plots for which he found purchasers was 373.58 acres, and the total price paid by the 22 purchasers was Rs. 5,18,500. A sale deed was executed by the Mundakayam Valley Rubber Co. Ltd. on 31st March, 1956. It covered all the 23 plots. The 22 plots for which the assessee found purchasers were conveyed to the respective purchasers and the 23rd plot was conveyed to the assessee himself. Mr. A.V. George and the Kailas Rubber Co. Ltd. were parties to this document. The plot which the assessee had retained for himself was 104.13 acres in extent. Its value was estimated by the Income-tax Officer at Rs. 2,08,300. The Income-tax Officer worked out the profit from the transaction of purchase and sale of land as follows :

	Rs.
"Sale price of 373 acres	5,18,500
Value of 104 acres retained by the assessee at Rs. 2,000 per acre	2,08,000
	7,26,500
Less cost	6,00,000
	1,26,500".

The Income-tax Officer held that a sum of Rs. 1,25,000 in round figures represented the assessee's profit from an adventure in the nature of trade and included this amount in his total income under section 34(1)(a) of the Act. The assessee appealed to the Appellate Assistant Commissioner who rejected the appeal. The assessee took the matter in further appeal to the Appellate Tribunal which also rejected the appeal holding that the amount of Rs. 1,25,000 represented profit from an adventure in the nature of trade. On reference the High Court answered the question against the assessee. The Assessee preferred an appeal to the Supreme Court:

Issue

Whether, on the facts and in the circumstances of the case, the transactions constituted a venture in the nature of trade and the surplus of Rs. 1,25,000 was assessable to tax?"

View

The question whether a transaction is an adventure in the nature of trade must be decided on a consideration of all the relevant facts and circumstances which are proved in the particular case. The answer to the question does not depend upon the application of any abstract rule or principle or formula but must depend upon the total impression and effect of all the relevant facts and circumstances established in the particular case.

But in judging the character of such transactions several factors have been treated as significant in decided cases. For instance, if a transaction related to the business which is normally carried on by the assessee, though not directly a part of it, an intention to launch upon an adventure in the nature of trade may readily be inferred. A similar inference would arise where a commodity is purchased and sub-divided, altered, treated or repaired and sold or is converted into a different commodity and then sold. The magnitude of the transaction of purchase, the nature of the commodity, the subsequent dealings of the assessee, the nature of the organisation employed by the assessee and the manner of disposal may be such that the transaction may be stamped with the character of a trading nature.

It was clear from the recital of the agreement, that the intention of the assessee in purchasing the estate was to re-sell it at a profit. An advance was paid by the assessee on date of agreement, the balance was agreed to be paid on a taken date it was open of the terms of the agreement that Mr. A.V. George to execute the sale deed either in favour of the assessee or his nominees. It was also found that the assessee did not have the resources to buy any estate worth a lakh of rupees when he entered into the agreement for the purchase of the Estate for an amount of Rs. 6 lakhs. In the intervening period the assessee divided the estate into 23 plots and arranged for the sale of 22 plots to different purchasers. The division of the land into 23 plots and the sale of the various purchasers indicated that there was scheming and organization on the part of the assessee. It was found that the assessee did not have the means and resources to cultivate land himself and that he had arranged for the sale of 22 plots to different purchasers.

Further the court observed that it was not a correct proposition to say that the profits of the assessee could not be ascertained even on the assumption that the transaction of the adventure of trade was not completed. Under the Act of 1922 for the purpose of assessment each year is a self-contained unit and in the case of trading adventure the profits have to be computed in the manner provided by the statute. It is true that the Act of 1922 makes no express provision with regard to the value of stock. It charges for payment of tax the income, profits and gains which have to be computed in the manner provided by the Act of 1922. In the case of a trading adventure the profits have to be calculated and adjusted in the light of the provisions of the Act of 1922 permitting allowances prescribed thereby. For that purpose it was the duty of the ITO to find out what profit the business has made according to the true accountancy practice. As a normal rule, the profit should be ascertained by valuing the stock-in-trade at the beginning and at the end of the accounting year.

Held

Having regard to the total effect of all the circumstances, High Court was right in its conclusion that the transactions of the assessee constituted an adventure in the nature-of-trade and were in the course of a profit-making scheme and the question was rightly answered by the High Court against the assessee.

Therefore, it was to be held that the income-tax authorities had correctly estimated the profit of the assessee by treating the land as stock-in-trade and valuing it according to the normal accountancy practice. It was held that the decision of the High Court was correct and appeal of assessee was dismissed. (AY.1956-57) (CA No. 1230 of 1967 dt. 12-2-1969)

P.M. Mohammed Meerakahn v. CIT (1969) 73 ITR 735 (SC)

Editorial: It is impossible to evolve any legal test or formula which can be applied in determining whether a transaction is in the nature of trade or not. The answer will depend on various factors and the total effect and impression of all the facts. The Supreme Court decision in ***Khan Bahadur Ahmed Alladin & Sons v. CIT [1968] 68 ITR 573*** enumerates some factors: 'For instance, if a transaction is related to the business which is normally carried on by the assessee, though not directly part of it, an intention to launch upon an adventure in the nature of trade may readily be inferred.

The SC also held that the profits of an adventure can be determined even if the adventure is not complete.

The above judgement is under the Indian Income-tax Act, 1922. However, the principals of the judgement is applicable even in Income-tax Act, 1961. Refer ***Anil Jain v. CIT (2007) 294 ITR 435/164 Taxman 319/212 CTR 347(SC); Tushar Tanna & Ors. v. CIT (2006) 284 ITR 453/203 CTR 426/153 Taxman 345 (Bom.)(HC); CIT v. Mohakampur Ice & Cold Storage (2005) 149 Taxman 593 (All.)(HC)); CIT v. Amrit Food (P.) Ltd. (2005) 147 Taxman 289/199 CTR 28 (All.)(HC); CIT v. Surjeet Kaur [2018] 91 taxmann.com 121 (Cal)(HC); PCIT v. John Poomkudy [2018] 409 ITR 149 (Ker)(HC)***

> *"Knowledge gained through experience is far superior and many times more useful than bookish knowledge."*
>
> \- Mahatma Gandhi

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S. 28(i) : Business income -Professional fees - Cash method of accounting - Outstanding fee of professional work done by assessee, who kept his accounts on cash basis, after close of his profession was not taxable either under head of professional income or under residuary head of income - Income which is chargeable under a particular head cannot be taxed under the residuary head [S. 2(45), 4, 5, 14, 56, 145 and of the Indian Income- tax Act, 1922, S. 2(15), 3, 4, 5, 10, 12]

Facts

The assessee was an advocate of a High Court and was practicing his profession till 1-3-1957, when he ceased to carry on his profession as he was elevated as a Judge of the High Court at Bombay. His method of accounting was cash and his accounting year was calendar year. During the accounting years relevant to assessment years 1959-60 and 1960-61, he received certain moneys on account of the outstanding fees, though no profession was carried on by him. The assessee included the aforesaid receipts as income from profession. The ITO treated these receipts as fees for professional services rendered in earlier years and as part of total income of the assessee. On an revision application under section 33A of 1922 Act the Commissioner held that it was chargeable under the residuary head and rejected the revision petition. It is from this order that the assessee filed appeal to the Supreme Court by special leave.

Issue

Whether an income from business or profession can be taxed under the head “Income from business or profession” after the assessee has ceased to carry on his business or profession? If such income is not taxable under the head “Income from business or profession”, then can it be taxed under the residuary head “Income from other sources?

Views

Taxability under the head “Profit and gains of business or profession” arise only in respect of profits and gains of any business or profession which was carried on by the assessee at any time during the previous year. If no business is carried on by the assessee at any time during the previous year, then the charging provision does not get attracted and therefore, one does not enter such head of income.

Further, in order to compute an income, the Act has bifurcated the incomes under Chapter IV of the Act ‘Computation of the Total Income’ in four specific heads viz. ‘Income from Salaries’, ‘Income from house properties’, ‘Profits and gains of business and profession’ and lastly “Capital gains’ and a residuary head i.e. ‘Income from other sources’. The scheme to arrive at the net income chargeable to tax under the various heads broadly differs from each other. Thus, the computation mechanism under the head ‘Income from house property’ and ‘Profits and gains of business and profession’ differ. The idea of having separate heads of income was to have separate computation mechanism for different types of income depending upon the nature of income. An income to be taxed has to be brought under any one of the heads of income. All the heads of income are mutually exclusive and therefore, a particular item of income can be taxed only under one particular head of income. If the same is not taxable under the said head of income then the same cannot be charged to tax under the other head of income.

Held

The Court held that receipts in the present case were the outstanding dues of professional work done and therefore would fall under the head “Profits and gains of business, profession or vocation”. Further, the Court held that the said receipts were not taxable under the said head as the said receipts were taxed on cash basis and in the year of receipt, no profession at all had been carried on by the assessee. In this regard, reliance was placed by the Court on the judgment in case of ***CIT v. Express Newspapers Ltd. [1964] 53 ITR 250 (SC)***.

The Court also held that heads of income are mutually exclusive, and if the receipts can be brought under the fourth head, they cannot be brought under the residuary head. Section 12 deals with income which is not included under any of the preceding heads. If the income is so included, it falls outside section 12 of 1922 Act. Whether an income is included under any of the preceding heads would depend on what kind of income it was. It follows that if the income is profits and gains of profession it cannot come under section 12 of 1922 Act. Section 12 of 1922 Act does not say that an income which escapes taxation under a preceding head will be computed under it for chargeability to tax. It only says that an income shall be chargeable to tax under the head “Other sources” if it does not come under any other head of income mentioned in the Act. Accordingly the Court held that the receipts were not chargeable to tax either under the head of professional income or under the residuary head.

However, Justice Bachawat had taken the dissenting view and held that the professional income of an assessee, whose accounts were kept on a cash basis, received by him during his lifetime after the discontinuance of the profession and after the close of the accounting year in which the profession was discontinued, is assessable to income-tax under section 12 of the Act. (AY. 1958-59, 1959-60) (CA Nos. 731 & 732 of 1964 dt. 4-5-1966)

Nalinikant Ambalal Mody v. S.A.L. Narayan Row, CIT (1966] 61 ITR 428 (SC)

Editorial: What was contained in section 12 of the 1922 Act in now incorporated in sections 56 to 59 of the Income-tax Act, 1961. The ratio of the judgement is applicable to The Income-tax Act, 1961. Refer ***CIT v. T. P. Sidhwa (1982) 133 ITR 840 (Bom) (HC).*** Further, this ratio has been followed by the Bombay High Court in case of ***Cadell Wvg. Mill Co. (P.) Ltd. v. CIT [2001] 116 Taxman 77 (Bombay)/ [2001] 249 ITR 265 (Bombay)/[2001] 166 CTR 7 (Bombay)*** which is also been affirmed by ***Apex Court in [2005] 142 Taxman 713 (SC)*** and by the Apex Court in case of ***CIT v. D. P. Sandu Bros. Chembur (P.) Ltd. [2005] 142 Taxman 713 (SC)/[2005] 273 ITR 1 (SC)/[2005] 193 CTR 578 (SC).***

In the Income Tax Act, 1961 Section 176(4) was introduced where the professional fees received by assessee from discontinued business was taxable. However, the Hon’ble Calcutta High Court in case of Justice R.M. Datta (1989) 180 ITR 86 has held that in spite of the introduction of section 176(4), in the absence of any deeming provision treating such receipts as income falling under the head “Profits and gains of business, profession or vocation”, as the assessee had not carried on any profession in any part of the relevant previous year, the said income could not be taxed under section 28 nor could such income be taxed under section 56 of the Act as income from other sources. The said income, therefore, could not be taxed under section 28, 56 or 176(4).

The same view has also been taken by Hon’ble Gujarat High Court in case of ***Anil R Dave [2015] 56 taxmann.com 139 (Guj)(HC)*** and Hon’ble Delhi Tribunal in case of Justice ***Rajiv Shakedar [2013] 36 taxmann.com 585 (Delhi) (Trib.)***

> *“If you want to change the world,*
> *start with yourself.”*
>
> \- Mahatma Gandhi

21

S. 28(iv): Business income – Waiver of loan – Remission or cessation of trading liability – S. 28(iv) does not apply if the receipts are in the nature of cash or money; but will apply if the benefits are received in some other form - Loan waiver amounts to benefit/receipt in the form of cash – Held, waiver of loan cannot be assessed u/s 28(iv) of the Act.

S. 41(1): Profits chargeable to tax - Remission or cessation of trading liability – Waiver of loan – Section 41(1) apply to a trading liability; in respect of which either an allowance or deduction is claimed by the assessee –Loan is not a trading liability and no deduction is claimed in respect of the interest expense – Held, no addition can be made u/s 41(1) of the Act in respect of waiver of loan. [S. 4, 36(1)(iii), 28(iv)]

Facts

Assessee had acquired certain tooling and equipments from KJC for which KJC agreed to provide loan to the assessee. Subsequently, another entity took over KJC and agreed to waive outstanding loan amount. Assessing Officer claimed that waived amount represented income under section 28(iv) or alternatively, under section 41(1) of the Act. The same was confirmed by CIT(A). However, ITAT and the High Court reversed the said findings of the lower authorities.

Issues

Whether waiver of loan can be taxed under section 28(iv) or section 41(1) of the Act?

Views

Waiver of loan take by an assessee cannot be considered as income as the same amounts to a capital receipt. As a result, the same cannot be taxed under the Act. Section 28(iv) of the Act taxes value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession. The said section can be invoked to tax something which is convertible into money, meaning thereby it can tax any receipt which is not in the form of money or cash. Waiver of loan is a benefit received in the form of money, therefore, section 28(iv) does not apply. In so far as section 41(1) is concerned, the same brings to tax any loss, expenditure or trading liability in respect of which a deduction or allowance is claimed by the assessee and subsequently, any benefit is received by the assessee in the form of cash or remission or cessation of liability. Loan taken by an assessee is not a trading liability and no deduction is taken in respect of such loan liability. Therefore, on waiver, section 41(1) does not get attracted.

Held

The Court held that, in order to invoke the provision of Section 28 (iv) of the Act, the benefit which is received has to be in some other form rather than in the shape of money and in case of waiver of loan, the benefit is received in the form of cash. Therefore, section 28(iv) does not get attracted. In so far as section 41(1) is concerned, the Court held that it is a sine qua non that there should be an allowance or deduction claimed by the assessee in any assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee. Subsequently, during any previous year, if the creditor remits or waives any such liability, then the assessee is liable to pay tax under section 41(1) of the Act. In respect of loan, no deduction is claimed by the assessee and in the facts of the case, even the interest amount was not claimed as a deduction under section 36(1)(iii) of the Act. Further, the Court also held that waiver of loan amounts to cessation of liability other than trading liability. Resultantly, the Court held that section 41(1) also does not apply to such waiver of loan. (AY. 1976-77) (CA Nos. 6049-6950 of 2004 dt. 24-4-2018)

CIT v. Mahindra and Mahindra Ltd. (2018) 404 ITR 1/165 DTR 337/302 CTR 213/255 Taxman 305 (SC)

CIT v. Dholgiri Industries (P) Ltd. (2018) 404 ITR 1/165 DTR 337/302 CTR 213/255 Taxman 305 (SC)

CIT v. Jindal Equipments Leasing & Consultancy Services Ltd. (2018) 404 ITR 1/165 DTR 337/302 CTR 213/255 Taxman 305 (SC)

CIT v. Ramaniyam Homes (P) Ltd. (2018) 404 ITR 1/165 DTR 337/302 CTR 213/255 Taxman 305 (SC)

Editorial: Mahindra and Mahindra Ltd. v. CIT (2003) 261 ITR 501 (Bom.) (HC) is affirmed. Refer ***CIT v. Compaq Electric Ltd [2019] 261 Taxman 71 (SC) [S.41(1)], Essar Shipping Ltd v. CIT (2020) 426 ITR 220/192 DTR 449/273 Taxman 49 (Bom) (HC) [S. 28(iv)], PCIT v. SICOM Ltd. [2020] 116 taxmann.com 410 (Bom) (HC) [S. 41(1)/28(iv)]*** and ***PCIT v. Colour Roof (India) Pvt Ltd (ITA 896/2017 dt. 25-9-2019) (Bom) (HC) [S. 41(1)]***

"No man loses his freedom except
through his own weakness."

- Mahatma Gandhi

22

S. 35AC : Expenditure on eligible projects-Schemes – Promissory estoppel is not available to an assessee against the exercise of legislative power nor any vested right accrues to an assessee in the matter of grant of any tax concession to him-In a taxing statute, a plea based on equity or/and hardship is not legally sustainable - Withdrawal of exemption is valid. S. 35AC(7) is prospective in nature-Provision is valid in law. [S. 35AC(7), Art. 142, 226]

Facts

The appellant is a Charitable Trust registered under the provisions of the Bombay Public Trust Act, 1950. On 27.09.2014, the appellant filed an application under S. 35AC of the Act to the National Committee for Promotion of Social and Economic Welfare, Department of Revenue, North Block, New Delhi for grant of approval to their hospital project as specified in S. 35AC of the Act so as to enable any "assessee" to incur expenditure by way of making payment of any amount to the appellant for construction of their approved hospital project and accordingly claim appropriate deduction of such payment from his total income during the previous year. Like the appellant, several persons, as specified in S. 35AC of the Act, also made applications to the Committee for grant of approval to their hospital projects. A notification was issued by the Government of India on 07.12.2015 mentioning therein that the Committee has approved 28 projects as "eligible projects" under Section 35AC of the Act. The name of the appellant appeared at serial No. 10 in the notification dated 07.12.2015. The appellant, received amount by way of donation from several assessees. However, subsequently, due to insertion of S. 35AC(7) from the assessment year 2018-19 by the Finance Act, 2016 with effect from 01.04.2017 the benefit of the exemption was withdrawn. The appellant challenged the validity of the provision S. 35AC(7) with effect from 1.4.2017. High Court dismissed the petition holding that the provision is valid in law.

Issue

Whether withdrawal of deduction to the donors by the Finance Act, 2016 w.e.f. 01.04.2017 by introducing section 35AC(7) was valid in law?

View

Withdrawal of benefit to the approved project is within the sole domain of the Legislature. If the same is withdrawn with retrospective effect then the same cannot be sustained because of the principle of promissory estoppel and on account of accrual of vested rights. However, where the same is withdrawn prospectively with adequate notice to the concerned parties, then the same cannot be challenged as unconstitutional on the ground of promissory estoppel and vested rights. It is within the sole discretion of the Legislature to extend or curtail any incentives or benefits.

Held

The Court held that a plea of promissory estoppel is not available to an assessee against the exercise of legislative power nor any vested right accrues to an assessee in the matter of grant of any tax concession to him. In a taxing statute, a plea based on equity or/and hardship is not legally sustainable and that the constitutional validity of any provision and especially taxing provision cannot be struck down on such reasoning. Accordingly, the Court held that the withdrawal of exemption was prospective and valid. (CA No 5849 of 2019 dt. 25-7-2019) (A.Y. 2017-18). The Court followed the decision in the case of ***Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P. [1979] taxmann.com 210 (SC).***

The Court further held that, as rightly argued by the learned counsel for the respondent (Revenue), the real aggrieved parties, which should have felt aggrieved by insertion of sub-section (7) in section 35AC of the Act, were those assesses, i.e., Donors, who despite paying the donation to the appellant were not allowed to claim deduction of the said amount from their total income during the financial year 2017-2018. (AY. 2015-16, 2016-17) (CA No. 5849 of 2019) (Arising out of SLP (No. 34287 of 2017 dt. 25-7-2019)

Prashanti Medical Service & Research Foundation v. UOI (2019) 416 ITR 485/180 DTR 209/309 CTR 457/265 Taxman 504 (SC)

Editorial : The Court held that the principles laid down in ***S.L. Srinivasa Jute Twine Mills (P) Ltd. v. UOI [2006] 2 SCC 740, Sangam Spinners v. Regional Provident Fund Commissioner [2008] 1 SCC 391*** and ***CIT v. Vatika Township (P.) Ltd. [2014] 49 taxmann.com 249/227 Taxman 121/367 ITR 466 (SC)*** have no application in the present case.

> *“It’s the action, not the fruit of the action, that’s important.”*
>
> - Mahatma Gandhi

23

S. 35D: Amortisation of preliminary expenses – Capital or revenue - Expenditure incurred on public issue of shares is revenue or capital expenditure – Debatable issue – Judgement of jurisdictional High Court on the issue – Issue cannot be said to be debatable – Held, issue can be considered in proceedings under section 143(1) of the Act.

Facts

The assessee is a public limited company and claimed deduction of Rs.65,47,448/- on advertisement and public issue as revenue expenditure in the return of income. The assessee also made an alternate claim in the return of income that if the claim cannot be considered as revenue expenditure, the same expenditure may be allowed under section 35D of the Act An Intimation under section 143(1) of the Act was issue and the Assessing Officer disallowed deduction of the said expenditure but allowed the alternate claim of the assessee. The CIT(A) deleted the adjustment made by the AO on the ground that such issue was a debatable issue and therefore, the concept of '*prima facie* adjustment' under section 143(1)(a) of the Act cannot be invoked. The ITAT and Gujarat High Court confirmed the order of the CIT(A).

Issue

Whether the expenditure on public issue of shares can be disallowed in an Intimation under section 143(1)(a) of the Act, being a settled issue?

View

The Supreme Court in ***Brooke Bond India Ltd. v. CIT [1997] 225 ITR 798/91 Taxman 26 (SC)*** held that expenditure incurred on issue of shares is capital expenditure. Divergent views have been expressed by various High Courts on this issues. The Madras, Andhra Pradesh, Kerala and Karnataka High Courts have held that the preliminary expenses incurred on raising share capital is a revenue expenditure. The Allahabad, Himachal Pradesh, Delhi, Calcutta, Bombay, Gujarat and Rajasthan High Courts have held that such expenditure is capital in nature.

Held

The Supreme Court has held that many High Courts including the jurisdictional High Court of Gujarat in ***Ahmedabad Mfg. & Calico (P.) Ltd. v. CIT [1986] 162 ITR 800*** have taken the view that expenses on issue of shares is capital expenditure and therefore, not allowable as revenue expenditure. The present case is from Gujarat and there is no debate as to the allowability of expenses incurred on public issue of shares in the State of Gujarat. Therefore, disallowance of such expenditure can be made in an Intimation under section 143(1)(a) of the Act. (AY. 1994-95) (CA No. 2315/2007 dt. 29-3-2017)

Dy. CIT v. Raghuvir Synthetics Ltd (2017) 394 ITR 1/151 DTR 153/295 CTR 143/247 Taxman 393 (SC)

Editorial: The issue in the present case is whether the disallowance of expenditure on public issue can be disallowed in the Intimation under section 143(1) of the Act and not with regards to allowability of expenditure on public issue. In ***Shasun Chemicals and Drugs Ltd v. CIT (2016) 388 ITR 1/243 Taxman 47 (SC)*** the Supreme Court held that expenses relating to issue of shares to public which was allowed in earlier 2 years, cannot be disallowed in the subsequent years on the ground that the same is capital expenditure.

> *"You have to do the right thing. It may not be in your power, may not be in your time, that there'll be any fruit. But that doesn't mean you stop doing the right thing."*
>
> \- Mahatma Gandhi

24

S. 36(1)(iii) : Interest on borrowed capital- Interest free loans and advances given to subsidiary - Interest-free funds available with assessee are sufficient to meet investment/advances - Presumption is that investments in subsidiaries were out of interest free funds - No disallowance can be made under section 14A [S. 14A]

Facts

The assessee had given interest free loans to its subsidiaries aggregating to the sum of Rs.3,727.14 crores during the year under consideration. The Assessing Officer disallowed proportionate interest on such loans by treating the same as not being incurred for the purpose of business. The Tribunal held that assessee had sufficient interest-free funds and in fact, the net profit after tax and before depreciation for the year under consideration exceeded not only the differential/ incremental loan given to subsidiaries during the year but also exceeded the total interest free loans given to the subsidiaries. Accordingly, the Tribunal held that it could be presumed that the investments were made from the interest free funds available with the assessee and no disallowance was required under section 36(1)(iii) of the Act. The Bombay High Court agreed with the view of the Tribunal following earlier rulings of the same court.

Issue

Whether interest referable to funds given to subsidiaries is allowable as deduction under section 36(1)(iii) of the Act when the interest would not have been payable to banks, if funds were not provided to subsidiaries? Whether, the interest paid and referable to funds given to subsidiaries can be said to be incurred for the purpose of business so as to be allowable under section 36(1)(iii) of the Act? Where an assessee is having sufficient interest free funds at its disposal, can it be presumed that the funds advanced to the subsidiary is out of the interest free funds?

View

Section 36(1)(iii) of the Act provides for deduction of interest expenditure which has been incurred for the purpose of business, meaning thereby the funds bearing interest are utilised for the purpose of business. If an assessee is paying interest on any loan, the funds of which have been advanced to a group company, then unless the business of both the companies are linked and connected and the advancing of loan to the group company is proved to be for the purpose of business, interest on loan taken by the assessee is prone to disallowance for not satisfying the conditions of section 36(1)(iii) of the Act. However, when the assessee is having sufficient interest free funds to take care of such advance to the subsidiary, then the Courts have laid down that a presumption can be made that such advance is out of the interest free funds available with the assessee, thereby requiring no disallowance under section 36(1)(iii) of the Act. Sometimes, the interest free funds and the interest bearing funds of the assessee are mixed in a common account, which is then utilised to make various payments, in which case, such presumption becomes inevitable. Such presumption was in fact accepted by the Apex Court in case of ***East India Pharmaceutical Works Ltd. v. CIT [(1997) 224 ITR 627 (SC)***] though in the facts of that case, no relief was granted to the assessee as no such argument was raised before the lower courts. Further, similar view was taken in an earlier judgment of the Calcutta High Court in ***Woolcombers of India Ltd. v. CIT [(1982) 134 ITR 219 (Cal)(HC)***. Following the above judgments, the Bombay High Court in case of ***CIT v. Reliance Utilities & Power Ltd. (2009) 313 ITR 340 (Bom)(HC)***, approved the theory of presumption, which is then followed in number of other judgments. Even otherwise, it may be argued that the interest bearing funds are employed in the business so as to interest free funds to be utilised for any non-business purpose.

Held

The Apex Court dismissed the appeal of the Revenue held that, when interest-free funds available with assessee is sufficient to meet investment, presumption is that investments in subsidiaries were out of interest free funds, accordingly no disallowance can be made u/s. 36(1)(iii) (AY. 2003-04 to 2006-07) (CA No. 10 of 2019 dt. 2-1-2019)

CIT (LTU) v. Reliance Industries Ltd. (2019) 410 ITR 466/175 DTR 1/307 CTR 121/261 Taxman 164 (SC)

Editorial: Order of the Bombay High Court in ***CIT (LTU) v. Reliance Industries Ltd. (ITA Nos. 1550/1592/1775 and 1881 of 2014 dt. 22-08-2017 (2017) 86 taxmann.com 24 (Bom.)(HC)*** is affirmed. This judgment is also applicable in context of section 14A of the Act read with erstwhile Rule 8D(2)(ii), wherein common interest expenditure of the assessee is disallowed by attributing the same towards exempt income.

> *"You may never know what results come from your action. But if you do nothing, there will be no result."*
>
> \- Mahatma Gandhi

25

S.36(1)(iii): Interest on borrowed capital – Upfront interest paid – Interest on debentures – Allowable in the first year or to be spread over a period of five years – Method of accounting – Held, entire expenditure to be allowed in the year in which interest expenditure is incurred and paid – Held, treatment in the books of account not determinative – Matching concept not to be applied in such a case [S. 35D, 37(1), 43, 145]

Facts

The assessee issued debentures giving the debenture holders two options as regards to the payment of interest. They could either receive interest periodically i.e. half yearly at the rate of 18% per annum over a period of five years or opt for one time upfront receipt of discounted interest of Rs. 55 per debenture. In the second alternative, discounted interest of Rs. 55 per debenture was to be paid upfront. At the end of five years period, the debentures were to be redeemed at the face value of Rs. 100. Two of the debenture holders opted for the upfront payment of interest. In the books of account the said upfront payment of interest on debentures was recorded as deferred revenue expenditure and was written off over a period of five years. For the purpose of income-tax, entire payment of interest was claimed as a deduction under section 36(i)(iii) of the Act in the year of payment itself. However, the AO, CIT(A), ITAT and High Court rejected the assessee’s claim and held that though the amount was paid upfront, the same was only allowable as a deduction over the tenure of the debentures i.e. over the period of five years.

Issue

Whether the upfront payment of interest to the debenture holders is allowable as a deduction in the year in which it is incurred and paid or it is to be spread over the life of the debentures?

View

In the case of ***Bharat Earth Movers v. CIT (2000) 245 ITR 428 (SC)*** the Supreme Court has held that if a business liability has arisen in the accounting year, the deduction should be allowed in that year even if such a liability may have to be quantified and discharged at a future date.

Held

The Supreme Court held that in accordance with the terms and conditions of the issue of non-convertible debenture floated by the assessee the amount of interest became payable to the debenture holders on the exercise of option by them which occurred in the current assessment year in which deduction of the expenditure was claimed. As per section 36(1)(iii) of the Act, any interest expenditure paid by the assessee for the purpose of its business is allowable as a deduction. Further, 'paid' as per section 43(2) means actually paid or incurred. Therefore, the Supreme Court held that when the interest was actually incurred and paid by the assessee, the assessee would be entitled to deduction of the upfront payment of discounted interest on debenture in the assessment year in which it is paid. The Supreme Court held that normally revenue expenditure incurred in a particular year has to be allowed in that year itself and if the assessee claims that expenditure in that year, the department cannot deny the same. There is no concept of deferred revenue expenditure in the Income-tax Act, 1961, except where the section specifically provides for the same. Further, the treatment in the books of account do not determine the allowability or taxability of any item of expenditure or income. The deduction of any expenditure is permissible as per the provisions of the Act. The matching concept also does not come in the way of the assessee. If an assessee follows mercantile system of accounting, the expenditure becomes allowable once the liability to pay is incurred by the assessee. Even if the assessee treats such expenditure as deferred revenue expenditure in the books of account, then same shall not estop the assessee from claiming the entire deduction for the purpose of the Act. (AY. 1996-97, 1997-98, 1998-99) (CA Nos. 6366-6368 of 2003 and 6946-6948 of 2004 dt. 23-3-2015)

Taparia Tools Ltd. v. JCIT (2015) 372 ITR 605/276 CTR 1/231 Taxman 5 (SC)/ 177 CTR 33 (SC)

Editorial: The order of the Bombay High Court in ***Taparia Tools Ltd. v. JCIT (2003) 260 ITR 102/126 Taxman 544 (Bom) (HC)*** has been reversed. The principle laid down in this judgment that once the liability is incurred by the assessee it has to be allowed as an expenditure has been followed by the Supreme Court in ***CIT v. Modern Spinners Ltd. (2016) 382 ITR 472/243 Taxman 437 (SC).*** This principle has been followed in the following judgments as well: ***CIT v. Oil & Natural Gas Corporation Ltd. (2016) 387 ITR 710 (Uttarakhand) (HC) Prithvi Associates v. ACIT (2016) 240 Taxman 621 (Guj.)(HC)***

> *"The law of love could be best understood and learned through little children."*
>
> \- Mahatma Gandhi

26

S. 36(1)(vii): Bad debt – Mere write off is sufficient for claiming deduction of bad debt – Held, Yes Subsequent to 01.04.1989, no requirement to establish that the debt has become irrecoverable

Facts

The assessee had claimed a deduction of bad debt under section 36(1)(vii) of the Act. The ITO disallowed the claim of bad debts on the ground that the assessee was unable to establish that the facts that the debt had become irrecoverable.

Issue

Whether the assessee has to establish that the debt has become irrecoverable to claim deduction under section 36(1)(vii) of the Act or a mere write off of such debt in the books of Account is sufficient?

View

Prior to 1-4-1989, deduction under section 36(1)(vii) of the Act was allowed in respect of amount of any debt, or part thereof, which was established to have become irrecoverable in the previous year. However, subsequent to the amendment to the Act w.e.f. 1-4-1989 deduction was available in respect of amount of any bad debt or part thereof which was written off as irrecoverable in the accounts of the assessee for the previous year. Thus, the condition for availability of deduction of bad debts was changed from establishing the debt to be irrecoverable to mere write off of such bad debts in the books of account.

Held

Subsequent to 1-4-1989 it is not necessary for the assessee to establish that the debts have become irrecoverable. It is sufficient if they are written off as irrecoverable in the accounts of the assessee. (AY. 1990-91 1993-94, 1994-95) (CA Nos. 5292 to 5294 of 2003 dt. 9-2-2010)

T. R. F. Ltd. v. CIT (2010) 323 ITR 397/190 Taxman 391/35 DTR 156/(2011) 220 Taxation 88 (SC)

Editorial : This judgement is followed in by the various High Courts some of which are as under:

CIT v. Sharda Worldwide Exports Pvt. Ltd (2015) 61 taxmann.com 100 (Bom.) (HC)

CIT v. Krone Communication Ltd. (2011) 333 ITR 497 (Karn)(HC)

CIT v. Samara India Pvt. Ltd. (2013) 356 ITR 12 (Delhi) (HC)

> *“Strength does not come from physical capacity,*
> *it comes from indomitable will.”*
>
> \- Mahatma Gandhi

27
S. 37(1) : Business expenditure – Method of accounting - Entries in the books of account cannot decide whether a receipt is taxable or not or whether expenses are allowable as deduction or not - Courts are compelled to go by the true nature of the receipts and not go by the entries in the books of account – Once a liability to pay has accrued during the assessment year deduction can be allowed even though it had to be discharged at a future date – Even if the assessee disputes the liability to pay sales tax by filing an appeal, once the demand for payment has been received, the said amount can be claimed as a deduction. [S. 28(1), 37(1), 145, Indian Income-tax Act, 1922, S. 10(2)(xv)]

Facts

The assessee is a public limited company doing the business of jute and manufacturing of jute goods. It followed the mercantile system of accounting. It filed its tax return on 13.01.1956. Thereafter, as a result of sales tax assessment, a demand notice was served by the sales tax authorities on 21-11-1957 for an amount of Rs. 1,49,776/-. Accordingly, the assessee filed a revised return on 09.11.1959 claiming the aforesaid deduction. The assessee also filed an appeal against the sales tax assessment disputing its liability. Assessing Officer rejected such claim of deduction of the assessee on the ground that the assessee had denied its liability to pay that amount and had made no provision in its books with regard to the payment of that amount. CIT(A) and ITAT confirmed the action of the Officer. The High Court was of the opinion that unpaid and disputed sales tax liability could not form the basis of a claim for deduction for the purposes of income-tax.

Issue

Can a deduction be claimed by an assessee where liability to pay the expense had accrued during the year of assessment even though it had to be discharged at a future date? Where deduction of an expense be disallowed to an assessee on the ground that such deduction was in fact not claimed in the books of account?

View

If an assessee follows mercantile system of accounting, deduction of an expense is allowed in the year in which the liability to pay arises even though the payment is to be made in subsequent year. This is the very essence of mercantile system of accounting, that the chargeability of any income and allowability of any expense is not contingent upon the actual receipt or payment. This view has been consistently taken by the Apex Court. Further, in case of sales tax, once the order of the assessing authority is received, it crystallises the liability and an assessee can claim deduction of such amount of tax on the ground that the same has accrued though he has not accepted the liability and has filed an appeal against the same.

Further, allowability of an expense and taxability of any income is not contingent upon the entries made in the books of account rather the same is governed by the provisions of the Act. Thus, even if there is no entry in the books of account making provision for any expenses, the same can be claimed as a deduction if otherwise the liability to pay has accrued in the assessment year under consideration.

Held

The Court held that an assessee who follows the mercantile system of accounting is entitled to deduct from the profits of the business such liability which had accrued during the period for which the profits and gains were being computed. In the facts of the present case, the Court held that the liability for payment of sales tax had accrued during the assessment year even though it had to be discharged at a future date. Further, the Court also held that if an assessee under some misapprehension or mistake fails to make an entry in the books of account and although, under the law, a deduction must be allowed by the Officer, the assessee will not lose the right of claiming or will not be debarred from being allowed that deduction. Whether the assessee is entitled to a particular deduction or not will depend on the provision of law relating thereto and not on the view which the assessee might take of his rights nor can the existence or absence of entries in the books of account be decisive or conclusive in the matter. (AY. 1955-56) (CA No. 1899 of 1967 dt. 17-8-1971)

Kedarnath Jute Manufacturing Co Ltd v. CIT (1971) 82 ITR 363 (SC) (367)

Editorial: Earlier and Subsequent decisions on the issue may be referred, ***CIT v. India Discount Co Ltd (1970) 75 ITR 191 (SC) (195), Sinclair Hurray & Co Ltd v. CIT (1974) 97 ITR 615 (SC), Sutlej Cotton Mills Ltd v. CIT (1979) 116 ITR 1(SC) (5), State Bank of India v. CIT (1986) 157 ITR 67 (SC), Godhra Electricity Co Ltd v. CIT (1997) 225 ITR 746 (SC), Tuticorin Alkai Chemicals & Fertilizers Ltd v. CIT (1997) 227 ITR 172 (SC), CIT v. Bokaro Steel Ltd (1999) 236 ITR 315 (SC).***

> *"You must not lose faith in humanity. Humanity is an ocean; if a few drops of the ocean are dirty, the ocean does not become dirty."*
>
> \- Mahatma Gandhi

28

S. 37(1) : Business expenditure – Legal expenses incurred for protecting the business of the firm – Held to be allowable business expenditure – Held, finding of fact by the Tribunal cannot be disturbed unless it found to be perverse

Facts

The partnership firm was dissolved due to differences between the partners. Subsequent to dissolution an auction conducted for taking over the business of the earstwhile partnership firm on going concern basis, three of the earstwhile partners of the partnership firm formed an AOP and emerged as the highest bidders of the auction. Thereafter, they continued the business in the name of the AOP. In A.Y. 1995-96, the assessee claimed deduction of legal expenses as revenue expenditure allowable under section 37(1) of the Act. The AO disallowed the claim of the assessee. The CIT(A) and ITAT allowed the claim of the assessee on the ground that the legal expenses incurred for defending the business of the going concern and for protecting its interest could not be said to be personal in nature nor could it be said that the expenses were unreasonable or not bona fide. The High Court reversed the finding of the Tribunal.

Issue

Whether legal expenses incurred for defending the business of the going concern and for protecting its interest could be said to be incurred for the purpose of the business and therefore, allowable under section 37(1) of the Act?

Held

The Supreme Court observed that in ***Dalmia Jain & Co. Ltd. v. CIT [1971] 81 ITR 754 (SC)*** it was held that the expenses for the purposes of protecting the business of the assessee as a going concern was allowable under section 37(1) of the Act. The Supreme Court held that there is a clear finding of fact by the Tribunal that the legal expenses incurred by the assessee were for protecting its business and there is no reason to reverse this finding of fact particularly since nothing has been shown to conclude that the finding of fact was perverse in any manner whatsoever. Therefore, the legal expenses incurred for protecting the business were allowable as deduction under section 37(1) of the Act. (AY. 1995-96) (CA Nos. 10547-10548 of 2011 dated 15/10/2015)

Facts

The assessee had also claimed deduction under Section 35A and 35AB of the Act for acquisition of Intellectual Property Rights such as rights over the trademark, copyright and technical know-how. In the alternative, the assessee claimed depreciation on capitalizing the value of the Intellectual Property Rights by treating them as plant. The AO and CIT(A) rejected the claim of the assessee. The ITAT allowed the claim of the assessee that the Intellectual Property Rights is Plant and therefore, depreciation can be claimed. The High Court reversed the decision of the ITAT.

Issue

Whether the expenditure incurred on the acquisition of trademarks, copyrights and know-how is allowed for depreciation under Section 32 of the Act, read with Section 43(3) of the Act?

Held

The Intellectual Property Rights such as trademarks, copyrights and know-how come within the definition of 'plant' for the reason that in a large business, control over intellectual property rights such as brand name, trademark etc. are absolutely necessary. Moreover, the acquisition of such rights and know-how is acquisition of a capital nature. Therefore, the trademarks, copyrights and know-how acquired by the assessee would come within the definition of 'plant' being commercially necessary and essential as understood by those dealing with direct taxes. Therefore, the assessee is entitled to the benefit of section 32 read with section 43(3) of the Act. (AY. 1995-96) (CA Nos. 10547-10548 of 2011 dt. 15-10-2015)

Mangalore Ganesh Beedi Works v. CIT (2015) 378 ITR 640/280 CTR 521/126 DTR 233 (SC)

Editorial: For issue no. 1: The Supreme Court has followed the decision in ***K. Ravindranathan Nair v. CIT [2001] 247 ITR 178/114 taxman 53 (SC)*** wherein it was observed that the High Court overlooked the cardinal principle that it is the Tribunal which is the final fact finding authority. A decision on fact of the Tribunal can be gone into by the High Court only if a question has been referred to it which says that the finding of the Tribunal on facts is perverse.

The decision in ***Mangalore Ganesh Beedi Works v. CIT*** has been followed in ***DCIT v. B. Kumara Gowda (2017) 396 ITR 386 (Karn.)(HC)***

For issue no 2: Section 32 of the Act as it stood for A.Y. 1995-96 did not make any distinction between tangible and intangible assets for the purposes of depreciation. Subsequently, the Act has been amended to provide for 25% depreciation on intangible assets like trademark, copyrights, patents, etc.

"For me, the different religions are beautiful flowers from the same garden, or they are branches of the same majestic tree. Therefore, they are equally true, though being received and interpreted through human instruments equally imperfect."

- Mahatma Gandhi

29

S. 37(1): Business expenditure - Foreign exchange fluctuation loss as on the balance sheet - Allowable as an expenditure [S. 43A, 145]

Facts

The assessee-company had debited to its profit and loss account certain unrealized loss due to foreign exchange fluctuation in foreign currency transaction on revenue items, on the last date of the accounting year. The Assessing Officer held that the liability as on the last date of the previous year under consideration was not an ascertained liability, but a contingent liability and, consequently, it had to be added back to the total income of the assessee. The Commissioner upheld the assessment order. The Tribunal allowed the claim, which was affirmed by the High Court [2007] 294 ITR 451 (Delhi) (HC).

Issue

Whether the fluctuation loss suffered by assessee on account of foreign exchange difference as on date of balance sheet is an item of expenditure under section 37(1)?

View

The term 'expenditure' in section 37 not defined in the Act and therefore, has to understood contextually. It covers an amount which is a 'loss' even though the said amount has not gone out from the pocket of the assessee. The 'loss' suffered by the assessee on account of the exchange difference as on the date of the balance sheet is an item of expenditure under section 37(1). Further, profits and gains are required to be computed in accordance with commercial principles and accounting standards (AS-11). Accounts and the accounting method followed by an assessee continuously for a given period of time needs to be presumed to be correct till the AO comes to the conclusion for reasons to be given that the system does not reflect true and correct profits;

Held

The Supreme Court on affirming the judgment of the High Court held:

(i) The word 'expenditure', which is not defined in the Act, has to be understood in the context in which it is used. The said expression may, in the circumstances of a particular case, cover an amount which is really a 'loss', even though said amount has not gone out from the pocket of the assessee.

(ii) Accounting Standards, which are continuously adopted by an assessee, can be superseded or modified by legislative intervention. However, but for such intervention or in cases falling under section 145(3), the method of accounting undertaken by the assessee continuously is supreme. In the instant case, there was no finding given by the Assessing Officer on the correctness or completeness of the accounts of the assessee. Equally, there was no finding given by the Assessing Officer stating that the assessee had not complied with the Accounting Standards. As per AS 11, any difference, loss or gain arising on conversion of the said liability at the closing rate, should be recognized in the profit and loss account for the reporting period.

(iii) The following factors have to be taken into account in order to find out if an expenditure is deductible:

> "(i) whether the system of accounting followed by the assessee is mercantile system, which brings into debit the expenditure amount for which a legal liability has been incurred before it is actually disbursed and brings into credit what is due, immediately it becomes due and before it is actually received; (ii) whether the same system is followed by the assessee from the very beginning and if there was a change in the system, whether the change was bona fide; (iii) whether the assessee has given the same treatment to losses claimed to have accrued and to the gains that may accrue to it; (iv) whether the assessee has been consistent and definite in making entries in the account books in respect of losses and gains; (v) whether the method adopted by the assessee for making entries in the books both in respect of losses and gains as per accepted Accounting Standards; (vi) whether the system adopted by the assessee is fair and reasonable or is adopted only with a view to reduce the incidence of taxation."

Thus, loss suffered by the assessee on account of fluctuation in the rate of foreign exchange as on the date of the balance sheet is an item of expenditure under section 37(1) of the Act. (AY. 1998-99) (CA Nos. 2206 & 2214 of 2009 dt. 8-4-2009)

CIT v. Woodward Governor India (P.) Ltd. (2009) 312 ITR 254/179 Taxman 326/21 DTR 106/223 CTR 1/213 Taxation 195/13 SCC 1 (SC)

Editorial: This judgment has been followed by various High Courts some of which are as under:

Ramamurthy v. DCIT (2011) 15 taxmannn.com 57 (Mad) (HC)

CIT v. Bharat Hotels (2016) 380 ITR 552 (Delhi) (HC)

Ballarpur Industries Ltd. v. CIT (2017) 84 taxmann.com 61 (Bom) (HC)

> *"The real love is to love them that hate you, to love your neighbor even though you distrust him."*
>
> \- Mahatma Gandhi

30

S. 37(1): Business expenditure – Termination of services of directors and employees to facilitate take over – Retrenchment compensation an allowable deduction – "Wholly and exclusively" does not mean "necessarily" – Benefit to third party irrelevant [Indian Income-tax Act, 1922 S. 10(2)(xv)]

Facts

D, holding directly or through his nominees, entire shares of the assessee-company, entered into an agreement with T, in terms of which D sold his shares in the assessee company to T. The agreement provided for termination of services of employees and managing director and for payment of retrenchment compensation, commutation of pension and compensation to managing director. The appellant paid Rs. 1,64,899, which amount, *inter alia,* included Rs. 16,188 paid to the managing director in lieu of six months' notice, Rs. 21,200 paid towards compensation for termination of pension allowance, and Rs. 16,885, the first of five annual payments as compensation to the director. These amounts were claimed as a deduction under section 37(1). These payments resulted in a substantial reduction in the wage bill as a consequence of the retrenchment.

The ITO denied the deduction on the ground that the services of the managing director and the employees were terminated not because of business expediency but because T made it a pre-condition under the agreement and therefore, it could not be considered as allowable under section 37(1). The additions were confirmed by the Commissioner (Appeals). The Tribunal confirmed that the expenditure was not incurred for the purpose of the business and further held that no deduction could be allowed since it was made to benefit the third party. On a reference, the High Court held that only the two amounts of Rs. 21,200 and Rs. 16,188 were allowable as deductions and that the balance of Rs. 1,27,511 paid to the employees and a director was not allowable as a deduction since the expenditure had not been incurred by the company for commercial reasons.

Issue

Whether the said payments of Rs. 1,27,511 made by the assessee company to the employees and the director by way of retrenchment compensation or compensation for termination of service were allowable as business expenditures under section 37(1)?

View

The assessee-company was neither dissolved nor was its business undertaking sold. It continued to exist as a juristic entity even after the transfer of its shares by D in favour of T. No doubt that on account of such transfer of shares, the transferees gained control on the assessee company, but neither D nor T derived any direct benefit out of the payment of retrenchment compensation even though such retrenchment might have facilitated the transfer of shares. The High Court wrongly placed more emphasis on the motive with which the amount was expended than the fact that the expenditure was incurred in connection with the business of the assessee company.

Held

On appeal reversing the judgement of the High Court, the Supreme Court held that even assuming that the motive behind the payment of the compensation was that the terms of the agreement between the D and T for the sale of the shares should be satisfied, as long as the amount of Rs. 1,27,511 was laid out wholly and exclusively for the purpose of the business of the appellant, there was no reason for denying the deduction. The appellant company continued to function even after its control passed on to the T and the expenditure in question was laid out for the purpose of the company's own trade and not for the trade of the T who was only its shareholder. As a result of the expenditure, the appellant company was in fact benefited by reduction in its wage bill. It could not be said that the T was in any way benefited financially because of the deduction in the consideration payable by it for the shares.

The expression 'wholly and exclusively' does not mean 'necessarily'. Ordinarily, it is for the assessee to decide whether any expenditure should be incurred in the course of his or its business. The fact that somebody other than the assessee is also benefited by the expenditure should not come in the way of an expenditure being allowed by way of deduction if it satisfies otherwise the test laid down by law.

The sum of Rs. 1,27,511 was, therefore, held to be expended by the appellant on the ground of commercial expediency and in order to indirectly facilitate the carrying on of its business, and was, therefore, allowable as a deduction. (AY. 1957-58, 1958-59, 1959-60 and 1960-61) (CA Nos. 2501 and 2502-2504 of 1972 dt. 3-5-1979).

Sasson J. David Co P. Ltd v. CIT (1979) 118 ITR 261/10 CTR 383/1 Taxman 485 (SC)

Editorial: Earlier and Subsequent decisions on the issue may be referred ***Calcutta & Co. v. CIT (1959) 37 ITR 1 (SC), CIT v. Travancore Sugar Chemicals Ltd (1973) 88 ITR 1 (SC), Eastern Investment Ltd v. CIT (1951) 20 ITR 1 (SC), Alembic Chemical works v. CIT (1989) 177 ITR 377 (SC).*** In ***Shahzada Nand & Sons v. CIT (1977) 108 ITR 358 (SC)*** the Court held that the reasonableness of the payment has to be judgement not on any subjective authority standard of assessing authority but from the point of view of commercial expediency.

> *"Truth is by nature self-evident. As soon as you remove the cobwebs of ignorance that surround it, it shines clear."*
>
> \- Mahatma Gandhi

31

S. 37(1): Business expenditure - Capital or revenue – Loan taken on mortgage of fixed assets - Amount spent towards stamps, registration fees, lawyer’s fees, etc. for availing loan – Loan neither an asset nor any business advantage nor any enduring benefit to the assessee - Nature of expenditure incurred in raising a loan not dependent upon nature and purpose of loan - Allowable business expenditure [Indian Income-tax Act, 1922, S. 10(2)(xv)]

Facts

The appellant obtained a loan of Rs. 40 lakhs from the Industrial Finance Corporation secured by a charge on its fixed assets. In connection therewith it spent a sum of Rs. 84,633 towards stamp duty, registration fees, lawyer’s fees, etc., and claimed this amount as business expenditure. The ITO held that the expenditure was incurred in obtaining capital and should be distinguished from interest on borrowed capital which was alone admissible as a deduction. The Commissioner (Appeals) confirmed the order of the ITO. The Tribunal was of the view that the whole of the mortgage loan was used firstly to discharge the loan of Rs. 25 lakhs and the balance for working funds and, as such, the whole of the amount was purely for the purposes of augmenting the working capital of the company and that it could not be stated that it was used for capital purposes. Accordingly, the claim was allowed.

On reference, the High Court restored the ITO’s order. It held that the borrowings were an advantage which the company derived for the duration of the loan and thus, capital in nature.

Issue

Whether the amounts expended by the assessee in obtaining the loan in the nature of stamp duty, registration fees, lawyer’s fees, etc., were allowable as a deduction under section 37(1)?

View

Where there is no express prohibition, an outgoing, by means of which an assessee procures the use of a thing by which it makes a profit, is deductible from the receipts of the business to ascertain the taxable income. Further, obtaining capital by issue of shares is different from obtaining loan by debentures. A loan obtained cannot be treated as an asset or advantage for the enduring benefit of the business of the assessee.

Held

On appeal reversing the High Court judgement, the Supreme Court held that the amount spent was not in the nature of capital expenditure and was laid out or expended wholly and exclusively for the purpose of the assessee's business and was, therefore, allowable as a deduction under section 37(1). The act of borrowing money was incidental to the carrying on of business, the loan obtained was not an asset or an advantage of enduring nature, the expenditure was made for securing the use of money for a certain period, and it was irrelevant to consider the object with which the loan was obtained. (AY. 1950-51) (CA No. 1106 of 1964 dt. 8-12-1965).

India Cements Ltd. v. CIT (1966) 60 ITR 52 (SC)

Editorial: Followed in ***Jeevanlal v. CIT (1969) 74 ITR 753 (SC)*** and ***Madras Industrial Investment Corp. v. CIT (1997) 225 ITR 802 (SC)***

> *"The future depends on what you do today."*
>
> \- Mahatma Gandhi

32

S. 40(a)(ia): Amounts not deductible – Failure to deduct tax at source - Payment exceeding Rs. 20,000 to each truck owners – Contract with a cement factory for transporting cement – Payment made to truck operator/owner amounts to payment made to a sub-contractor – Disallowance is not limited only to amount outstanding and this provision equally applies in relation to expenses that had already been incurred and paid by assessee - S. 40(a)(ia) as introduced by Finance (No.2) Act, 2004 with effect from 01.04.2005 is applicable to and from assessment year 2005-06 – Amendment by Finance Act, 2014 is prospective - Disallowance held to be justified [S. 40A(3), 194C]

Facts

The assessee entered into a contract with its customer for transporting cement to various places in India. The assessee engaged the services of other truck operators/owners. The payments made to the assessee by the customer suffered TDS. However, no tax was deducted at source on payments of freight charges to truck operators/owners. The ITO treated the assessee in default for failure to deduct tax source under section 194C as there existed a sub-contract between the assessee and truck operators/owners. As a result, freight charges were disallowed under section 40(a)(ia). The Commissioner, Tribunal and High Court confirmed the assessment order.

Issues

(i) Whether there existed a contract between the assessee and truck operators/owners?

(ii) Whether disallowance under section 40(a)(ia) was confined/limited to the amount ‘payable’ and not the amount already ‘paid’?

(iii) Whether sub-clause (ia) to Section 40(a) is applicable for the financial year 2004-05 relevant to the assessment year 2005-06?

View

(i) Under the contract with the customer, the assessee was responsible to transport goods and how to accomplish that task, was within exclusive domain of the assessee. Hence, hiring the services of truck operators/owners for carrying out this purpose could only have been under a contract between the assessee and truck operators/owners. Whenever a truck was engaged to deliver the goods, all the essentials of making a contract existed between the assessee and truck operators/owners. It is irrespective whether such contract was reduced in writing or not. In ***CIT v. Hardarshan Singh (2013) 350 ITR 427) (Delhi)(HC),*** the assessee was found to be acting only as a commission agent for arranging for transportation through other transporters i.e. a facilitator or intermediary between the consigner company and transporters. Contrary to facts of Hardarshan Singh, the assessee was neither a facilitator nor intermediary. The assessee had entered into separate contracts with its customer for transportation of goods and also, with truck operators/owners for effectuating the transportation.

(ii) In ***Palam Gas Service v. CIT (2017) 394 ITR 300 (SC),*** the Supreme Court held that section 40(a)(ia) covers not only those cases where the amount is 'payable' but also when it is 'paid'.

(iii) Sub-clause (ia), was inserted in clause (a) of section 40 of the Act with effect from 01.04.2005 by Finance (No. 2) Act, 2004. The Finance Act got presidential assent on 10.09.2004. It was thus argued by the assessee that it could not have foreseen prior to 10.09.2004 that any amount paid to a contractor without deducting tax at source was likely to become not deductible under section 40.

Held

(i) Following its earlier decision in Palam Gas Services, the Supreme Court held that once a particular truck was engaged on hire charges for transportation of the goods, the Truck operator/owner became the sub-contractor and all the requirements of Section 194C came into operation. Further, provisions dealing with disallowance of deductions particularly sections 40(a)(ia) and 40A(3) are intended to enforce due compliance of the requirement of other provisions of the Act and to ensure proper collection of tax as also transparency in dealings. The interest of a *bonafide* assessee who had made the deduction as required and had paid the same to the revenue is safeguarded. No question about prejudice or hardship arises.

(ii) Following its earlier decision in Palam Gas Services, the Supreme Court held that the provisions apply not only to amounts 'payable' but also paid and that the term 'payable' has been used in Section 40(a)(ia) of the Act only to indicate the type or nature of the payments by the assessees to the payees referred therein. Further, accordingly to the Supreme Court, its earlier decision of Palam Gas Service did not warrant any reconsideration in absence of anything to show that the decision is not in conformity with any binding decision of larger bench or statutory provision or any other reason of like nature.

(iii) Section 40(a)(ia) having come into force from 01.04.2005, would apply from Assessment Year 2005-06 and onwards. he Supreme Court held that the requirement of deducting tax at source was already existing as per Section 194C of the Act. The obligation to deduct tax at source on a payment cannot be held to be dependent upon the drastic consequence of default of non-deduction i.e. disallowance of payment.

(iv) The Supreme Court also rejected the argument of the assessee that the amendment by Finance (No. 2) Act, 2014, whereby the disallowance under section 40(a)(ia) has been restricted to 30% of sum payable, was retrospective and applied from inception of section 40(a)(ia). The amendment was specifically made applicable w.e.f. 01.04.2015 relevant to assessment year 2015-16 and therefore held to be applicable from that date. Accordingly, the disallowance made by the ITO under section 40(a)(ia) was upheld. (AY. 2005-06) (CA. No. 7865 of 2009 dt. 29-7-2020)

Shree Choudhary Transport Co. v. ITO (2020) 426 ITR 289/192 DTR 161/315 CTR 849/272 Taxman 272 (SC)

Editorial: Judgement of High Court of Rajasthan in ***Shree Choudhary Transport Co. v. ITO (2009 225 CTR 125 (Raj) (HC)*** affirmed.

Judgement of CIT v. Hardarshan Singh (2013) (350 ITR 427 (Delhi)(HC), PIU Ghosh v. Dy CIT (2016) 386 ITR 322) (Cal.) (HC) and ***CIT v. Calcutta Export Co. (2018) 404 ITR 654) (SC)*** distinguished.

Judgement of Palam Gas Service v. CIT (2017) 394 ITR 300 (SC) followed.

In ***CIT v. Calcutta Export Company (2018) 404 ITR 654 (SC)*** the Court held that the amendment made by the Finance Act, 2010 in Section 40(a)(ia) of the IT Act is retrospective in nature i.e. from the date of insertion of the said provision w.e.f. AY. 2005-06.

> *"A small group of determined and like-minded people can change the course of history."*
>
> \- Mahatma Gandhi

33

S. 41(2) : Profits chargeable to tax - Balancing charge - Slump sale - Business as going concern – Gain is liable to tax u/s 41(2) on itemized basis if slump price is determined on valuation of each asset/liability – Body of individuals - Where firm has sold its business as a going concern, surplus arising out of transaction has to be assessed in status of BOI and not as a firm [S. 2(31)(iv), 2(31)(v), 2(42C), 4, 45, 50B]

Facts

A private limited company formed for the purpose of taking over the business of the assessee-firm entered into an agreement with the assessee whereunder the assessee sold the business as a whole as a going concern. The consideration for the sale was Rs. 11,50,400 which was paid by allotment of fully paid-up shares to the assessee's partners. The business stood transferred to the company accordingly in the accounting year relevant to the assessment year in question. For the purpose of determination of purchase consideration the assets were shown at Rs. 41,73,973 out of which the machinery and dead-stock was revalued by the valuer at Rs. 1,5,87,296. The liabilities were shown at Rs. 30,23,573 and the balance amount of Rs. 11,50,400 was shown as the purchase consideration. The assessee filed nil return for the year in question. Relying upon the decision of the Supreme Court in ***CIT v. B.M. Kharwar [1969] 72 ITR 603 (SC),*** the ITO held that tax was payable under section 41(2) on the surplus amount, i.e., difference between the written down value of plant, machinery and deadstock as per the assessee's books and the value of the same as revalued by the valuer. The ITO took the difference between the value of plant, machinery and dead-stock (Rs. 15,87,296) as revalued and the written down value of the plant, machinery and dead-stock as per assessee's book (Rs. 4,36,896) which came to Rs. 11,50,400 as taxable u/s. 41(2).

The AAC, on appeal, held that the surplus was assessable under the head 'Capital gains' and not under the head 'Profits and gains of business or profession'. As regards the status of the assessee it was held that the assessee must be taxed in the status of 'association of persons' and not in the status of a 'registered firm'. The assessee as well as the revenue filed appeals against the said decision of the AAC before the Tribunal.

The Tribunal while upholding the ITO's view, held that the surplus was taxable as business profit under section 41(2) and that the assessee was assessable in the status of a registered firm. The High Court held that on the facts of the case section 41(2) was not attracted and that the transfer of a going concern was liable to tax under section 45. The High Court has held that the decision of this Court in ***B. M. Kharwar’s case [l969] 72 ITR 603 (SC)*** is not applicable and that the present case is governed by the decision of this Court in ***CIT v. Mugneeram Bangur & Co. [1965] 57 ITR 299 (SC)*** The High Court further held that the status of the assessee was that of BOI and not registered firm.

On appeal to the Supreme Court.

Issue

Whether the surplus as a result of difference between the written down value and the sale consideration for the plant, machinery and dead-stock transferred by the assessee is taxable u/s. 41(2) of the 1961 Act

View

It was held in ***CIT v. Mugneeram Bangur & Co. [1963] 47 ITR 565 (Cal)(HC)*** that where there is a slump transaction and the business is sold as a going concern what is to be seen is whether any portion of the slump price is attributable to the stock-in-trade and if on the basis of the facts it can be found that a particular price is attributable to a particular item, then the excess amount would be chargeable to tax under section 10(2)(vii), proviso (ii) of the Indian Income-tax Act, 1922 corresponding to section 41(2) of the 1961 Act.

In the instant case, it was the admitted case of the assessee before the ITO that the plant, machinery and dead-stock had been revalued at the time of the agreement for sale and the amount of Rs. 11,50,400 was fixed after taking into account the value of the plant, machinery and dead-stock at Rs. 15,87,296 as per valuation by the valuer. This showed that at the time of execution of the agreement the value of the plant, machinery and dead-stock that were transferred was Rs. 15,87,296.

It was no doubt true that in the agreement there was no reference to the value of the plant, machinery and dead-stock. But on the basis of the information that was furnished by the assessee before the ITO it became evident that the amount of Rs. 11,50,400 had been arrived at by taking into consideration the value of the plant, machinery and dead-stock as assessed by the valuer at Rs. 15,87,296. This was not a case in which it could not be said that the price attributed to the items transferred was not indicated and, hence, section 41(2) could not be applied.

Held

Therefore, the High Court was not correct in holding that section 41(2) was not applicable.

The income was chargeable to income-tax under section 41(2). The decision of the High Court that it was chargeable to tax as capital gain could not be upheld. But the liability under section 41(2) is limited to the amount of surplus to the extent of difference between the written down value and the actual cost. If the amount of surplus exceeds the difference between the written down value and the actual cost, then the surplus amount to the extent of such excess will have to be treated as capital gain for the purpose of taxation. The Tribunal had not considered the matter in this light. It will be open to the Tribunal to rehear the parties and record clear findings in the light of the observations made in this judgment. The High Court was correct in its view that the assessee could not be assessed as a 'registered firm', and had to be assessed in the status of a 'body of individuals'. (AY. 1967-68) (CAO. 2276 (NT) of 1981 dt. 8-7-1897)

CIT v. Artex Manufacturing Co (1997) 227 ITR 260/93 Taxman 357/141 CTR 290 (SC)

Editorial: Subsequent decisions on the issue may be referred ***East India Electric Supply & Traction Co. Ltd. v. CIT (2003) 263 ITR 243 (Cal.)(HC); CIT v. Carew Phipson Ltd. (2003) 260 ITR 668 (Cal.)(HC)***

> *"When you are right, you have no need to be angry. When you are wrong, you have no right to be angry."*
>
> \- Mahatma Gandhi

34

S. 43B : Certain deductions on actual payment-Tax, duty, cess or fee-Proviso clarifying that sums paid after accounting year but before due date for submission of return deductible is to be treated as retrospective [S. 43B]

Facts

The ITO disallowed a deduction claimed by the assessee of an amount which was on account of sales-tax collected by the assessee for the last quarter of the relevant accounting year. This amount was payable within 30 days of the end of the quarter. The disallowance was made under section 43B, which was inserted in the statute with effect from 1-4-1984. The Commissioner confirmed the disallowance. The Tribunal also dismissed the appeal of the assessee on the basis of the judgments of the Delhi High Court in the case of ***Sanghi Motors v. Union of India [1991] 187 ITR 703*** and ***Escorts Ltd. v. UOI [1991] 189 ITR 81.*** Hence a reference came up before the Court.

Issue

Whether the sales-tax collected by the assessee and paid after the end of the relevant previous year but within the time allowed under the relevant sales-tax law is to be disallowed under section 43B?

View

Section 43B was aimed at curbing the activities of those taxpayers who did not discharge their statutory liability of payment of excise duty, employer's contribution to provident fund, etc., for long periods of time but claimed deductions from their income on the ground that the liability to pay these amounts had been incurred by them in the relevant previous year. It was to stop this mischief that section 43B was inserted. It was clearly not realised that the language in which section 43B was worded would cause hardship to those taxpayers who had paid sales-tax within the statutory period prescribed for this payment, although the payment so made by them did not fall in the relevant previous year. This was because the sales-tax collected pertained to the last quarter of the relevant accounting year. It could be paid only in the next quarter which fell in the next accounting year. Therefore, even when the sales-tax had in fact been paid by assessee within the statutory period prescribed for its payment and prior to the filing of the income-tax return, these assessees were unwittingly prevented from claiming a legitimate deduction in respect of the tax paid by them. This was not intended by section 43B. Hence the first proviso was inserted in section 43B. The amendment which was made by the Finance Act, 1987 in section 43B by inserting, *inter alia*, the first proviso, was remedial in nature, designed to eliminate unintended consequences which may cause undue hardship to the assessee and which made the provision unworkable or unjust in a specific situation.

A proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the section and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole. Looking to the curative nature of the amendment made by the Finance Act, 1987 it can be said that the proviso which is inserted by the amending Finance Act, 1987 should be given retrospective effect and be read as forming a part of section 43B from its inception.

The expression "any sum payable" in clause (a) of section 43B was open to the interpretation that the amount payable in a particular year should also be statutorily payable under the relevant statute in the same year. Explanation 2 was, therefore, added by the Finance Act, 1989, with retrospective effect from April 1, 1984, for the purpose of removing any ambiguity about the term "any sum payable" under clause (a) of section 43B.

Held

Section 43B(a), the first proviso and *Explanation 2* have to be read together as giving effect to the true intention of section 43B. *Explanation 2* being retrospective, the first proviso has also to be so construed. Without the first proviso, *Explanation 2* would not obviate the hardship or the unintended consequences of S. 43B. The proviso supplies an obvious omission. But for this proviso the ambit of section 43B becomes unduly wide bringing within its scope those payments which were not intended to be prohibited from the category of permissible deductions. The first proviso to section 43B, therefore, has to be treated as retrospective. The rule of reasonable construction must be applied while construing a statute. (AY.1984-85) (TR No. 2 of 1993 dt. 10-3-1997)

Allied Motors (P) Ltd v. CIT (1997) 224 ITR 677/139 CTR 364/91 Taxman 205 (SC)

Editorial : Followed in ***CIT v. Alom Extrusions Ltd. [2009] 319 ITR 306 (SC)*** and ***CIT v. Calcutta Export Company [2018] 404 ITR 654 (SC).*** Decision in ***Escorts Ltd. v. UOI (1991) 189 ITR 81 (Delhi) (HC) reversed.***

> *"People cannot hurt you without your permission."*
>
> \- Mahatma Gandhi

35

S. 44AB: Audit of accounts – Only Chartered Accountants can audit accounts of business of an assessee – Income Tax Practitioners do not have the same expertise – Section does not violate Article 14 and 19 of the Constitution of India - Constitutionally validity of provision upheld [S. 288(2), Constitution of India, 1950, Art. 14, 19]

Facts

The appellant, on behalf of income-tax practitioners, claimed that they were entitled to be 'authorised representatives' on behalf of the assessee and, therefore, excluding them for the purpose of auditing accounts under section 44AB was violative of articles 14 and 19 of the Constitution of India. They, therefore, challenged the validity of provision of section 44AB. The High Court rejected the plea of the Income Tax Practitioners. This was challenged before the Supreme Court.

Issue

Whether section 44AB is violative of Article 14 and 19 of the Constitution, in as much as it excludes Income-tax Practitioners from auditing of accounts under the said section?

View

Section 44AB required every person carrying on business, if his total sales, turnover or gross receipts exceeded Rs. 40 lakhs, and every person carrying on a profession, if his gross receipts exceeded Rs. 10 lakhs, in any previous year "to get his accounts of such previous year audited by an accountant before the specified date...." The Explanation to the section defines 'Accountant' for its purpose to have the same meaning as in the Explanation below section 288(2). Section 288 deals with authorised representatives. Sub-section (2) clause (4) refers to an Accountant. The Explanation says that in that section 'Accountant' means a Chartered Accountant within the meaning of the Chartered Accountancy Act and includes persons entitled to be appointed to Act as auditors of companies in a particular State by reasons of the provisions of section 226(2) of the Companies Act, 1956.

Held

Dismissing the petition, the Supreme Court held that Chartered Accountants, by reason of their training have special aptitude in the matter of audits and thus, it is reasonable that they, who form a class by themselves, should be required to audit the accounts of businesses. It was observed by the Court that Income-tax Practitioners do not have the same expertise as Chartered Accountants in the matter of accounts and thus, the challenge under article 19 fails. (CA No. 2824 of 1992 dt. 8-12-1998)

T.D. Venkata Rao v. UOI (1999) 237 ITR 315/103 Taxman 621/153 CTR 203 (SC)

Editorial: Decision of the Madras High Court in ***R. Sathya Moorthy v. UOI [1991] 189 ITR 491 (Mad) (HC)*** affirmed. in ***Bar Council of India v. A. K. Balaji AIR 2018 SC 1382*** (CA Nos. 7875-7879 of 2015 dt. 13-3-2018) explained the scope of foreign lawyers and firms to practice in India. Foreign law firms and foreign lawyers cannot set up offices and practice in India, however they can give advice to Indian clients on 'fly in and fly out' mode on temporary basis.

In ***Sales Tax Practitioners' Association of Maharashtra v. State of Maharashtra (2008) 170 Taxman 371, the Bombay High Court,*** following this decision, held that section 61 of Maharashtra Value Added Tax Act, 2002, which requires accounts of certain dealers to be audited by Chartered Accountants, is constitutionally valid and it does not infringe article 14 or 19 of the Constitution of India.

Applying this decision conversely, the Income-tax (Sixth Amendment) Rules, 2018, which omitted the words "or an accountant" appearing in Rule 11UA(2)(b) of the Income Tax Rules, 1962 (for the purpose of determining the value of equity shares), may be challenged on the ground that Chartered Accountants do have expertise and have had special training and aptitude in the matter of valuations and accordingly, the exclusion of Chartered Accountants from the said rule is invalid.

> *"Nothing has saddened me so much in life as the hardness of heart of educated people."*
>
> \- Mahatma Gandhi

36

S. 45: Capital gains –Transfer - Extinguishment of rights - Not limited to transfer - Extends to extinguishment of rights independent of or otherwise than on account of transfer [S. 2(47)(ii), 47(ii), 47(vii), 49(2), Companies Act, 1956, S. 391(2), 394]

Facts

The assessees were shareholders of Ambassador Steamship (P.) Ltd. The High Court of Kerala sanctioned a Scheme of Arrangement under sections 391(2) and 394 of the Companies Act whereby Ambassador Steamship Pvt. Ltd. ('the amalgamating company') was amalgamated with Collis Line Pvt. Ltd. ('the amalgamated company'). The Scheme contemplated the transfer by way of amalgamation of all assets and liabilities of the amalgamating company to the amalgamated company in consideration of the amalgamated company issuing to the members of the amalgamating company 14 equity shares of Rs. 100 each, credited as fully paid-up, in the amalgamated company for each share held in the amalgamating company. Upon amalgamation, the amalgamating company would cease to function and the amalgamated company would take over all its business, assets and liabilities and carry on its business.

The assessees sold the 45,318 shares of the amalgamated company of the face value of Rs. 100 each which they had acquired under the Scheme to one B.K. Chatterji and his associates on February 29, 1976 for the aggregate sum of Rs. 48,72,523/-. This meant that they had sold each share for Rs. 107.50/-.

For the assessment year 1976-77, the previous year which ended on March 31, 1976, the ITO levied capital gains tax upon the assessees in respect of the sale to Chatterji and others.

Issue

Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that on the amalgamation of Ambassador Steamships Pvt. Ltd. with Collis Line Pvt. Ltd., there was a transfer by the assessee of their shares in Ambassador Steamships Pvt. Ltd.

View

The definition clearly contemplates the extinguishment of rights in a capital asset distinct and independent of such extinguishment consequent upon the transfer thereof. We do not approve, respectfully, of the limitation of the expression 'extinguishment of any rights therein' to such extinguishment on account of transfers or to the view that the expression 'extinguishment of any rights therein' cannot be extended to mean the extinguishment of rights independent of or otherwise than on account of transfer. To so read, the expression is to render it ineffective and its use meaningless.

Held

That the expression under section 47(ii) of the Act does include the extinguishment of rights in a capital asset independent of and otherwise than on account of transfer. (AY. 1976-77) (CA No. 4437-45 of 1997 dt. 23-2-2011)

CIT v. Grace Collis (2001) 248 ITR 323/115 Taxman 326/166 CTR 201 (SC)

Editorial: Vania Silk Mills (P.) Ltd. v. CIT [1991] 191 ITR 647 (SC) is disapproved. ***Grace Collis v. CIT (1996) 135 CTR 25/1997) 226 ITR 55 (Ker) (HC)*** is set aside. In ***CIT v. Chhaya B. Parikh (Mrs) (ITA (L) No. 2583 of 2012 dt. 24-1-2013 (Bom) (HC)*** the Court held that demolition of Bungalow will not be treated as transfer and exemption granted u/s. 54(3) of the Act, cannot be withdrawn, ratio of decision in ***Vanial Silk Mills (P) Ltd (1991) 191 ITR 647 (SC)*** is held to be not applicable

> *"If we want to reach real peace in this world,*
> *we should start educating children."*
>
> \- Mahatma Gandhi

37

S. 45: Capital asset- Personal effects - Capital gains- Sovereigns and silver coins which were customarily used for *puja* purposes and other ritual purposes could not be designated as effects meant for personal use [S. 2(14), Indian Income-tax Act, 1922, S. 2(4A), 12B]

Facts

The assessee, a minor, having been recognised by the Government as successor of the former Maharaja, certain assets consisting of gold sovereigns, silver coins and silver bars were released by the Govt. and handed over to Rajmata being the adoptive mother and guardian of the assessee. During the financial year 1957-58, the aforesaid sovereigns, silver coins and silver bars were sold at the suggestion of the Government. The assessee contended that there was no voluntary sale chargeable to capital gains tax under section 12B of the 1922 Act and the aforesaid items did not constitute "capital assets" as contemplated by section 2(4A) of the 1922 Act but fell within the purview of the exception carved out by clause (ii) thereof and as such were to be excluded in computing the gains because they were held for personal use by the assessee and the members of his family as was evident from the fact that they were used for the purpose of Maha Lakshmi *puja* and other religious festivals and rituals in the family. The ITO overruled the assessee's contention and taking into account the market value of the assets worked out capital gains. The appeal before the AAC remained unsuccessful. On second appeal, the Tribunal dismissed the appeal holding that the expression "personal effects" meant such items of movable property as were necessary adjuncts to an individual's own personality and the nature of sale being voluntary or otherwise was irrelevant for the purpose of section 12B of the 1922 Act. On reference, the High Court held that in order that an article should constitute a part of personal effects, it is necessary that the article must be associated with the person of the possessor and that the aforesaid items consisting of gold sovereigns, silver rupees and silver bars could not be deemed to fall within the exception carved out by clause (ii) of section 2(4A) of the 1922 Act merely because they were placed before Goddess Lakshmi while performing *puja*.

Assessee preferred further appeal to the Supreme Court.

Issue

Whether an item of movable property consisting of gold sovereigns, silver rupees and silver bars held for personal use i.e they were placed before Goddess Lakshmi while performing *puja* is a part of personal effects of an assessee and fall within the exception carved out by clause (ii) of section 2(4A) of the Act?.

View

The expression "personal use" occurring in section 2(4A)(ii) of the 1922 Act is very significant. A close scrutiny of the context in which the expression occurs showed that only those effects can legitimately be said to be personal which pertain to the assessee's person. In other words, an intimate connection between the effects and the person of the assessee must be shown to exist to render them "personal effects".

The enumeration of articles like wearing apparel, jewellery, and furniture mentioned by way of illustrations in the above-quoted definition of "personal effects" also showed that the legislature intended only those articles to be included in the definition which were intimately and commonly used by the assessee.

The meaning assigned to the expression "personal effects" in various dictionaries also lends support to this view.

The silver bars or bullion could by no stretch of imagination be deemed to be "effects" meant for personal use. Even the sovereigns and the silver coins which were alleged to have been customarily brought out of the iron safes and boxes on two special occasions, namely, the Ashtami Day of "Sharadh Paksh" for Maha *Lakshmi Puja* and for worship on the occasion of Diwali festival could not also be designated as effects meant for personal use. They might have been used for *puja* of the deities as a matter of pride or ornamentation but it was difficult to understand how such user could be characterised as personal use. The court noted that if sanctity of *puja* were considered so essential by the assessee, the aforesaid articles would not have been delivered by his guardian to the banks for sale.

The court also noted that no exemption on behalf of the assessee was claimed in respect of the aforesaid effects under the provision of the Wealth-tax Act.

Held

The aforesaid articles were capital assets and not personal effects and as such could not be excluded while computing the gains. The appeal of assessee was dismissed. (AY. 1957-58) (CA No. 779 of 1971 dt. 17-2-1976)

H. H. Maharaja Rana Hemant Singhji v. CIT (1976) 103 ITR 61/1976 CTR 188 (SC)

Editorial: Ratio of above judgment is followed in, ***Jayantilal A. Shah v. K. N Ananthrama Aiyar v. CIT (1985) 156 ITR 448 (Bom) (HC); Faiz Murtaza Ali v. CIT (2014) 360 ITR 200 (Delhi)(HC)***

> *"Live simply so that others may simply live."*
>
> \- Mahatma Gandhi

38

S. 45: Capital gains – Conversion of proprietary business into firm – Amounts to transfer of interest in property to other partners – No consideration received – No capital gains tax [S. 2(47), 48]

Facts

D was carrying on the business of a transporter as an individual up to financial year 1966-67. From 01.04.1967, he converted his proprietary business into a partnership firm, taking his two nephews as partners and giving each 1/4th share in the firm.

The ITO treated such conversion of proprietary into partnership as transfer of assets for less than fair market value and taxed the difference between the market value determined by him and the book value as capital gains. The Commissioner granted part relief to the assessee by reducing the quantum of capital gains. On further appeal, the Tribunal concluded that on conversion of individual business into a partnership it did not result in any transfer as envisaged by section 45 read with section 2(47).

On a reference application, the following question was referred to the Madras High Court: "Whether, on the facts and in the circumstances of the case, it has been rightly held that there was no transfer of assets in the assessee's case within the meaning of section 2(47) read with section 45 of the Income-tax Act, 1961?" The High Court came to the conclusion that there was no transfer of assets and, therefore, no capital gains could be levied. ***CIT v. H. Rajan and H. Kannan [1984] 149 ITR 545 (Mad) (HC).*** The Revenue approached the Supreme Court.

Issue

Two questions arose (1) Whether it has been rightly held that there was no transfer of assets on conversion of proprietary business into partnership firm?, and (2) If no, then would such a transfer result in there being any gains or profit taxable under section 45 of the Act? (additional question raised by the Supreme Court)

Views

In the case of ***Sunil Siddharthbhai v. CIT [1985] 156 ITR 509 (SC)***, introduction of capital assets into a partnership firm was held to be a transfer of capital asset under section 2(47) on the ground that the exclusive interest of a partner in personal asset was reduced and the said asset became an asset of the firm, in which the other partners got an interest. However, it also held that on such a transfer, no consideration was received within the meaning of section 48 and, therefore, no profit or gain accrued to the transferor and thus, there was no capital gains which could be taxed.

Held

In so far as the first question, the Court held that the exclusive business of the assessee was imparted with a character of a partnership business with induction of two nephews of the assessee, which was a transfer of the assets under section 2(47) by the assessee in favour of his nephews. However, for the second question, the Court concluded that such a transfer did not yield any profits or gains to the assessee which could be subjected to tax under section 45. For this, the Court followed its decision in ***Sunil Siddharthbhai v. CIT [1985] 156 ITR 509 (SC).*** (AY. 1968-69) (CA No. 3644 of 1983 dt. 12-2-1998)

CIT v. H. Rajan and H. Kannan (1999) 236 ITR 42/153 CTR 11 (SC)

Editorial: After amendment in sub-section (3) in section 45 by the Finance Act, 1987, the amount recorded in the books of account of the firm/AOP/BOI as the value of the capital asset is deemed to be the 'full value of the consideration' received or accruing as a result of the transfer of the capital asset by an assessee towards his capital contribution in the firm/AOP/BOI. However, the ratio in so far as the second question is concerned remains relevant for cases where no consideration is received by the assessee of transfer of a capital asset and the Revenue seeks to invoke the deeming provisions of sections 50CA and 50D of the Act. Also see ***CIT v. Texspin Engg. & Mfg. Works (2003) 263 ITR 345 (Bom) (HC)*** for the same proposition.

> *"Our ability to reach unity in diversity will be the beauty and the test of our civilization."*
>
> - Mahatma Gandhi

39

S. 45: Capital gains – Retirement of a partner – Amount received in respect of his share in the partnership including goodwill – Amount not taxable as capital gains [S. 2(14), 2(47), 48]

Facts

Disputes arose between the partners of a partnership firm and as a result of which the assessee retired from the firm. On retirement, the assessee received a certain amount in respect of his share in the partnership including his proportionate share in the value of the goodwill which constituted an asset of the partnership and thus, liable to be taken into account in determining the share of each assessee in the partnership on the date of retirement.

The ITO held that the amount received by the assessee to the extent it included his proportionate share in the value of the goodwill represented capital gains chargeable to tax under section 45. This was confirmed by the Commissioner. The Tribunal however held that goodwill was a self-created asset, which had cost nothing to the firm and its partners and a “transfer” of it was, therefore, not within the ambit section 45.

The High Court in ***CIT v. Mohanbhai Pamabhai [1973] 91 ITR 393 (Guj) (HC)*** held that when, a partner retires, what he receives is his share in partnership and not any consideration for transfer of his interest in partnership to continuing partners and therefore, there is no transfer of interest in the partnership assets involved within the meaning of section 2(47). Accordingly, the High Court held that no part of the amount received by any assessee in respect of his share in the value of the goodwill could be regarded as capital gain chargeable to tax.

Issue

Whether the amount received by a partner from the partnership on retirement by way of his share in the goodwill of the firm was liable to be assessed to tax as capital gains?

View

Interest of a partner in the partnership is not interest in any specific item of the partnership property, rather, it is a right to obtain his share of profits from time to time during the subsistence of the partnership and on dissolution of the partnership or his retirement from the partnership, to get the value of his share in the net partnership assets which remain after satisfying the debts and liabilities of the partnership. When, therefore, a partner retires from a partnership and amount of his share in net partnership assets after deduction of liabilities and prior charges is determined on taking accounts on footing of notional sale of partnership assets and given to him, what he receives is his share in partnership and not any consideration for transfer of his interest in partnership to continuing partners. His share in the partnership is worked out by taking accounts in the manner prescribed by the relevant provisions of the partnership law and it is this and this only, namely, his share in the partnership which he receives in terms of money. There is in this transaction no element of transfer of interest in the partnership assets by the retiring partner to the continuing partners. It is true that section 2(47) defines "transfer" in relation to a capital asset and this definition gives an artificially extended meaning to the term "transfer" by including within its scope and ambit two kinds of transactions which would not ordinarily constitute "transfer" in the accepted connotation of that word, namely, relinquishment of the capital asset and extinguishment of any rights in it. But, even in this artificially extended sense, there is no transfer of interest in the partnership assets involved when a partner retires from the partnership. Therefore, even if goodwill is assumed to be capital asset within the charging provision enacted in section 45, there is no transfer of interest of any assessee in the goodwill within the meaning of section 2(47) when the assessee retired from the firm.

Held

The Supreme Court dismissed the appeal of the Revenue having regard to the view taken by it in ***Sunil Siddharthbhai v. CIT [1985] 156 ITR 509.*** The order of the High Court stood. (AY.1963-64) (CA Nos. 1856 to 1859 of 1973 dt. 12-2-1987.

Addl. CIT v. Mohanbhai Pamabhai (1987) 165 ITR 166 (SC)

Editorial: Followed in ***CIT v. R. Lingmallu Raghukumar (2001) 247 ITR 801 (SC)*** and ***Tribhuvandas G. Patel v. CIT (1999) 236 ITR 515 (SC)***

Ratio is applicable even after the introduction of provision of section 45(4) unless any asset belonging to the firm is allotted to the retiring partner. See ***CIT v. Dynamic Enterprises (2013) 359 ITR 83 (Karn) (HC) (FB), PCIT v. Electroplast Engineers (2019) 263 Taxman 120 (Bom) (HC).***

> *"There is nothing that wastes the body like worry, and one who has any faith in God should be ashamed to worry about anything whatsoever."*
>
> \- Mahatma Gandhi

40

S. 45: Capital gains – Goodwill — Initially generated goodwill — cannot be regarded as 'Asset' – Transfer does not give rise to capital gains tax [S. 2(14), 2(47), 48, 49, 50, 55]

Facts

The assessee-firm's instrument of partnership showed that its goodwill had not been valued and that the same would be made on its dissolution. Subsequently, it was dissolved by a deed dated 31.12.1965 and its goodwill was valued at Rs. 1,50,000. A new partnership by the same name was constituted under an instrument dated 2.12.1965 and it took over all the assets, including the goodwill, and liabilities of the dissolved firm. The Revenue sought to tax the sale of goodwill as capital gains in the hands of the dissolved firm. The Tribunal held that the impugned sale of the goodwill did not attract tax on capital gain under section 45. The High Court, on reference under section 256(1), sustained the Tribunal's order.

Issue

Whether the transfer of goodwill to the newly constituted firm gave rise to capital gains under section 45 in the hands of transferor firm?

View

Goodwill denotes the benefit arising from connection and reputation. Its value may fluctuate from one moment to another depending on changes in the reputation of the business. It is affected by everything relating to the business, the personality and business rectitude of the owners, the nature and character of the business, its name and reputation, its location, its impact on the contemporary market, the prevailing socio-economic ecology, introduction to old customers and agreed absence of competition. There can be no account in value of the factors producing it. It is also impossible to predicate the moment of its birth. No business commenced for the first time possesses goodwill from the start. It is generated as the business is carried on and may be augmented with the passage of time.

The asset must be one which falls within the contemplation of section 45. It must bear that quality which brings section 45 into play. All transactions encompassed by section 45 must fall under the governance of its computation provisions. A transaction to which those provisions cannot be applied must be regarded as never intended by section 45 to be the subject of the charge. Thus, inference flows from the general arrangement of the provisions in the Act in which the charging section and the computation provisions together constitute an integrated code. Ordinarily, the operation of the charging provision cannot be affected by the construction of a particular computation provision. But the question here is whether it is possible to apply the computation provision at all if a certain interpretation is pressed on the charging provision.

Held

The Supreme Court held:

(i) The charging section and the computation provisions together constitute an integrated code. When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section.

(ii) All transactions encompassed by s. 45 must fall under the governance of its computation provisions. A transaction to which those provisions cannot be applied must be regarded as never intended by section 45 to be the subject of the charge. What is contemplated by section 48(ii) is an asset in the acquisition of which it is possible to envisage a cost: it must be an asset which possesses the inherent quality of being available on the expenditure of money to a person seeking to acquire it. None of the provisions pertaining to the head "Capital gains" suggests that they include an asset in the acquisition of which no cost at all can be conceived. When goodwill generated in a new business is sold and the consideration brought to tax, what is charged is the capital value of the asset and not any profit or gain. Further, the date of acquisition of the asset is a material factor in applying the computation provisions pertaining to capital gain; but in the case of goodwill generated in a new business it is not possible to determine the date when it comes into existence. Having regard to the nature of goodwill, it will be impossible to determine its cost of acquisition.

(iii) Therefore, 'goodwill' generated in a newly commenced business cannot be described as an "asset" within the terms of section 45 and the transfer of goodwill initially generated in a business does not give rise to a capital gain for the purposes of income-tax. (AY. 1966-67) (dt. 18-2-1981)

CIT v. B. C. Srinivasa Setty (1981) 128 ITR 294/5 Taxman 1/21 CTR 138 (SC)

Editorial: Amendment in section 55(2) overturned this decision and the position now is that cost of acquisition of self generated goodwill of a business or profession is to be taken as nil. However, as per the ratio: once computation provisions cannot be applied, the charge must fail, is unaffected by the amendment.

It is also well settled that in a case where the charge is certain, the machinery/ computational provisions have to be read in a manner so as to avoid defeating the levy of tax. In the above case, the self generated goodwill was held to be not an 'asset' and therefore, not envisaged to be taxed under section 45. Refer ***A. R. Krishnamurthy v. CIT (1989) 176 ITR 417 (SC),*** which distinguished the above case.

> *"A person who is worried about the outcome of his work does not see his goal; he sees only his opposition and the obstacles before him."*
>
> \- Mahatma Gandhi

41

S. 45: Capital gains- Income from other Sources - A receipt that is capital in nature cannot be assessed under the head income from other source- Tenancy right is a capital asset the surrender of which would attract capital gains - Amount is not taxable under capital gains as cost of acquisition of tenancy right is indeterminate [S. 10(3), 14, 48, 56]

Facts

The assessment year in question is 1987-88. The lease agreement was entered in 1959 for 50 years under which an annual rent was paid by the lessee/assessee to the lessor. The lease would have continued till 2009. During the relevant previous year, in March 1986, the assessee surrendered its tenancy right to its lessor prematurely. In consideration for such premature termination, the lessor paid the assessee/lessee a sum of Rs.35 lakhs. In the assessee's return the sum of Rs.35 lakhs had been credited to its reserve and surplus account. This was disallowed by the Assessing Officer who held that the amount of Rs.35 lakhs was taxable as "income from other sources" under Section 10(3) read with Section 56 of the 'Act'. The assessee appealed to the Commissioner of Income Tax (Appeals) who came to the conclusion that the assessee was liable to pay capital gains on the amount of Rs.35 lakh after deducting an amount of Rs.7 lakhs as the cost of acquisition. The Commissioner had determined the cost of acquisition at Rs.7 lakhs on the basis of the market value of the property as on 1.4.1974. Both the Department and the assessee challenged the decision of the Commissioner before the Tribunal. The Tribunal relied upon the decision of this Court in ***CIT v. Srinivasa Setty (1981) 128 ITR 294/(1981) 2 SCC 460*** as well as the amendment to Section 55(2) of the Act in 1995 and held that the assessee did not incur any cost to acquire the leasehold rights and that if at all any cost had been incurred it was incapable of being ascertained. It was therefore held that since the capital gains could not be computed as envisaged in Section 48 of the'Act', therefore capital gains earned by the assessee if any was not exigible to tax. The Department preferred an appeal before the High Court. The High Court dismissed the appeal. Being aggrieved by the decision of the High Court, this further appeal has been preferred by the Department.

Issue

The primary question involved in this appeal is whether the amount received by the respondent-assessee on surrender of tenancy rights is liable to capital gains tax under Section 45 of the Income tax Act, 1961.

Views

In 1981 the Court in ***CIT v. B. C. Srinivasa Setty (1981) 128 ITR 294/(1981) 2 SCC 460*** held that the transactions encompassed by Section 45 must fall within the computation provisions of Section 48. If the computation as provided under Section 48 could not be applied to a particular transaction, it must be regarded as "never intended by Section 45 to be the subject of the charge". In that case, the Court was considering whether a firm was liable to pay capital gains on the sale of its goodwill to another firm. The Court found that the consideration received for the sale of goodwill could not be subjected to capital gains because the cost of its acquisition was inherently incapable of being determined. Pathak J. as his Lordship then was, speaking for the Court said:

> *"What is contemplated is an asset in the acquisition of which it is possible to envisage a cost. The intent goes to the nature and character of the asset, that it is an asset which possesses the inherent quality of being available on the expenditure of money to a person seeking to acquire it. It is immaterial that although the asset belongs to such a class it may, on the facts of certain case, be acquired without the payment of money."*

Held

Dismissing the revenue's appeal, the court held that, the tenancy rights is a capital asset, the surrender of the tenancy rights is a "transfer" and the consideration received therefore is a capital receipt within the meaning of Section 45 has not been questioned before us and must in any event be taken to be concluded by the decision of this Court in ***A. Gasper v. CIT (1991) 192 ITR 382 (SC).*** Normally the consideration would therefore be subjected to capital gains under Section 45. Futher court held that, an asset which is capable of acquisition at a cost would be included within the provisions pertaining to the head 'capital gains' as opposed to assets in the acquisition of which no cost at all can be conceived. Then the court considered the Circular issued by the Central Board of Direct Taxes Circular No.684 dated 10th June 1994 wherefrom it was observed by the court that, to meet the situation created by the decision in Srinivasa Setty and the subsequent decisions of the High Court that the Finance Act 1994 amended Section 55(2) to provide that the cost of acquisition of *inter alia* a tenancy right would be taken as nil. By this amendment, the judicial interpretation put on capital assets for the purposes of the provisions relating to capital gains was met. In other words the cost of acquisition would be taken as determinable but the rate would be nil. Further the court considered the aspect of effective period of stated amendment by Finance Act, 1994 to which court noted that, amendment took effect from 1st April, 1995 and accordingly applied in relation to the assessment year 1995-96 and subsequent years. But till that amendment in 1995 therefore covering the Assessment Year in question, the law as perceived by the Department was that if the cost of acquisition of a capital asset could not in fact be determined, the transfer of such capital asset would not attract capital gains. Next the court considered the aspect of possibility of taxability under any other provision like section 56 of the Act, to which it held that, once applicable Section 45 cannot be applied, it is not open to the Department to impose tax on such capital receipt by the assessee under any other Section. That is after considering various heads of taxation specified under section 14 of the 'Act', it held that, if the income is included under any one of the heads, it cannot be brought to tax under the residuary provisions of Section 56. In other words it held that, it would be illogical and against the language of Section 56 to hold that everything that is exempted from capital gains by statute could be taxed as a casual or non recurring receipt under Section 10(3) read with Section 56 of the 'Act'. (AY. 1987-88) (CA No. 2335 of 2003 dt. 31-1-2005)

CIT v. D. P. Sandhu Bros. Chembur (P.) Ltd. (2005) 273 ITR 1/142 Taxman 713/193 CTR 578/185 Taxation 471 (SC)

Editorial : Cadell Weaving Mill Co. (P) Ltd. v. CIT (2001) 249 ITR 670 (Bom.) approved. Decision of Special Bench in ***Cadel Wvg. Mills Co Pvt Ltd v. ACIT (1995) 55 ITD 137/(1996) 217 ITR 51 (SB)(Mum) (Trib.)*** was reversed.

Above decision has been applied by Delhi high court in ***Girish Bansal v. UOI (2016) 384 ITR 161 (Delhi) (HC)*** in context of non taxable capital receipt argument of assessee for amount received on account of cancellation of sale certificate/deed which was accepted and it was held that said amount can not be taxed as casual and non recurring receipt under section 10(3) read with section 56 of the 'Act'. Bombay High Court in the case of ***CIT v. Sambhaji Nagar Co-op. Hsg. Society Ltd [2015] 370 ITR 325 (Bom) (HC)*** held that the asset i.e. Floor Space Index (FSI)/Transferable Development Rights (TDR). is generated by change in the development control regulations. A specific insertion would therefore be necessary so as to ascertain its cost for computing the capital gains. The Court, referring to the decision of the Apex Court in ***CIT v. D. P. Sandu Bros Chembur P Ltd [2005] 273 ITR I (SC),*** held that all which is capable of acquisition at a cost would be included within the provisions pertaining to the head capital gains as opposed to assets in the acquisition of which no cost at all can be conceived. Thus, the Bombay High Court held that since the cost of acquisition of the rights being transferred cannot be determined, the amount is not liable to capital gains tax. To the same effect is Mumbai bench ITAT decision in case of Anil Gulab Shah in ITA 5134/Mum/2017 order dated 09/08/2019 held that "there could not be any transfer of a "right to sue" under Indian Law and any capital receipt arising from a right to sue cannot thus be considered capital gains under Section 45. Additionally, the cost of the said right being indeterminable, the charging Section would fail as per the cited decision of Hon'ble Supreme Court rendered in ***CIT v. B. C. Srinivasa Shetty [supra].*** Therefore, no infirmity could be found on the issue in adjudication done by learned CIT(A). The same is further fortified by the decision of this Tribunal rendered in ***Sushmita Sen v. ACIT [2019] 174 ITD 8 (Mum) (Trib)*** wherein it has been held that compensation received for loss of reputation and not to initiate civil or criminal proceedings would be capital in nature. Similar is the decision in ***ACIT v. Jackie Shroff [2018] 172 ITD 425 (Mum) (Trib)*** wherein it has been held that compensation/damages received for withdrawal of criminal complaint would be capital receipt and could not be treated as income u/s 2(24). This decision places reliance on the decision of Hon’ble Bombay High Court rendered in ***CIT v. Amar Dye Chem Ltd. (1994)74 Taxman 254 (Bom) (HC)***

> *“Earth provides enough to satisfy every man’s needs, but not every man’s greed.”*
>
> \- Mahatma Gandhi

42

S. 45(5) : Capital gains – Compulsory acquisition of land – Accrual – Enhanced compensation – Interest – Taxable in the year of receipt and not to be spread over – Individual v. Association of Persons [S. 2(31), Land Acquisition Act, 1894, S. 28]

Facts

The assessees, three brothers, inherited agricultural land from their father. This land was acquired by the Government and compensation was awarded to the assessees. During the relevant previous year, compensation was enhanced along with interest in terms of section 28 of the Land Acquisition Act, 1894. The assessees filed their return of income claiming the status of 'individual'. The ITO passed the assessment order by treating the status of the assessees as that of a 'AOP' and also refused to spread the interest income over the years and treated it as taxable in the year of receipt. The Commissioner and Tribunal confirmed the assessment order. The High Court treated assessees were to be assessed as 'individuals' and not as an AOP. It further held that the interest was to be spread over from the year of dispossession of land till the year of actual payment.

Issue

(i) Whether the assessees were to be assessed as 'individuals' or as an 'AOP'?, and

(ii) Whether the interest has to be taxed in year of receipt and not to be spread over years on accrual basis?

View

(i) In ***Meera & Co. v. CIT [1997] 4 SCC 677,*** the Supreme Court laid down the basic test to determine a 'AOP': an association formed by volition of the parties for the purpose of generation of income. In this case, the subject property acquired by the Government, came to the assessees on inheritance from their father, i.e., by operation of law. Even the income which was earned in the form of interest was not because of any business venture of the three assessees but the result of the act of the Government in compulsorily acquiring the land.

(ii) In ***CIT v. Ghanshyam (HUF) [2009] 8 SCC 412,*** Interest earned under section 28 of the Land Acquisition Act, which is on enhanced compensation, is treated as a accretion to the value and therefore, part of the enhanced compensation/consideration, making it exigible to tax under section 45. In that case, the Court also held the said interest would be taxed in the year in which it is received.

Held

(i) Following the earlier decision in Meera & Co., the Supreme Court held that since, in assessee's case, it was not a case where any 'Association of persons' was formed by volition of parties for purpose of generation of income, these persons were to be given status of 'individual' and assessed accordingly and not as AOP.

(ii) Following its earlier decision in Ghanshyam (HUF), the Supreme Court held that the interest received under section 28 of the Land Acquisition Act, 1894, on the enhanced income was to be taxed in the year in which such interest on the enhanced compensation was received and was not to be spread over the period in question. (AY. 1987-88) (CA Nos. 8103 to 8110 of 2009 dt. 4-9-2014)

CIT v. Govindbhai Mamaiya (2014) 367 ITR 498/109 DTR 65/271 CTR 31/ (2015) 229 Taxman 138 (SC)

Editorial: Judgment of Gujarat High Court in ITA No. 8103 of 2009 dt. 16.11.2006 was partly affirmed and partly reversed.

Also see ***Movaliya Bhikhubhai Balabhai v. ITO [2016] 388 ITR 343 (Guj)(HC)***

> *"Truth resides in every human heart, and one has to search for it there, and to be guided by truth as one sees it. But no one has a right to coerce others to act according to his own view of truth."*
>
> \- Mahatma Gandhi

43

S. 50: Capital gains–Slump sale- Deemed" short term capital gains -Undertaking is sold as a running business with all assets and liabilities for a slump price, no part of the consideration can be attributed to depreciable assets-If the undertaking is held for more than three years, it constitutes a "long-term capital asset" and the gains are assessable as a long-term capital gain- Sale of entire business as running concern which qualifies to be long term capital asset is different from sale of one or more block of assets used in business as such. Assessee's treatment of offering the gains as long term capital gains with consequential benefits under section 48(2) upheld [S. 45, 48, 50(2), 50B]

Facts

The assessee was engaged in the business of manufacturing sheet metal components out of CRPA & OP sheds at Ahmedabad. It decided to sell their entire running business in one go. With this aim in view, it sold their entire running business in one go with all its assets and liabilities on 31.12.1990 to a Company called "Amtrex Appliances Ltd" for Rs.58,53,682. The assessee filed its income tax return for the Assessment Year 1991-1992. In the return, the assessee claimed deduction under Section 48(2) of the Act as it stood then by treating the sale to be in the nature of "slump sale" of the going concern being in the nature of long term capital gain in the hands of the assessee. The 'AO' by his order dated 04.03.1994 did not accept the contention of the assessee in claiming deduction. According to the 'AO', the case of the assessee was covered under Section 50(2) of the Act because it was in the nature of short term capital gain as specified in Section 50(2) of the Act and hence did not fall under Section 48(2) of the Act as claimed by the assessee. The 'AO' accordingly reworked the claim of the deduction treating the same to be falling under Section 50(2) of the Act and framed the assessment order. The assessee, felt aggrieved, filed appeal before the CIT (appeals). By order dated 06.10.1995, the Commissioner (Appeals) allowed the assessee's appeal in so far as it related to the issue of deduction. He held that when it is an undisputed fact that the assessee has sold their entire running business in one go with its assets and liabilities at a slump price and, therefore, the provisions of Section 50(2) of the Act could not be applied to such sale. He held that it was not a case of sale of any individual or one block asset which may attract the provisions of Section 50(2) of the Act. He then examined the case of the assessee in the context of definition of "long term capital gain" and "short term capital asset" and held that since the undertaking itself is a capital asset owned by the assessee nearly for six years and being in the nature of long term capital asset and the same having been sold in one go as a running concerned, it cannot be termed a "short terms capital gain" so as to attract the provisions of Section 50(2) of the Act as was held by the Assessing Officer. The CIT (appeals) accordingly allowed the assessee to claim the deduction as was claimed by them before the Assessing Officer. The Revenue, felt aggrieved of the order of the CIT (appeal), filed appeal before the Income Tax Appellate Tribunal. By order dated 27.06.2002, the Tribunal concurred with the reasoning and the conclusion arrived at by the Commissioner of Appeal and accordingly dismissed the Revenue's appeal. The Revenue, felt aggrieved of the order of the Tribunal, carried the matter to the High Court in further appeal under Section 260-A of the Act. By impugned order, the High Court dismissed the appeal holding that the appeal does not involve any substantial question of law within the meaning of Section 260-A of the Act. It is against this order the Revenue felt aggrieved and carried the matter to this Court in appeal by way of special leave.

Issue

Whether provisions of section 50(2), deemed short term capital gains can apply to case where assessee sold entire business as going concern in one go and which sale otherwise qualifies as long term capital asset under the Act and resultantly gives rise to 'LTCG' which is thus entitled to be computed with special benefits under then section 48(2) of the Act available to 'LTCG'?

Premier Automobiles Ltd v. ITO (2003) 264 ITR 193 (Bom) (HC), the Division Bench of the Bombay High Court examined the extant question in detail on somewhat similar facts and has taken the same view. The Learned Judge S. H Kapadia - (as His Lordship then was) speaking for the Bench aptly explained the legal position to which the court in present case has expressed its respectful concurrence as it approved the said Bombay high court view as correctly summarizing the legal position applicable to such facts. Further court took specific note of its earlier decision in case of ***CIT v. Artex Manufacturing Co. 1997(6) SCC 437*** which it observed supports the view taken in extant case.

Held

Dismissing the appeal of revenue, the court held that the case of the assessee does not fall within the four corners of Section 50(2) of the Act. Section 50(2) applies to a case where any block of assets are transferred by the assessee and not where the entire running business with assets and liabilities is sold by the assessee in one go.. In simple words, it is held that the provisions of Section 50(2) of the Act would apply to a case where the assessee transfers one or more block of assets, which he was using in running of his business. Such is not the case here because in this case, the assessee sold the entire business as a running concern and so court finally gave its imprimatur to the reasoning in the impugned orders of the

CIT (appeal), Tribunal and High Court and upheld the treatment given by assessee under section 48(2) of the 'Act'. (AY. 1991-92) (CA No. 4399 of 2007 dt. 18-4-2017)

CIT v. Equinox Solution Pvt Ltd (2017) 393 ITR 566/247 Taxman 89/294 CTR 1/150 DTR 137(SC)

Editorial : Provisions of section 48(2) applicable upto Assessment Year 1992-1993 are no longer in statute as such after detailed amendments made by Finance Act 1992 with effect from Assessment Year 1993-1994 as explained by CBDT in its circular no. 636 dated 31.08.1992 and also to slump sale special provisions are inserted in section 50B of the Act by Finance Act 1999 with effect from assessment year 2000-2001 as explained by CBDT in its circular no. 779 dt. 14.09.1999 (1999) 240 ITR 3 (St)

> *"Man should forget his anger*
> *before he lies down to sleep."*
>
> - Mahatma Gandhi

44

S. 50: Capital gains-Depreciable assets-Capital asset in respect of which depreciation has been obtained, option of substituting fair market value on prescribed date is not available to such a person - Assessee has enjoyed depreciation allowance,therefore his cost of acquisition shall have to be determined as provided in section 50 [S. 32, 41(2), 43(6), 45, 48, 49, 55(2(i)]

Facts

The assessment year is 1971-72, the accounting year being 1970-71. The assessee, a limited company, was possessed of considerable properties at Calicut and Mangalore. It owned these properties right from 1920 onwards. The assessee had claimed depreciation for its factory buildings which had been allowed in the previous years. During the period relevant to the assessment year 1971-72 the assessee sold some of these properties on which it had already claimed depreciation. The Calicut Weaving Factory was sold for Rs. 20,000, its original value being Rs. 10,000. The assessee had incurred an additional expenditure of Rs. 979 on this property. As noted above, depreciation had been allowed on the value of the property in the earlier years. In computing the capital gains the assessee showed a capital loss of Rs. 78 on the sale of this property. This the assessee did on revaluing the property as on 1st January, 1954. The assessee sold its Mangalore buildings for Rs. 2,25,000. Its original cost as adjusted came to Rs. 76,680. In respect of these buildings also depreciation had been claimed and allowed in the previous years. Here again the assessee revalued the buildings as on 1st January, 1954 and on that basis showed the capital gains at Rs. 44,713. The stand taken by the assessee was that it had the option under section 55(2)(i) of the Act either to adopt the written down value of the building or the value of the building as on 01.01.1954 and it had chosen the latter. The Income tax Officer (ITO), however, took the view that the assessee did not have the right to substitute the value as on 01.01.1954 because the assets were depreciable assets to which section 50(1) applied which was a special provision in respect of depreciable assets and the provision as contained in section 55(2)(i) allowing option which was a general provision was not applicable in the case of depreciable assets. The ITO, therefore, substituted the original value and arrived at a capital gain of Rs. 9021 in the case of Calicut property and Rs. 1,46,320 in the case of Mangalore buildings. On appeal filed by the assessee the Appellate Assistant Commissioner (AAC) agreed with the ITO. He was also of the view that the assessee did not have the right to substitute the value as on 01.01.1954 in respect of depreciable assets. The assessee then went to the Tribunal and the Tribunal dismissed the appeal but at the instance of the assessee referred the aforesaid second question for the decision of the High Court. The High Court agreed with the view of the Tribunal and decided the question in the affirmative, in favour of the Revenue and against the assessee. ***CIT v. Commonwealth Trust Ltd (1982) 135 ITR 19 (Ker) (HC) (FB)***. On certificate granted by the High Court under section 261 of the Act this appeal has come before us.

Issue

Whether an assessee who has acquired capital asset before 01.01.1954 otherwise than by any of the modes mentioned in s. 49 and sold it after 01.01.1954, on which it had already claimed and allowed depreciation under section 32 of the 'Act', is also entitled to have the quantum of taxable capital gains computed in the manner provided by cl. (i) of sub-s. (2) of s. 55 of the Act ? (That is, whether an assessee in such case, has the right under section 55(2)(i) of the 'Act' to adopt the written down value ('WDV') of the building or the value of the building as on 1st January, 1954?)

Views

While the Revenue gets support from the decisions of the High Courts of Gujarat, Allahabad and Calcutta for upholding the impugned judgment, the assessee gets support from the decision of the Bombay High Court. Gujarat, Allahabad and Calcutta decisions are reported respectively in ***Rajnagar Vaktapur Ginning, Pressing & Mfg. Co. Ltd. v. CIT (1975) 99 ITR 264 (Guj) (HC) CIT v. Upper Doab Sugar Mills (1979) 116 ITR 240 (All)(HC)*** and ***India Jute Co. Ltd. v. CIT (1982) 136 ITR 597 (Cal)(HC),*** Bombay decision is reported in ***Goculdas Dossa & Co. & Ors. v. J. P. Shah & Ors. (1995) 211 ITR 706 (FB) (Bom) (HC).***

Held

Dismissing the assessee's appeal, the court held that, Section 55(2) would be applicable to all assets depreciable or non-depreciable for the purposes of arriving at the cost of acquisition under sections 48 and 49 but section 50 carves out a category of those capital assets which had been subjected to grant of depreciation allowance and this section 50 therefore provides a special method for determining the cost of acquisition in such cases. Further it noted that, for sections 48 and 49 the provision of section 55(2) would apply as modified by those of section 50. It is further held that, for the purposes of applying section 55(2), sections 48 and 49 will have to be applied as modified by section 50. Finally the court inferred after analyzing and studying the anatomy of these provisions that, where the capital asset purchased by the assessee is a depreciable or non-depreciable asset, the assessee will have the option for substituting for its actual cost of acquisition its fair market value as on 01.01.1954 but where it is a depreciable asset and the assessee has enjoyed depreciation allowance, his cost of acquisition shall have to be determined as provided in section 50. Section. 50 is in absolute terms specially providing for fixing the cost of acquisition in the case of depreciable asset only. Ergo, it was summed up that section 50(1) has no dependence on the provisions of section 55(2). There is no mention of "fair market value" in section 50(1) and besides that the adjustments stated there are with reference to the written down value only which has nothing to do with the fair market value. So the court held that, where the capital asset is depreciable and the assessee has availed of deduction on account of depreciation the cost of acquisition shall have to be determined in terms of the provisions of s. 50 read with section 48. So the court gave its imprimatur to views of the Gujarat, Allahabad, Calcutta High Courts and of the Kerala High Court in the impugned judgment and disapproved the views of Bombay High court. (AY. 1971-1972) (C.A Nos.2978/82, C.A. Nos. 2979/82 dt. 30-7-1997)

Commonwealth Trust Ltd. v. CIT (1997) 228 ITR 1/142 CTR 214/94 taxman 137 (SC)

Editorial : Decision in ***CIT v. Commonwealth Trust Ltd. [1982] 135 ITR 19 [FB] (Ker) (HC)*** is affirmed. Interestingly the court in above decision, took special cognizance of subsequent amendment made in the Act and succinctly observed in this regard that, since the relevant provisions have been amended w.e.f. 1st April, 1988, the controversy like the one raised in the present proceedings does no longer survive which stands explained in CBDT circular number 469 dated 23.09.1986 where concept of block of assets was introduced (carrying same rate of depreciation), which has been hitherto referred by Delhi High Court in its decision in case of ***CIT v. Oswal Agro Mills Limited, (2012) 341 ITR 467 (Delhi)(HC) and CIT. v. Ansal Properties and Infrastructure Limited (2012) 207 Taxman 61 (Delhi) (HC)***

> *"It's not too late at all. You just don't yet know what you are capable*
>
> \- Mahatma Gandhi

45

S. 52(2): Consideration for transfer of cases of under statement - Additions cannot be made on presumptions - Capital gains - Where the consideration for the transfer is under-stated or in other words, the assessee has actually received a larger consideration for the transfer than what is declared in the instrument of transfer and it would have no application in case of a *bona fide* transaction where the full value of the consideration for the transfer is correctly declared by the assessee - Burden is on revenue to prove that under consideration is received by the assessee - Task of interpretation of a statutory enactment is not a mechanical task and it is more than a mere reading of mathematical formulae where the plain literal interpretation of a statutory provision produces a manifestly absurd and unjust result which could never have been intended by the legislature, the court may modify the language used by the legislature or even 'do some violence' to it, so as to achieve the obvious intention of the legislature and produce a rational construction [S. 45]

Facts

Assessee who purchased a house situated in Ernakulam in 1958 for Rs. 16,500 sold the same on 25.12.1965, (falling assessment year 1966-1967), to his daughter in law and five of his children. On this assessment was first completed in normal course accepting the case of assesse that no capital gains accrue on subject property sale transaction since the house was sold by the assessee at the same price at which it was purchased and no capital gains accrued or arose to him as a result of the transfer. Later on, on 04.04.1968, Assessing Officer ('AO') issued notice under section 148 of the Act seeking to reopen the assessment of assessee for subject assessment year. *Vide* letter dated 4th March 1969 the 'AO' intimated to the assessee that he proposed to fix the fair market value of the house sold by the assessee on 25.12.1965 at Rs. 65,000 as against the consideration of Rs. 16,500 for which the house was sold and assess the difference of Rs. 48,500 as capital gains in the hands of the assessee. The assessee raised objections against the reassessment proposed to be made by the Income-tax officer but the objections were over-ruled and an order of reassessment was passed by the Income-tax officer including the sum of Rs. 48,500 as capital gains and bringing it to tax. Though the sale of the house by the assessee was in favour of his daughter-in-law and five of his children who were persons directly connected with him, the

'AO' could not invoke the aid of section 52 sub-section (1) for bringing the sum of Rs. 48,500 to tax, because there was admittedly no under- statement of consideration in respect of the transfer of the house and it was not possible to say that the transfer was effected by the assessee with the object of avoidance or reduction of his liability under section 45. The 'AO' therefore rested his decision to assess the sum of Rs. 48,500 to tax on sub-section (2) of section 52 and taking the view that this sub-section did not require as a condition precedent that there should be under-statement of consideration in respect of the transfer and it was enough to attract the applicability of the sub-section if the fair market value of the property as on the date of the transfer exceeded the full value of the consideration declared by the assessee by an amount of not less than 15% of the value so declared, which was indisputably the position in the present case, the 'AO' assessed the sum of Rs. 48,500 to tax as capital gains. Now assessee filed writ petition before Kerala High court (single Judge court) where stand of assessee that under-statement of consideration in respect of the transfer was a necessary condition for attracting the applicability of section 52 sub-section (2) and since in the present case there was admittedly no under-statement of consideration and it was a perfectly *bonafide* transaction, section 52 sub-section (2) had no application and the sum of Rs. 48,500 could not be brought to tax as capital gains under that provision was given imprimatur by Single Judge of Kerala high court and re-assessment was resultantly quashed. Now it was revenue turn to file intra court appeal against this order of Single Judge of Kerala high court in Division bench where on the issue was referred for consideration of full bench given the importance and complexity of the question involved. In full bench decision, the majority opinion of two judges favored the revenue side as it held that in order to bring a case within section 52 sub-section (2), it is not at all necessary that there should be under-statement of consideration in respect of the transfer and once it is found that the fair market value of the property as on the date of the transfer exceeds the full value of the consideration declared by the assessee in respect of the transfer by an amount of not less than 15% of the value so declared, section 52 sub-section (2) is straightaway attracted and the fair market value of the property as on the date of the transfer is liable to be taken as the full value of the consideration for the transfer. The writ petition was accordingly dismissed and the order of re-assessment sustained by the majority decision (while one opinion by Raghvan C.J. agreed substantially with the view taken by single judge).Hence the present appeal by the assessee before the apex court.

Issue

The principal question that arises for determination in this appeal by certificate is whether understatement of consideration in a transfer of property is a necessary condition for attracting the applicability of section 52 sub-section (2) of the Income Tax Act 1961 (hereinafter referred as the Act) or it is enough for the Revenue to show that the fair market value of the property as on the date of the transfer exceeds the full value of the consideration declared by the assessee in respect of the transfer by an amount of not less than 15% of the value so declared

Views

The Court significantly observed at the outset that *"The task of interpretation of a statutory enactment is not a mechanical task. It is more than a mere reading of mathematical formulae because few words possess the precision of mathematical symbols. It is an attempt to discover the intent of the legislature from the language used by it and it must always be remembered that language is at best an imperfect instrument for the expression of human thought and as pointed out by Lord Denning, it would be idle to expect every statutory provision to be "drafted with divine prescience and perfect clarity." We can do no better than repeat the famous words of Judge Learned Hand when he said: " it is true that the words used, even in their literal sense, are the primary and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." We must not adopt a strictly literal interpretation of section 52 sub-section (2) but we must construe its language having regard to the object and purpose which the legislature had in view in enacting that provision and in the context of the setting in which it occurs. We cannot ignore the context and the collocation of the provisions in which section 52 sub-section (2) appears, because, as pointed out by Judge Learned Hand in most I felicitous language the meaning of a sentence may be more than that of the separate words as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create". Keeping these observations in mind we may now approach the construction of section 52 sub-section (2)."*

Held

Allowing the appeal of assessee and quashing reassessment order, the court held that, Firstly it was held that *"We must therefore eschew literalness in the interpretation of section 52 sub-section (2) and try to arrive at an interpretation which avoids this absurdity and mischief and makes the provision rational and sensible, unless of course, our hands are tied and we cannot find any escape from the tyranny of the literal interpretation. It is now a well settled rule of construction that where the plain literal interpretation of a statutory provision produces a manifestly absurd and unjust result which could never have been intended by the legislature, the court may modify the language used by the legislature or even 'do some violence' to it, so as to achieve the obvious intention of the legislature and produce a rational construction"*. Secondly, that, having regard to this well recognised rule of interpretation, a fair and reasonable construction of section 52 sub-section (2) would be to read into it a condition that it would apply only where the consideration for the transfer is under-stated or in other words, the assessee has actually received a larger consideration for the transfer than what is declared in the instrument of transfer and it would have no application in case of a *bonafide* transaction where the full value of the consideration for the transfer is correctly declared by the assessee. Thirdly, it held that there may be cases where the consideration for the transfer is shown at a lesser figure than that actually received by the assessee but the transferee is not a person directly or indirectly connected with the assessee or the object of under-statement of the consideration is unconnected with tax on capital gains, Such cases would not be within the reach of sub section (1) and the assessee, though dishonest, would escape the rigour of the provision enacted in that sub-section. Parliament therefore enacted sub-section (2) with a view to extending the coverage of the provision in sub-section (I) to other cases of under statement of consideration. This becomes clear if one gives regard to the object and purpose of the introduction of sub-section (2) as appearing from *travaux preparatoire* relating to the enactment of that provision. It is a sound rule of construction of a statute firmly established in England as far back as 1584 when Heydon's case was decided that"... *for the sure and true interpretation of all statutes in general-four things are to be discerned and considered: (1) What was the common law before the making of the Act, (2) What was the mischief and defect for which the common law did not provide, (3) What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth, and (4) The true reason of the remedy, and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy"*. Fourthly, it held that,the speech made by the Mover of the Bill explaining the reason for the introduction of the Bill can certainly be referred to for the purpose of ascertaining the mischief sought to be remedied by the legislation and the object and purpose for which the legislation is enacted. This is in accord with the recent trend in juristic thought not only in Western countries but also in India that interpretation of a statute being an exercise in the ascertainment of meaning, everything which is logically relevant should be admissible. Fifthly, it held that, The object and purpose of sub-section (2), as explicated from the speech of the Finance Minister, was not to strike at honest and *bonafide* transactions where the consideration for the transfer was correctly disclosed by the assessee but to bring within the net of taxation those transactions where the consideration in respect of the transfer was shown at a lesser figure than that actually received by the assessee, so that they do not escape the charge of tax on capital gains by under-statement of the consideration. This was real object and purpose of the enactment of sub-section (2) and the interpretation of this sub-section must fall in line with the advancement of that object and purpose. So it was held that it accepts as the underlying assumption of sub-section (2) that there is under-statement of consideration in respect of the transfer and sub-section (2) applies only where the actual consideration received by the assessee is not disclosed and the consideration declared in respect of the transfer is shown at a lesser figure than that actually received. Sixthly, it held that, its interpretation of sub-section (2) of section 52 is strongly supported by the marginal note to section 52 which reads 'Consideration for transfer in cases of under-statement' to which the court noted that "It is undoubtedly true that the marginal note to a section cannot be referred to for the purpose of construing the section but it can certainly be relied upon as indicating the drift of the section or, to use the words of Collins MR in Bushel v. Hammond to show what the section is dealing with." Seventhly, the court held that the placement of subsection (2) in section 52 does indicate in some small measure that Parliament intended that sub-section to apply only to cases where the consideration in respect of the transfer is under-stated by the assessee. As held by the court, it is not altogether without significance that the provision in sub- section (2) was enacted by Parliament not as a separate section, but as part of section 52 which, as it originally stood, dealt only with cases of under-statement of consideration. It was further explained that, If Parliament intended sub-section (2) to cover all cases where the condition of 15% difference is satisfied, irrespective of whether there is understatement of consideration or not, it is reasonable to assume that Parliament would have enacted that provision as a separate section and not pitch-forked it into section 52 with a total stranger under an inappropriate marginal note. Moreover there is inherent evidence in sub-section (2), which suggests that the thrust of that sub-section is directed against cases of under-statement of consideration. Eighthly, the court after noting that, soon after the introduction of sub-section (2), the Central Board of Direct Taxes, in exercise of the power conferred under section 119 of the Act, issued a circular dated 7th July, 1964 explaining the scope and object of sub-section (2) and another circular on 14th January, 194 whereby the Central Board, after reiterating the assurance given by the Finance Minister in the course of his speech pointed out and instructed the Income-tax officers that "while completing the assessments they should keep in mind the assurance given by the Minister of Finance and the provisions of section 52(2) of the Income-tax Act may not be invoked in cases of *bonafide* transactions", held that these two CBDT circulars are i) binding on the Tax Department in administering or executing the provision enacted in sub-section (2), but quite apart from their binding character, ii) they are clearly in the nature of *contemporanea expositio* furnishing legitimate aid in the construction of sub-section (2). Ninthly the court held that, the two circulars of the Central Board of Direct Taxes to which they have referred are legally binding on the Revenue and this binding character attaches to the two circulars even if they be found not in accordance with the correct interpretation of subsection (2) and they depart or deviate from such construction. Tenthly, the court held that, there are two distinct conditions which have to be satisfied before sub-section (2) of section 52 can be invoked by the Revenue and the burden of showing that these two conditions are satisfied rests on the Revenue. It is for the Revenue to show that each of these two conditions is satisfied and the Revenue cannot claim to have discharged this burden which lies upon it, by merely establishing that the fair market value of the capital asset as on the date of the transfer exceeds by 15% or more the full value of the consideration declared in respect of the transfer and the first condition is therefore satisfied. The court held that, The Revenue must go further and prove that the second condition is also satisfied. Merely by showing that the first condition is satisfied, the Revenue cannot ask the Court to presume that the second condition too is fulfilled, because even in a case where the first condition of 15% difference is satisfied, the transaction may be a perfectly honest and *bonafide* transaction and there may be no under-statement of the consideration. It was clearly held that, the fulfillment of the second condition has therefore to be established independently of the first condition and merely because the first condition is satisfied, no inference can necessarily follow that the second condition is also fulfilled. Each condition has got to be viewed and established independently before sub- section (2) can be invoked and the burden of doing so is clearly on the Revenue. Eleventhly, it was held that, to throw the burden of showing that there is no understatement of the consideration, on the assessee would be to cast an almost impossible burden upon him to establish the negative, namely, that he did not receive any consideration beyond that declared by him. Twelwethly, it held that,it may be noted that section 52 is not a charging section but is a computation section. It has to be read alongwith section 48 which provides the mode of computation and under which the starting point of computation is “the full value of the consideration received or accruing”. What in fact never accrued or was never received cannot be computed as capital gains under section 48. Therefore sub- section (2) cannot be construed as bringing within the computation of capital gains an amount which, by no stretch of imagination, can be said to have accrued to the assessee or been received by him and it must be confined to cases where the actual consideration received for the transfer is under-stated and since in such cases it is very difficult, if not impossible, to determine and prove the exact quantum of the suppressed consideration, sub-section (2) provides the statutory measure for determining the consideration actually received by the assessee and permits the Revenue to take the fair market value of the capital asset as the full value of the consideration received in respect of the transfer. Thirteenthly, it held that, if sub-section (2) is literally construed as applying even to cases where the full value of the consideration in respect of the transfer is correctly declared or disclosed by the assessee and there is no understatement of the consideration, it would result in an amount being taxed which has neither accrued to the assessee nor been received by him and which from no view point can be rationally considered as capital gains or any other type of income. It is a well settled rule of interpretation that the Court should as for as possible avoid that construction which attributes irrationality to the legislature. Besides, under Entry 82 in List I of the Seventh Schedule to the Constitution which deals with “Taxes on income” and under which the Income Tax Act, 1961 has been enacted, Parliament cannot “choose to tax as income as item which in no rational sense can be regarded as a citizens income or even receipt. Sub-section (2) would, therefore, on the construction of the Revenue, go outside the legislative power of Parliament. Fourteenthly, it held that, sub-section (2) of sec. 52 can be invoked only where the consideration for the transfer has been understated by the assessee or in other words, the consideration actually received by the assessee is more than what is declared or disclosed by him and the burden of proving such under-statement or concealment is on the Revenue. This burden may be discharged by the Revenue by establishing facts and circumstances from which a reasonable inference can be drawn that the assessee has not a correctly declared or disclosed the consideration received by him and there is understatement of concealment of the consideration in respect of the transfer. Sub-section (2) has no application in case of an honest and *bonafide* transaction where the consideration received by the assessee has been correctly declared or disclosed by him, and there is no concealment or suppression of the consideration. Finally accepting appeal of assessee it was concluded that, subsection (2) had no application to the present case and the Income-tax officer could have no reason to believe that any part of the income of the assessee had escaped assessment so as to justify the issue of a notice under section 148. The order of re-assessment made by the Income-tax officer pursuant to the notice issued under section 148 was accordingly without jurisdiction and the majority judges of the Full Bench were in error in refusing to quash it. (AY. 1966-67) (CA No. 412 of 1973 dt. 4-9-1981)

K. P. Varghese v. ITO (1981) 131 ITR 597/24 CTR 358/7 Taxman 13 (SC)

Editorial: Section is omitted by the Finance Act, 1987, w.e.f 1-4-1988. Followed in ***CIT v. Shivakami Co Pvt Ltd (1986) 159 ITR 71 (SC).***

No doubt K. P. Varghese has been a milestone verdict and a *locuss classicus* in income tax jurisprudence and it is still a good law even today in matters of interpretation of statutory taxation provisions like section 52(2) of the Act. Three recent Apex court decisions where K. P. Varghese in context of taxation statute is not only referred but heavily relied to flash the primary burden on revenue in context of *anti abuse* provisions inserted in the Act to address some tax avoidance etc are ***Sati Oil Udyog, (2015) 7 SCC 304/372 ITR 746 (SC), Rajasthan State Electricity Board v. Dy. CIT (2020) 424 ITR 704 (SC)*** and ***Southern Motors case of 18/01/2017 in CA Nos. 10955-10971 of 2016***, all these three decisions are towing the same line of thought as charted in K. P. Varghese case. Another landmark decision of Apex court which states in same tone is ***Ms Era v. Govt of NCT of Delhi (2017) 15 SCC 133.*** One may be definitely benefited by reading all these references in full detail. In present context of provisions of section 50C, 43CA and section 56 where in relation to immovable property (land/building) sale/purchase stamp value is prescribed as standard benchmark for purposes of taxation, subject to reference to Department Valuation Officer (DVO), K. P. Varghese case (supra) remain relevant specially where distress sales etc are made and revenue is not able to prove any “on money” case, there actual price might not be allowed to be interfered. Similar views can be found in

Mumbai bench ITAT recent decision in case of Mohd Yusuf Trust in ITA 2243/ Mum/2015 order dated 08.03.2019 (paragraph 12/15 discusses K. P. Varghese case). Likewise Mumbai bench of ITAT in recent case of Subodh Menon in ITA 676/ Mum/2015 order dated 07.12.2018 in paragraph 18 has relied on K. P. Varghese case in context of section 56(2)(vii) of the ‘Act’ where issue of shares was in issue and it was held that said provision does not apply to *bonafide* business transaction.)

> *“You yourself as much as anybody in the entire universe deserve your love and affection.”*
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> \- Mahatma Gandhi

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S. 64: Clubbing of income – Clubbing of the share of 'income' of wife and minor children – Income include loss- Loss can be clubbed and carried forward like income - Though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than in in-justice, then such construction should be preferred to the literal construction if strict literal construction leads to an absurd result i.e. result not intended to be subserved by the object of the legislation found out in the manner indicated before, and if another construction is possible apart from strict literal construction then that construction should be preferred to the strict literal construction- The scheme of the Act has to be considered in holistic manner which in this case is, to counteract, the effect of the transfer of assets so far as computation of income of the assessee is concerned [S. 70, 71, 72, Income-tax Act, 1922, S. 16(3), 24(2)]

Facts

The assessee is an individual. He was carrying on business in the relevant assessment years in purchase and sale of ground-nut oil and was also running an oil mill. He was also an abkari contractor. On 1st June, 1957, he had gifted away a part of the oil mill machinery, viz., a solvent extraction plant, to his wife and three minor children. A firm was constituted by the assessee's wife and another person to the profits of which the three minor sons of the assessee were also admitted. The mill premises as well as the remaining machinery of the assesses were leased out to this firm which carried on the business of the manufacture and sale of ground-nut oil. The assessee himself continued to carry on business in purchase and sale of ground-nut cake and oil on a small scale. The assessee also continued his business as abkari contractor. The assessee had incurred huge losses in his individual business in the earlier years which were being carried forward from year to year upto the assessment year 1958-59. The loss carried forward from the assessment year 1958-59 was Rs. 7,88,734. The assessee's profit from his own business for 1959-60 were Rs 14,324. The share income of the assessee's wife and minor children from the firm for the assessment year 1959-60 was Rs. 24,592. The said income was included in the computation of the total income of the assessee under Section 16(3) of the Act for the assessment year 1959-60. The assessee claimed set off of the loss carried forward from the assessment year 1958-59 against the profits of his own business as also the share income of his wife and minor children. The 'AO' rejected the claim for set off in so far as it related to the share income of his wife and minor children. Similar claims for set off were made in the assessment years 1960-61 and 1961-62 but were rejected. On appeals preferred by the assessee, the Appellate Assistant Commissioner allowed the set off claimed on the ground that the assessee himself is deemed to be carrying on the business from which the share income was derived by his wife and minor children. The revenue appealed to the Income Tax Appellate Tribunal, Hyderabad Bench. The Tribunal held that although the assessee was not carrying on the business of manufacture and sale of oil during the years under appeal, he was continuing to carry on the business of oil in general; that the firm did carry on the same business as has hitherto carried on by the assessee but there was no connection between the assessee and the business carried on by the firm and they were two different entities and, as such, the assessee could not be said to be carrying on the business out of which the share income of the wife and minor children arose. Accordingly, it held that the assessee was not entitled under Section 24 (2) of the Act to claim set off of his losses against the income of his wife and minor children. On appeal by assessee before High court, on a consideration of the scheme of the Act and the provisions there in referred to, the High Court was of the opinion that the share income of the assessee's wife and minor children included in the assessee's total income under Section 16(3) of the said Act should be regarded as business income derived from business carried on by the assessee and in that view of the matter the assessee was entitled to set off his loss carried forward from the previous year. Accordingly, the question referred to in respect of these years was answered in the affirmative and in favour of the assessee by the High Court. Now revenue filed the appeals before Apex court in this case being aggrieved by High court order.

Issue

The question involved in this case is, whether the income of the wife and/or minor children of the assessee from a partnership firm in which the wife is a partner and/or minor children have been admitted to the benefits of partnership carried on with the assets transferred by the assessee in any year subsequent to the year of transfer could be set off against any loss brought forward by the assessee in respect of a business carried on by the assessee?

Views

In the case of ***K. P. Verghese v. Income-Tax Officer, Ernakulam and Another 131 I.T.R. 597,*** this Court emphasised that a statutory provision must be so construed, if possible, that absurdity and mischief may be avoided. Where the plain literal interpretation of a statutory provision produces a manifestly unjust result which could never have been intended by the legislature, the Court might - modify the language used by the legislature so as to achieve the intention of the legislature and produce a rational construction. The task of interpretation of a statutory provision is an attempt to discover the intention of the Legislature from the language used. It is necessary to remember that language is at best an imperfect instrument for the expression of human intention. It is well to remember the warning administered by judge Learned Hand that one should not make fortress out of dictionary but remember that statutes always have some purpose or object to accomplish and sympathetic and imaginative discovery is the surest guide to their meaning.

Held

Dismissing the appeals of revenue and answering the question in assessee's favor and against the revenue, the court pertinently noted that "Several propositions were canvassed before us on behalf of the assessee the main one being that the court should consider the purpose of the section for the proper construction of the relevant provisions of the Act. It is manifest, as contended for on behalf of the assessee, that the object of Section 16(3)(a)was to foil an individual's attempt to reduce the incidence of tax by transferring his assets to his wife or minor child or by admitting his wife as a partner or his minor child to the benefits or partnership in a firm in which he was a partner by transferring the assets directly or indirectly to them otherwise than for adequate consideration" In this connection, significant further dilation of the court narrates that *"…. In the instant case, the business of the firm in which assessee's wife is a partner and to the benefits of which his minor children had been admitted was a firm in which the assessee himself was not a partner and as such that business was not being carried on by the assessee. Counsel for the assessee contended that the real object of Section 16(3) of the said Act was to restore the position which obtained before the transfer, qua income. In other words, he urged that it was as if the transfer had not taken place. It was his submission that if the transfer had not taken place, the income of the wife and the minor children from the assets transferred viz., machinery in this case, would be the income of the assessee. In other words, it would be income from his business if the transfer was ignored. In that case loss from business could be carried forward for six to eight years as the case may be, to be set off against the business income of the assessee. Counsel urged that the object of the said section was not to punish the assessee for having transferred his assets to his wife or minor children by denying any allowance, concession, deduction, etc. to which he or others would otherwise be entitled to. There is substance in this contention.."* Further discussing the revenue's case it was noted by the court that, *"….But the question that arises here is whether against the inclusion of such income, loss suffered by the assessee in a previous year which was carried forward under Section 24(1) of the Act should be allowed to be set off or not. The revenue contends that it cannot be. It lays emphasis on the fact that set off for the carried forward loss is permitted only by Section 24(1) of the Act and there should be strict literal construction of Section 24(2) and as such in view of the provisions of Section 24(2)(ii) which stipulates that loss to be carried forward* *must be 'loss sustained by him in any other business, profession or vocation, it shall be set off against the profits and gains, if any, of any business, profession or vocation carried on by him in that year; provided that the business, profession or vocation in which the loss was originally sustained continued to be carried on by him in that year'. Therefore, it is required that the business, profession or vocation against profits of which the set off is claimed must be carried on by the assessee in that year. But the problem here is that the business out of whose share income of the wife or minor child is derived is no longer carried on by the assessee himself in the subsequent year in which set off is being claimed. On behalf of the revenue it was emphasised that this requirement is to be strictly followed... It was further stressed on behalf of the revenue that equity has no place in interpreting fiscal legislation."* After considering rival contentions, the court held that, *"…the object of Section 16(3) of the Act which has to be read in conjunction with Section 24(2) in this case for the present purpose. If the purpose of a particular provision is easily discernible from the whole scheme of the Act which in this case is, to counteract, the effect of the transfer of assets so far as computation of income of the assessee is concerned then bearing that purpose in mind, we should find out the intention from the language used by the Legislature and if strict literal construction leads to an absurd result i.e. result not intended to be subserved by the object of the legislation found out in the manner indicated before, and if another construction is possible apart from strict literal construction then that construction should be preferred to the strict literal construction. Though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than in in-justice, then such construction should be preferred to the literal construction. Furthermore, in the instant case we are dealing with an artificial liability created for counteracting the effect only of attempts by the assessee to reduce tax liability by transfer. It has also been noted how for various purposes the business from which profit is included or loss is set off is treated in various situations as assessee's income. The scheme of the Act as worked out has been noted before…"* and concluded that *".....Therefore, where Section 16(3) of the Act operates, the profits or loss from a business of the wife or minor child included in the total income of the assessee should be treated as the profit or loss from a 'business carried on by him' for the purpose of carrying forward and set off such loss under Section 24(2) of the Act. On a consideration of the scheme of the Act and the provisions therein as noted before, the share income of the wife and minor children included in the assessee's total income under Section 16(3) of the Act should be regarded as business income derived from business carried on by the assessee and in that view of the matter,, the assessee is entitled to set off his loss carried forward from the previous years. In the premises the question must be answered in the affirmative and in favour of the assessee."* In this process the court laid emphasis on some principle of interpretation of statute; firstly that if strict literal construction leads to an absurd result i.e. result not intended to be subserved by the object of the legislation found out in the manner indicated before, and if another construction is possible apart from strict literal construction then that construction should be preferred to the strict literal construction, secondly that though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than in in-justice, then such construction should be preferred to the literal construction. Thirdly that whole scheme of the Act has to be kept in mind and then the same needs to be balanced with the object/purpose of the stated provisions in consideration; It was very succinctly held that income would include loss.

Notably in this case, the court took special cognizance of 1961 Act provisions and mentioned that, *"When 1961 Act was enacted, this was also not clarified. The requirement of Section 72 which replaced Section 24(2) of the Act proceeds substantially on previous basis."* (AY. 1959-1960 to 1961-1962) (CA Nos. 1596 to 1598 (NT) of 1973 CMP. No. 97 of 1975 dt. 29-8-1985)

CIT v. J. H. Gotla (1985) 156 ITR 323/48 CTR 363/23 Taxman 14 (SC) 1985 AIR 1698

Editorial : The principles of interpretation as laid down in this case are of eternal value and hold the field today also, specially on equity and stranger aspect to which one recent illustration can be found from apex court decision in case of Southern Motors case of 18/01/2017 in CA Nos 10955-10971 of 2016 refer paragraph 30 of said decision. These principles are often relied by courts in dealing with provisions of taxing statute.

> *"Whenever you have truth it must be given with love, or the message and the messenger will be rejected."*
>
> \- Mahatma Gandhi

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S. 68 : Cash credits-Bogus share capital/premium - The assessee is under legal obligation to prove the receipt of share capital/premium to the satisfaction of the Assessing officer, failure of which, would justify addition of the said amount to the income of the assessee - Mere mention of income tax file number of an investor is not sufficient to discharge the onus - Credit worthiness of the investor companies was not discharged - In present case in wake of field inquiries made by 'AO' revealing non existence of investor companies and the onus to establish the identity of the investor companies, was not discharged by the assessee - Addition under section 68 of Rs. 17,60,00,000 was restored [S. 131]

Facts

The instant case pertains to the Assessment Year of 2009–10, for which the Assessee had filed the original Return of Income on 29.09.2009 declaring a total income of Rs.7,01,870. A Notice was issued under section 148 of the Act to re-open the assessment on 13.04.2012 for the reasons recorded therein. The issue before the "AO" was whether the amount of Rs. 17,60,00,000 allegedly raised by the Respondent through share capital/premium were genuine transactions or not. On the basis of the detail filed, enquiries conducted, the A.O. held that the Assessee had failed to prove the existence of the identity of the investor companies and genuineness of the transaction. The AO held that the Assessee had failed to discharge the onus by cogent evidence either of the credit worthiness of the so-called investor-companies, or genuineness of the transaction. As a consequence, the amount of Rs. 17,60,00,000 was added back to the total income of the Assessee for the assessment year in question. The Commissioner of Income Tax (Appeals) deleted the addition made by the A.O. on the ground that the Respondent had filed confirmations from the investor companies, their Income Tax Return, acknowledgments with PAN numbers, copies of their bank account to show that the entire amount had been paid through normal banking channels, and hence discharged the initial onus under Section 68 of the Act, for establishing the credibility and identity of the shareholders. The Revenue filed an Appeal before the "ITAT". The ITAT dismissed the appeal, and confirmed the order of the CIT(A) on the ground that the Assessee had discharged their primary onus to establish the identity and credit-worthiness of the investors, especially when the investor companies had filed their returns and were being assessed.. The

Revenue filed an Appeal under section. 260A of the Act before the Delhi High Court to challenge the order of the Tribunal. The Assessee did not appear before the High Court. Hence, the matter proceeded *ex-parte*. The High Court dismissed the Appeal filed by the Revenue *vide* the Impugned Order dated 26.02.2018, and affirmed the decision of the Tribunal on the ground that the issues raised before it, were urged on facts, and the lower appellate authorities had taken sufficient care to consider the relevant circumstances. Hence no substantial question of law arose for their consideration. Aggrieved by the Order passed by the High Court, the Revenue filed the present S.L.P. (C) No. 29855/2018 before this Court. Since assessee did not appear before Apex court, matter was decided *ex-parte* by the court, after hearing revenue's counsel.

Issue

The issue which arises for determination is whether the Respondent/Assessee had discharged the primary onus to establish the genuineness of the transaction required under Section 68 of the said Act. The issue which arises for consideration is that in a case where Share Capital/Premium is credited in the books of account of the Assessee company, the onus of proof is on the assessee to establish by cogent and reliable evidence of the identity of the investor companies, the credit-worthiness of the investors, and genuineness of the transaction, to the satisfaction of the Assessing Officer.

Views

One of the primary judicial views on Share capital vis-a-vis its treatment in section 68 (unexplained cash credit) which has held the field for long was in case of ***CIT v. Stellar Investment Ltd (1991) 192 ITR 87 (Delhi) (HC) :*** civil appeal Dismissed by Apex court in ***CIT v. Steller Investment Ltd. (2001) 251 ITR 263 (SC)*** holding that share capital can never be income of recipient company concerned and only addition can be made in hands of share holder subscribing to share capital which was later rationalised in case of full bench decision of delhi high court in ***CIT v. Sophia Finance Ltd (1994) 205 ITR 98 (Delhi) (HC)*** holding that if share holder identity is established on facts and it is not in doubt that share holders have invested in share capital of company concerned then share capital being capital receipt cant be assessed as income in hands of assessee company being capital receipt non chargeable to tax. Later in a very detailed order Delhi high court after reviewing entire case law on subject of share capital in context of section 68 has propounded detailed tests to examine share capital genuineness in case of ***CIT v. Divine Leasing and Finance Ltd (2007) 299 ITR 268 (Delhi) (HC)*** where although assessee was asked to first establish primary details on identity of share holders and receipt of share capital by acceptable documentary evidence still AO was put under corresponding onus to repudiate the assessee's case by detailed follow up investigation and scrutiny nature sans which adverse inference in section 68 was held not tenable in law. In this order notably a suggestion was made by Hon'ble court to government in following words *"…In our opinion, it is for Parliament to introduce legislation if the duty presently resting on the Department is thought to be too onerous. We ought not to twist the language of a statute to remove the burden of proof altogether from the Department even though it has the necessary wherewithal to discharge it. The malaise can also be arrested if unclaimed share subscriptions are taken over by the State and/ or if the assessee concerned is precluded from distributing dividends, bonus shares etc. against such share subscriptions unless they are duly claimed by the original subscribers within a prescribed period, perhaps not exceeding three years. Thereafter the shares could automatically stand transferred to the State on the principle of escheat. For these events to happen, requisite amendments to the IT Act may be required." This order of Delhi High court in Lovely Exports Pvt Ltd came up for dismissal by Apex court in* **CIT v. Lovely Exports (P.) Ltd SLP in (2009) 319 ITR 5 (St)/(2008) 216 CTR (SC) 195** *where while dismissing revenue SLP, Apex court observed that : "2. Can the amount of share money be regarded, as undisclosed income under s. 68 of I. T. Act, 1961? We find no merit in this Special Leave Petition for the simple reason that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the A.O. then the Department is free to proceed to reopen their individual assessments in accordance with law. Hence, we find no infirmity with the impugned judgment…..* " This order of Hon'ble Apex court held the field for long on the subject of share capital and widely followed in all judicial forums.

With due respect it is humbly submitted that both these long standing decisions of Stellar Capital (supra) and Lovely exports (supra) of Apex court have remained unconsidered in the present case of NRA Iron (Supra) probably because no representation was there to assist the court from side of assessee. Even Apex court dictum in case of ***G. S. Homes & Hotels Ltd v. Dy. CIT (2016) 387 ITR 126 (SC)*** that amount received on issue of share capital including share premium are on capital account and can not be considered as income, seems to be not cited in the case of NRA Iron before the court. So one may explore the doctrine of *per-incuriam* to this decision in the case of NRA Iron vis-a-vis Apex court decisions in cases of Stellar Capital; Lovely exports; G. S. Homes (supra).

Held

After considering various previous decisions (refer note 1 below), the court summed up principles governing applicability of section 68 of the Act *qua* share capital issue/share premium issue as under:

> *"The principles which emerge where sums of money are credited as Share Capital/Premium are :*
>
> *i. The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and credit-worthiness of the investors who should have the financial capacity to make*

the investment in question, to the satisfaction of the AO, so as to discharge the primary onus.

ii. *The Assessing Officer is duty bound to investigate the credit-worthiness of the creditor/subscriber, verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of name-lenders.*

iii. *If the enquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack credit-worthiness, then the genuineness of the transaction would not be established. In such a case, the assessee would not have discharged the primary onus contemplated by Section 68 of the Act"*

After repeatedly noting that in present case some of the investor companies were non-existent as per field enquiry conducted by the AO which as per noting made by the court revealed that *"… in several cases the investor companies were found to be non-existent, and the onus to establish the identity of the investor companies, was not discharged by the assessee". Whereas at one place the court also mentioned that "…Clearly the onus to establish the credit worthiness of the investor companies was not discharged. The entire transaction seemed bogus, and lacked credibility.."* So at one place it is observed by the court that assessee has not established its onus qua identity of the investor companies whereas at other place it held that assessee company failed to prove the identity of the investor companies which two findings seems on different tangents. On discharge of onus under section 68 of the Act, it seems that significant findings (ratio/principle emerging from the order) of court are contained in paragraph 13 where it holds that ***"The lower appellate authorities appear to have ignored the detailed findings of the AO from the field enquiry and investigations carried out by his office. The authorities below have erroneously held that merely because the Respondent Company – Assessee had filed all the primary evidence, the onus on the Assessee stood discharged."*** At closure, some passing observations are made by the court that *"The practice of conversion of un-accounted money through the cloak of Share Capital/Premium must be subjected to careful scrutiny. This would be particularly so in the case of private placement of shares, where a higher onus is required to be placed on the Assessee since the information is within the personal knowledge of the Assessee. The Assessee is under a legal obligation to prove the receipt of share capital/premium to the satisfaction of the AO, failure of which, would justify addition of the said amount to the income of the Assessee."*, which observations of the court seems in nature of obiter dicta only. Finally the court held that *"…On the facts of the present case, clearly the Assessee Company - Respondent failed to discharge the onus required under Section 68 of the Act, the Assessing Officer was justified in adding back the amounts to the Assessee's income."* So revenue appeal was allowed reversing three concurrent orders of CIT-A, ITAT and High court. (AY. 2009 10) (CA No. 2463 of 2019, dt. 25.10.2019)

PCIT v. NRA Iron & Steel Pvt. Ltd. (2019) 412 ITR 161/262 Taxman 74/175 DTR 289/307 CTR 353 (SC).

Editorial : PCIT v. NRA Iron & Steel Pvt. Ltd. (Delhi)(HC) (ITA No. 244 of 2018 dt. 26-2-2018) Ratio is explained in ***PCIT v. Alag Securities Pvt. Ltd. (Formerly known as Mahasagar Securities and Richmond Securities Pvt. Ltd. (2020) 425 ITR 658 (Bom) (HC), PCIT v. Ami Industries (India) P. Ltd. (2020) 424 ITR 219 (Bom) (HC) In CIT v. Sun Engineering Works (1992) 198 ITR 297 (SC)*** the Court held that the judgment of the Court to be read as a whole in the contest it was delivered. It is neither desirable nor permissible to pick out a word or a sentence from the judgement. Also refer ***Oriental Insurance Co Ltd. v. Rajkumari (Smt) & ors AIR 2008 SC 403.***

This *ex-parte* decision of NRA Iron where reversal of addition deletion was made restoring order of 'AO' (under section 68 of the Act, for share capital/share premium for Assessment Year 2009-2010) came up for recall prayer before the apex court which recall prayer of assessee/respondent has been hitherto dismissed by the apex court (***CIT v. NRA Iron & Steel Pvt. Ltd. (2019) 311 CTR 263/183 DTR 60 (SC))***; Court held that the applicant company having failed to make out any credible or cogent ground for re-call of the judgement dt. 5-3-2019, the application for recall is dismissed. One interesting jurisdictional aspect in revenue special leave petition before apex court in NRA Iron case (supra) which was not debated or contended or argued is, whether in a case where high court in impugned appeal under section 260A of the Act holds that no substantial question of law arose due to concurrent findings of CIT-A and ITAT, can sans substantial question of law being identified at the apex court level and so asked to be framed under section 260A of the Act by the apex court, such straight reversal of the high court order can be made in such circumstances, bypassing jurisdictional filter of section 260A of the Act? This remains an open question. Further now this decision on section 68 is cited in every matter from side of revenue before various judicial forums and so it has been subject matter of abundant interpretation as to its true ratio/principle emerging from the same. One important decision from Bombay high court in case of ***CIT v. Ami Industries Pvt Ltd (2020) 424 ITR 219 (Bom) (HC)*** where it is held that even after NRA Iron (supra) assessee receiving share capital/share premium (before amendment made by Finance act 2012 (with prospective effect from assessment year 2013-2014)) is not supposed to prove source of source of share holder. In this case Bombay high court noted that "2. In NRA Iron & Steel (P) Ltd (supra), the Assessing Officer had made independent and detailed inquiry including survey of the investor companies. The field report revealed that the shareholders were either non-existent or lacked credit-worthiness. It is in these circumstances, Supreme Court held that the onus to establish identity of the investor companies was not discharged by the assessee. The aforesaid decision is, therefore, clearly distinguishable on facts of the present case." Further very recently Bombay high court in case of ***PCIT v. Alag Securities Pvt Ltd (2020) 425 ITR 658 (Bom) (HC)*** has distinguished revenue reliance on NRA Iron (supra) where case of entry provider was in consideration and it was held that it should be assessed on commission income only. Recently Karnataka high court in a matter relating to section 68 (share capital) while reversing the ITAT order and deleting the addition sustained at ITAT level, in the case of ***Kumar Nirman and Nivesh Pvt Ltd v. ACIT (2020) 425 ITR 486 (Karn) (HC),*** has distinguished NRA Iron case (supra). One important reference which requires special mention is decision of Bombay high court (Nagpur bench) in case of ***PCIT v. Apeak Infotech (2017) 397 ITR 148 (Bom) (HC)*** where on issue of applicability of section 68 to share capital and share premium aspect it is perspicaciously held that prior to assessment year 2013-2014 such treatment is not tenable, relying on cases of (i) Bombay high court ***CIT v. Gangadeep Infrastructure (P) ltd (2017) 394 ITR 680 (Bom) (HC) (***ii) Bombay high court in ***Vodafone India Services Pvt. Ltd. v. Addl. CIT (2014) 368 ITR 1 (Bom)*** (iii) Hon'ble Apex Court in ***G. S. Homes & Hotels P. Ltd. v. Dy. CIT (2016) 387 ITR 126 (SC).*** This Bombay high court decision for period prior to assessment year 2013-2014 significantly holds the position that addition under section 68 of the Act for alleged unexplained share capital/share premium is not tenable where sufficient basic documents are placed on records by assessee company which is on basis of due consideration of subsequent prospective amendments made in section 68 and section 2(24) of the Act from Finance Act 2012. Further various ITAT benches have distinguished NRA Iron (supra) one notable order which is worth mentioning here is Ahmedabad bench of ITAT in recent decision in case of D. J. Stock broking Pvt Ltd (ITA 313/Ahd/2017 order dated 3-3-2020: Mere low income in ITR vis-a-vis investment was jettisoned by the ITAT to hold that creditworthiness is not restricted to income returned by share applicant which is very important finding of Ahmedabad bench of ITAT after considering NRA Iron and Bombay high court Ami Industries (supra))

> *"The difference between what we do and what we are capable of doing would suffice to solve most of the world's problems."*
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> \- Mahatma Gandhi

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S. 69 : Unexplained investments – Income from undisclosed sources – Non-Resident – Deposit in NRI Accounts – Deletion of addition by the Tribunal based on the evidences – Reversal of the order of Tribunal by the High Court is held to be not valid – Oder of the Tribunal is affirmed [S. 158BB, 158BC, 260A, Foreign Exchange Regulation Act, 1973, S. 13]

Facts

(culled out from High Court order ***CIT v. Purshottam Khatri (2007) 290 ITR 260(MP)***)

The assessee left India in 1968 and was employed in Muscat and Dubai till the previous year relevant to the assessment year 1992-93 and thereafter returned to India. A search was carried out under Section 132 of the Income Tax Act ('Act') in the premises of the assessee at Bhopal for a period of 13 days from 18.10.1996 to 30.10.1996. Thereafter, an assessment was made under section 158BC read with section 143(3) of the Act by the AO on 29.10.1997 determining the total undisclosed income for the block period 01.04.1986 to 18.10.1996 at Rs. 2,10,48,043. In the present case, the 'AO' has found that the assessee during the previous years relevant to the assessment years 1992-93 to 1997-98 was not an ordinarily resident in India and the AO has further found that the assessee had made number of deposits in foreign currency in his NRE accounts in different banks in India. After having excluded the various items of foreign currency deposits in the NRE accounts of the assessee, the 'AO' found that foreign currencies representing Rs. 1,03,50,020 ($3,14,534) were unexplained deposits and treated the same to be undisclosed income of the respondent. Aggrieved, the respondent filed an appeal before the Tribunal and by order dated 07.06.2000 the Tribunal deleted some of the additions made by the AO to the undisclosed income of the respondent and allowed the appeal in part. Before the Tribunal, the assessee also made a grievance that for the remaining foreign currency deposited by him in the NRE accounts in India, although he could not produce declarations to show that such foreign currency was brought by him to India, he produced other materials such as exchange vouchers issued by the exchange centres abroad and certificates issued by the banks in India in support of his claim that such foreign currency deposited by him accrued or arose to him as income outside India. The Tribunal found in para 13 of the its order that the foreign currency exchange vouchers produced by the assessee were issued a few days prior to the date of visit of the assessee in India and hence the claim of the assessee that the foreign currency shown in the foreign currency exchange vouchers was in fact brought into India by him in his visits to India also appears to be plausible, but the AO while working out the unexplained deposits of foreign currency in the NRE accounts has totally ignored these foreign currency exchange vouchers. The Tribunal has further held that a visitor to India is required to surrender the declaration form at the time of his departure from India, if he wishes to carry any foreign currency with himself and in these circumstances, it is possible that the assessee might have brought some foreign currency with himself while leaving India and the possibility of his surrendering the declaration forms to the Customs authorities at the time of leaving India is not ruled out. The Tribunal has further held that a common man may not anticipate that in the years to come, he would be searched by the Income tax authorities and would be required to produce all the evidence through which he has brought the foreign currency which is not chargeable to tax in India and since the assessee had earned foreign currency outside India, which is not chargeable to tax in India the same should not have been viewed with an evil eye when it is brought to India through lawful means. Notably, this paragraph 13 of Tribunal order is reproduced verbatim in apex court decision to which apex court has given its imprimatur.

On appeal by revenue under section 260A, following substantial question of law was formulated by High court:

> *"..Whether, on the facts and circumstances of the case, the learned Tribunal was justified in deleting the addition of Rs. 1,03,50,020 made on account of unexplained deposits in the NRE bank accounts of the assessee even when the assessee had failed to discharge his onus of establishing the genuineness of the source of credits in his NRE bank accounts ?"*

The question of law was answered by High court in favour of revenue/appellant, overruling ITAT decision on this aspect, holding *inter-alia* that *"…Since the respondent (assessee) had not been able to produce such evidence nor any other material before the Tribunal to clearly establish that the deposits made by him in his NRE accounts represent his income which had accrued or arose to him outside India, the finding of the Tribunal that the deposits made by the respondent in the NRE accounts in India is his income which he had earned as foreign currency outside India is without any evidence…..".*

This led to filing of extant civil appeal at apex court by assessee.

Issue

Whether High court rightly interfered under section 260A of the Act to upset ITAT order in present facts?

Held

In short order, allowing civil appeal of assessee, the court held that *"The impugned judgment has added as unexplained income a sum of Rs.1.03 crores,* *as aforesaid, basically on the ground that the assessee has been unable to present declaration forms that had been filled in by him at the time of his visits to India from abroad. Keeping in mind the fact that these declaration forms were asked for long after such expenditure had, in fact, been incurred, it cannot possibly be said that the Appellate Tribunal's judgment and findings therein are perverse, which is the only entry on facts for the High Court exercising its appellate jurisdiction under section 260-A of the Income Tax Act, 1961. Having heard learned counsel for both the parties, we are clearly of the view that the High Court ought not to have interfered with the Appellate Tribunal's Judgment as no substantial question of law arose therefrom. Accordingly, we allow the appeal and set aside the judgment of the High Court and reinstate that of the Appellate Tribunal"* (AY. 1992-93 to 1997-98) (CA No. 1161 of 2007 dt. 9-7-2019)

Purshottam Khatri v. CIT (2019) 419 ITR 475/267 Taxman 503/(2020) 312 CTR 323/185 DTR 177 (SC)

Editorial : Decision in ***CIT v. Purshottam Khatri (2006) 203 CTR 1/(2007) 290 ITR 260 (MP) (HC)*** is reversed. In ***CIT v. P. K. Noorjahan (Smt) (1999) 237 ITR 570 (SC)*** the court held that the word 'may' in section 69 gives discretion to the Assessing Officer to accept the explanation of the assessee if it is found satisfactory. Issues relating to "undisclosed income" for purposes of block assessment under section 158BC of the Act as detected out of search operation within meaning of section 158BB of the Act, is something which seems not agitated before High court and Apex court in above matter

> *"Nothing is impossible for pure love."*
>
> \- Mahatma Gandhi

49

S. 80HH: Newly established industrial undertakings – Maintenance of separate books of accounts unit wise is not mandatory - Neither section 80HH, nor section 80I statutorily obliged assessee to maintain accounts unit wise – Consolidated accounts held to be valid and revision held not valid [S. 80I, 263]

Facts

Assessee was engaged in refinery, petrochemical and polyester staple fibre business. Assessee set up three units for production of separate and distinct products. Assessing Officer allowed deduction under section 80HH and section 80I off he Income-tax Act, 1961 after examining the unit wise profit and loss statement filed by the assessee. Commissioner revised the order under section 263 and disallowed the claim for deduction holding that the assessee should have maintained segregated accounts for each of the three units to avail benefit of section 80HH and section 80I. In appeal, the Tribunal held that though there was no statutory requirement to maintain unit-wise accounts, in the facts of the case, the assessee should submit unit wise audited accounts and claim deduction under section 80HH and 80I. On appeal, High Court set aside the order of the Tribunal in so as far as it required the assessee to submit unit wise audited accounts.

Issue

Whether assessee is bound to maintain segregated accounts for each of its units for claiming deduction under section 80HH and 80I

View

Deductions under sections 80HH and 80-I can be claimed by an assessee who is engaged in carrying on eligible business mentioned therein. Deduction is granted on the profits and gains derived from the eligible business. It may so happen that an assessee may have more than one eligible business undertaking or one eligible and one non-eligible undertaking. In such situations, disputes arise as to whether profits of each undertaking have been correctly determined by properly allocating the expenses and whether an assessee is obliged to maintain its accounts unit wise so as to be eligible for claiming deduction.

Held

Supreme Court held that neither section 80HH nor section 80I statutorily obliged the assessee to maintain its accounts unit wise. Supreme Court further held that it was open to the assessee to maintain its accounts in a consolidated form. Supreme Court remitted the matter to the Assessing Officer to ascertain whether the assessee had correctly calculated the unit wise net profits for claiming deduction under section 80HH and 80I. Supreme Court further observed that if profits were not correctly determined, auditors could determine and certify the unit wise net profit computation from the consolidated books of accounts and place the same before the Assessing Officer. (From the judgment in ***Bongaigaon Refinery and Petrochemicals Ltd. v. CIT (2005) 274 ITR 379 (Gau) (HC)*** (AY. 1992-93) (CA No. 1679 of 2004 dt. 5-9-2012)

CIT v. Bongaigaon Refinery & Petrochemical Ltd. (2012) 349 ITR 352/210 Taxman 229/79 DTR 8/254 CTR 98 (SC)

Editorial: Though it is not required to maintain unit wise accounts, assessee should be in a position to demonstrate the manner in which unit wise profits have been calculated from the consolidated accounts.

"Every home is a university and the parents are the teachers."

- Mahatma Gandhi

50

S. 80HH: Newly established industrial undertakings – Backward areas – Manufacture – Conversion of Jumbo rolls into small flat and rolls amounts to manufacture [S. 2(29B), 32AB, 80I]

Facts

Assessee was engaged in the business of conversion of jumbo rolls of photographic films into small flats and rolls of desired sizes. Assessee claimed deduction under sections 32AB, 80HH and 80I of the Income-tax Act, 1961 taking a stand that the aforesaid activity amounted to manufacture or production.

Issue

What is the meaning of the term 'manufacture' and 'production' and whether conversion of jumbo rolls of photographic films into small flats and rolls amounts to manufacture or production

Held

Supreme Court held that conversion of jumbo rolls of photographic films into small flats and rolls of desired sizes amounted to manufacture or production. Supreme Court took into account the dictionary meanings and earlier decisions and observed that manufacture implies a change but every change is not manufacture. Manufacture is a transformation of an article which is commercially different from the one which is converted. Supreme Court further took into account its decision in ***CIT v. Sesa Goa (2004) 271 ITR 331 (SC)*** where it was held that the word 'production' had a wider connotation than the word 'manufacture' and that 'production' meant bringing into existence new goods by a process which may or may not amount to 'manufacture'. Consequently, Supreme Court allowed the assessee's claim for deduction under sections 32AB, 80HH and 80I. (CA Nos 3649-3650 of 2003/, 6835-6836 of 2005/, 1522 & 3720 of 2007 and 451-452 of 2008 dt. 12-11-2008)

India Cine Agencies v. CIT (2008) 175 Taxman 361/220 CTR 223/(2009) 308 ITR 98/15 DTR 121/209 Taxation 410 (SC)

Computer Graphics Ltd. v. CIT (2008) 175 Taxman 361/220 CTR 223/(2009) 308 ITR 98/15 DTR 121/209 Taxation 410 (SC)

Editorial: Finance (No. 2) Act, 2009 introduced section 2(29BA) in the Act to define the term 'manufacture' to mean a change in a non-living physical object or article or thing – (a) resulting in transformation of the object or article or thing into a new and distinct object or article or thing having a different name, character and use; or (b) bringing into existence of a new and distinct object or article or thing with a different chemical composition or integral structure. Though the term ‘manufacture’ is now defined in the Act the term ‘production’ remains undefined – and as held by several decisions, the term ‘production’ has a wider connotation than the term ‘manufacture’.

> *“To give pleasure to a single heart by a single act is better than a thousand heads bowing in prayer.”*
>
> \- Mahatma Gandhi

51

S. 80IA: Industrial undertaking – Conversion of a partnership firm into a company – Part IX of Companies Act – As per S. 575 of the Companies Act, the conversion of a partnership firm into a company under Part IX causes a statutory vesting of all assets of the firm into the company without the need for a conveyance – The business of the firm is carried on by the company and the latter is eligible for the benefits of S. 80IA(4) of the Act [S. 80IA(4), Companies Act, 1956, S. 575]

Facts

Chetak Enterprises, a partnership firm, entered into an agreement with the Government of Rajasthan for construction of road and collection of road/toll tax. The construction of road was completed on 27th March 2000. The partnership firm was converted into a private limited company Chetak Enterprises (P) Ltd. on 28th March 2000 under Part IX of the Companies Act, 1956. Assessee company intimated the fact of conversion to the Chief Engineer (Roads), PWD which was noted and fresh registration code was granted to the assessee company. The road was inaugurated on 1st April 2000 and the assessee company started collecting toll tax. For the assessment year 2002-03, the assessee claimed deduction under section 80-IA of the Income-tax Act, 1961. The Assessing Officer denied the claim. The CIT (Appeals) allowed the claim and the Tribunal confirmed this following its decision in the case of the assessee for the assessment year 2001-02 (see ***Chetak Enterprises P. Ltd. v. Asst. CIT [2006] 281 ITR (AT) 162 (Jodhpur)).*** On appeal by the Department on the question whether the Tribunal was right in finding that the assessee fulfilled the conditions of sub-section (4)(i)(b) of section 80-IA, the High Court upholding the view taken by the CIT (Appeals) and the Tribunal, dismissed the appeal.

Issue

What is the effect of conversion of partnership firm into a company under Part IX of the Companies Act? Whether deduction under section 80IA is available to the assessee company post conversion when the agreement for construction of infrastructure facility was entered into by the erstwhile partnership firm.

Views

80IA(4)(i) of the Act *inter-alia* provides that section 80-IA applies to an enterprise carrying on the business of (i) developing (ii) maintaining and operating or (iii) developing, maintaining and operating any infrastructure facility. The said section further states that the enterprise should be owned by a company registered in India and that such company should have entered into an agreement for developing/maintaining/operating a new infrastructure facility with the Central/ State Government/local authority. In other words, deduction under the section will not be allowed if a partnership firm carries on the specified business.

Held

Supreme Court dismissed the department's appeal and held that the assessee was entitled to deduction under section 80IA. Supreme Court observed that as per section 575 of the Companies Act, on conversion of a partnership firm into a company under Part IX of the Companies Act all properties of the firm statutorily vest in the company without any need for a conveyance. Post conversion of firm into company, the earlier agreement entered into between the erstwhile partnership firm and the State Government for construction of road, by legal implication, would be treated as an agreement between the assessee company and the State Government. The assessee company, therefore, satisfied the requirements of section 80IA(4)(i). (AY. 2002-03) (CA No. 1764 of 2010 dt. 5-3-2020)

CIT v. Chetak Enterprises Pvt. Ltd (2020) 423 ITR 267/313 CTR 489/187 DTR 351/115 taxmann.com 108 (SC)

Editorial: in ***CIT v. Texspin Engg. & Mfg. Works (2003) 263 ITR 345 (Bom) (HC)*** has held that when a firm is converted into a company under Part IX of the Companies Act, 1956, there is no transfer of capital asset as contemplated by section 45 but a statutory vesting of all properties in the company. Bombay High Court observed that *"on the vesting of all the properties statutorily in the company, the cloak given to the firm is replaced by a different cloak and the same firm is now treated as a company."*

> *"Man is a product of his thoughts.*
> *What he thinks, he becomes."*
>
> \- Mahatma Gandhi

52

S. 80IB(10) : Housing Projects – If the project is approved by local authority as housing project with convenience shopping the assessee is entitled to deduction – Prior to 1-4-2005 – Clause (d) inserted to Section 80IB(10) with effect from 1-4-2005 is prospective and not retrospective and hence cannot be applied for the period prior to 1-4-2005

Facts

Assessee had undertaken construction projects which were approved by the municipal authorities/local authorities as housing projects. Assessee claimed deduction under section 80IB(10) of the Income-tax Act, 1961 as per the provisions in force prior to 1st April 2005 which granted deduction of 100% of profits derived by an undertaking developing and building housing projects approved by a local authority if it satisfied the requisite conditions mentioned therein. Assessing officer denied the deduction on the ground that the projects were not "housing project" as some commercial activity was also undertaken in those projects. The Tribunal allowed the assessee's claim. The High Court upheld the decision of the Tribunal.

Issue

Whether deduction under section 80IB(10) as in force prior to the amendment by the Finance (No. 2) Act, 2004 could be claimed by a housing project comprising of residential units as well as commercial establishments

Held

Supreme Court upheld the decision of the High Court which had taken the view that the assessee was eligible for deduction under section 80-IB of the Act. Supreme Court held that up to 31st March, 2005, deduction under section 80-IB(10) of the Act is allowable in respect of the entire project which is approved by the local authorities as housing project even though the project has some commercial element within the limits prescribed under the Development Control Rules/regulation. Supreme Court also agreed with the decision of the High Court that clause (d) which was inserted in section 80-IB(10) w.e.f. 1st April, 2005 stipulating that the built-up area of the shops and other commercial establishment included in the housing project should not exceed a certain percentage of the built-up area of the housing project was prospective in nature and could not be applied for the period prior to 1st April, 2005. (SLP (C) Nos. 22450 and Ors dt. 30-4-2015)

CIT v. Veena Developers (2015) 277 CTR 297/119 DTR 237/66 taxmann.com 353 (SC)

Editorial: Judgment in ***CIT v. Brahma Associates (2011) 333 ITR 289 (Bom)*** affirmed.

"Prayer from the heart can achieve
what nothing else can in the world."

- Mahatma Gandhi

53

S. 90 : Double taxation relief – Business income arising out of rubber plantations in Malaysia cannot be taxed in India - capital gains derived from immovable property is not taxable in India as the property being situated in Malaysia - In case of conflict between Income-tax Act and the provisions of DTAA, provisions of DTAA would prevail over the provisions of Income-tax Act - DTAA India - Malaysia [S. 4, 5, 28(i), 45, Art. 4, 5, 6, 7 & 22]

Facts

Assessee, a firm, earned business income from rubber estates in Malaysia. During the year, assessee also sold an immovable property situated at Malaysia and earned short term capital gains. The Assessing Officer charged the business income as well as capital gains to tax in India. CIT(A) and Tribunal held that (i) business income earned in Malaysia was not taxable in India as the assessee did not have a permanent establishment in India (ii) capital gain was also not taxable in India as the property was situated in Malaysia. High Court upheld the view of the Tribunal and held that where a DTAA contains a specific provision, laws of any one of the respective Contracting States cannot be applied. High Court also held that as the DTAA provided that the aforesaid incomes 'may be taxed' in Malaysia, the tax authorities in India did not have the right to assess the same income.

Issue

Whether income from business carried on in Malaysia and from sale of an immovable property in Malaysia would be taxable only in Malaysia and not in India?

Views

Section 90(2) of the Act provides that in relation to an assessee to whom a DTAA applies, the provisions of the Act shall apply to the extent they are more beneficial to the assessee.

Held

With respect to the meaning of the term 'may be taxed', Supreme Court did not "enter into an exercise in semantics as to whether the expression "may be" will mean allocation of power to tax or is only one of the options and it only grants power to tax in that State and unless tax is imposed and paid no relief can be sought." Supreme Court, however, held that if an Indian resident is deemed to be a resident of other Contracting State where his personal and economic relations are closer, then his residence in India will become irrelevant and the provisions of the DTAA will prevail over sections 4 and 5 of the Act. Supreme Court observed that the immovable property from which income was derived was situated in Malaysia. Similarly, assessee earned business income from the business of rubber plantations which was carried out in Malaysia and the assessee did not have a permanent establishment in India. Supreme Court, therefore, held that the business income and capital gains cannot be taxed in India because the assessee has closer economic relations with Malaysia where the permanent establishment has been set up and where the immovable property is situated. Supreme Court also rejected the argument of the revenue that capital gain is not income and therefore not covered by the DTAA. Supreme Court held that capital gain derived from immovable property is income and covered under Article 6 of the DTAA. (CA No. 5746/5752 & Ors of 1997/2006/& 2451 of 2000 dt. 26-5-2004)

CIT v. P.V.A.L. Kulandagan Chettiar (2004) 267 ITR 654/137 Taxman 460/189 CTR 193 (SC)

Editorial: Review petition against ***CIT v. Kulandagan Chettiar (P.V.A.L.) (2004) 267 ITR 654*** dismissed on account of delay as well as on merits ***CIT v. Kulandagan Chettiar (P.V.A.L.) (2008) 300 ITR 5 (SC).***

> *"In a gentle way, you can shake the world."*
>
> - Mahatma Gandhi

54

S. 90: Double taxation relief – India – Mauritius DTAA – Circular No. 789 (2000) 243 ITR (St) 57, not *ultra vires* the provisions of the Income-tax Act [S. 2(17), 5(2), 6(3), 119, Art. 3, 4, 13(4)]

Facts

CBDT issued Circular No. 789 dt. 13th April, 2000 (2000) 243 ITR (St) 57, clarifying that Certificate of Residence issued by the Mauritian Authorities will constitute sufficient evidence for accepting the status of residence as well as beneficial ownership for applying the India Mauritius DTAA. Accordingly, Foreign Institutional Investors who are resident in Mauritius would not be taxable in India on income from capital gains arising in India on sale of shares as per Article 13(4) of the treaty. Public interest litigation was filed before Delhi High Court by ***Shivkant Jhah v. UOI and Azadi Bachoo andolan v. UOI (WP No. 2802 of 2000*** challenging the aforesaid Circular.

Issue

Whether the provisions of the DTAA override the provisions of the Act. What is the meaning of the term 'liable to tax'? Can a non-resident claim benefit of DTAA only if he 'pays tax' in a Contracting State?

Held

Supreme Court observed that section 90 of the Act enables and empowers the Central Government to issue a notification for implementation of the terms of a DTAA. Supreme Court held that a DTAA would operate even if inconsistent with the provisions of the Income Tax Act and would override the provisions of the Act for determining the total income and the tax liability. Supreme Court further held that Circular no. 789 is a circular within the scope of section 90 and shall prevail even if it is inconsistent with the provisions of the Act. Supreme Court rejected the argument of the respondents that FIIs cannot be considered to be 'residents' of Mauritius under the DTAA because they are not 'liable to tax' in Mauritius on account of tax exemption on sale of shares under the Mauritius Income tax Act. Supreme Court held that the term 'liable to tax' is not the same as 'pays tax'. Therefore, FIIs incorporated in Mauritius are 'liable to tax' in Mauritius and are also to be treated as resident of Mauritius under the DTAA. Supreme Court held that Circular no 789 clarifying that FIIs, etc. which are resident in Mauritius would not be taxable in India on income from capital gains arising on sale of shares is not ultra vires the provisions of the Act. From the Judgement in

Shivkant Jhah v. UOI/Azadi Bachao Andolan v. UOI (2002) 175 CTR 371/256 ITR 563 (Delhi)(HC) (CA Nos. 8161 & 8162 of 2003 and 8163 & 8164 of 2003 dt. 7 -10-2003)

UOI v. Azadi Bachao Andolan (2003) 263 ITR 706/132 Taxman 373/184 CTR 450 (SC)

Editorial: With respect to tax planning, Supreme Court in Azadi Bachao Andolan Andolan observed that the decision of ***McDowell and Co. Ltd. v. CTO (1985) 154 ITR 148 (SC)*** could not be read as laying down the ratio that every attempt at tax planning is illegitimate and must be ignored or that every transaction or arrangement which is perfectly permissible under law which has the effect of reducing the tax burden of the assessee must be looked upon with disfavour. In ***Vodafone International Holdings BV v. UOI (2003) 341 ITR 1 (SC)*** held that there is no conflict between ***McDowell and Co. Ltd. v. CTO (1985) 154 ITR 148 (SC) and Azadi Bachao Andolan***

> *"The test of friendship is assistance in adversity,*
> *and that too, unconditional assistance.*
> *Co-operation which needs consideration is as*
> *a commercial contract and not friendship.*
> *Conditional co-operation is like adulterated*
> *cement which does not bind."*
>
> \- Mahatma Gandhi

55

S. 92C: Avoidance of tax – Transfer pricing – Arms' length price – Transactional Net Margin Method is the appropriate method in the case of service PE as it apportions the total operating profit arising from the transaction on the basis of sales, costs, assets, etc - Attribution of profit to permanent establishment – DTAA – India-USA [S. 9(1), 90, 92B, Art. 7]

Facts

Assessee, a US company, was an investment bank and was a part of the Morgan Stanley group. Assessee entered into an agreement with a group company Morgan Stanley Advantages Services Pvt. Ltd. (MSAS) for obtaining certain support services. Assessee filed an application with the Authority for Advance Rulings (AAR) seeking a decision as to whether the assessee had a permanent establishment (PE) in India and if so the income attributable to such PE. AAR held that the assessee did not have a fixed place PE or agency PE in India. AAR, however, held that the assessee would be regarded as having a service PE under Article 5(2)(l) of the India US DTAA if it sends its employees as stewards or on deputation in the employment of MSAS. In respect of income determination, AAR held that the Transactional Net Margin Method was the most appropriate method for determining the arm's length price for the services rendered. The ruling of the AAR was challenged by the assessee as well as by the department directly before the Supreme Court.

Issue

When does an assessee constitute a fixed place PE/agency PE/service PE in India? Does stewardship activity result in a service PE? Can a non-resident be taxed in India if it remunerates its associated enterprise which constitutes its permanent establishment in India on an arm's length basis?

Views

Article 5(1) of the India US DTAA states that the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on. Article 5(2)(l) states that the term permanent establishment would specifically include furnishing of services within a Contracting State by an enterprise through its employees or other personnel if the other conditions stated therein are satisfied. As per Article 5(4) of the India USA DTAA, an assessee shall be deemed to have a permanent establishment if, *inter alia,* a person other an agent of an independent status habitually exercises an authority to conclude contracts on behalf of the assessee.

Held: Supreme Court held that the assessee did not have a fixed place PE in India. Supreme Court noted that the group company MSAS would only be performing back office operations in India for the assessee and that it could not be said that the assessee has a fixed place of business through which the assessee carries on its business. Supreme Court also held that no agency PE was constituted in India as MSAS had no authority to enter into or conclude contracts on behalf of the assessee. Supreme Court noted that the contracts would be entered into and concluded in USA. Supreme Court also held that the term 'permanent establishment' was defined in an inclusive manner in section 92F(iiia) and would even include service PE, agency PE, construction PE, etc. While determining whether the assessee had a service PE in India, the Supreme Court bifurcated the activities into two – stewardship activities and work performed by employees on deputation. With respect to stewardship activities, Supreme Court observed that the assessee who has world-wide operations is entitled to insist on quality control and confidentiality from the service provider. In the present case, stewardship activities included briefing the staff of MSAS (i.e. service provider) to ensure that the output meets the requirements of the assessee (i.e. service recipient) and to also monitor the operations at MSAS. Supreme Court held that the object of stewardship activities is to protect the interests of the assessee customer and it could not be said that the assessee was rendering services to MSAS. Supreme Court, therefore, held that to the extent of stewardship activities, the assessee did not have a service PE in India. To the extent of services rendered by the employees on deputation, Supreme Court upheld the decision of the AAR that the deputed employees constitute a service PE of the assessee. Supreme Court observed that service PE is created in such instances as the assessee is responsible for the work of employees on deputation and the employees continue to remain on its payroll or they continue to have their lien on their jobs with the assessee. Supreme Court held that the income of the non-resident assessee is taxable in India to the extent of income attributable to the activities carried on by the non-resident through its permanent establishment in India. Supreme Court observed that the Transactional Net Margin Method is the appropriate method in the case of service PE as it apportions the total operating profit arising from the transaction on the basis of sales, costs, assets, etc. Supreme Court further held that where an associated enterprise that also constitutes a PE is remunerated on an arm's length basis taking into account all the risk-taking functions nothing further needs to be attributed to the PE. (CA No. 2914 of 2017 dt. 9-1-2007)

DIT v. Morgan Stanley & Co. (2007) 292 ITR 416/210 CTR 419/162 Taxman 165/201 Taxation 160 (SC)

Editorial: Supreme Court in Formula One World Championship Limited v. CIT (2017) 394 ITR 80/150 DTR 305/247 Taxman 153/295 CTR 12 (SC) and ***ADIT v. E-Funds IT Solution Inc. (2017) 399 ITR 34 (SC)/(2017) 298 CTR (SC) 505/(2017) 251 Taxman 280 (SC)*** held that to constitute a fixed place PE in India there must exist a fixed place of business in India which is ‘at the disposal’ of the assessee i.e. the assessee should have the right to use the place and should have control thereupon through which it carries on its own business. To constitute service PE, Supreme Court in E-funds observed that it is essential that an enterprise furnishes services “within India” through employees or other personnel.

> *“Each one has to find his peace from within. And peace to be real must be unaffected by outside circumstances.”*
>
> \- Mahatma Gandhi

56

S. 115J : Book profit – Net profits in profit and loss account prepared in accordance with Parts II and III of Schedule VI to Companies Act – Accounts scrutinised and certified by statutory auditors – Assessing Officer has no power to scrutinise except as provided in Explanation [Companies Act, 1956, Parts II and III of Schedule VI]

Facts

Assessee in its Profit and loss account provided for arrears of depreciation. Assessing officer while determining the book profit of the assessee for the purposes of section 115J of the Act excluded the provision for depreciation arrears and held that the Profit and loss account prepared by the assessee was not in accordance with Parts II and III of Schedule VI to the Companies Act, 1956.

Issue

Can the Assessing Officer while determining the book profits chargeable under section 115J of the Act question the correctness of the profit and loss account prepared by the assessee in accordance with the requirements of the Companies Act and certified by statutory auditors of the company?

Views

Section 115J(1A) mandates every company to prepare its profit and loss account in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956. *Explanation* to section 115J defines the term 'book profit' to mean net profit as shown in the profit and loss account prepared under section 115J(1A). The said Explanation provides for certain items to be added to or to be reduced from the net profit as shown in the profit and loss account.

Held

Supreme Court held that the Assessing Officer while computing the income under section 115J can only examine whether the books of accounts are certified by the authorities under the Companies Act to have been properly maintained in accordance with the Companies Act. The Assessing Officer cannot question the net profit shown in the profit and loss account. The limited power with the Assessing Officer is to make additions and reductions as provided for in the

Explanation to section 115J. (AY. 1988-89) (CA Nos. 6100 of 1998 and 2518 to19 of 1999 dt. 2-5-2002)

Apollo Tyres Ltd v. CIT (2002) 255 ITR 273/122 Taxman 562/174 CTR 521 (SC)

Editorial: Decision of the Kerala High Court in ***CIT v. Apollo Tyres Ltd. [1999] 237 ITR 706*** affirmed on this point.

"One must become as humble as the dust before he can discover truth."

- Mahatma Gandhi

57

S. 119: Central Board of Direct Taxes – Instructions – Circulars binding on revenue. [Indian Income-tax Act, 1922, S. 2(6A)(e), 12(IB)]

Facts

Assessee challenged the constitutional validity of sections 2(6A)(e) and 12(1B) which were introduced by the Finance Act, 1955 w.e.f. 1st April 1955. Section 2(6A)(e) defined dividend to include any advance or loan by a company not being a company in which public are substantially interested to its shareholder. Section 12(1B) was inserted to provide that any advance or loan which would have been treated as dividend under section 2(6A)(e) in any year prior to A. Y. 1955-56 if that clause was in force in that year, shall be treated as a dividend received in A. Y. 1955–56 if such loan or advance remained outstanding as on 1st April 1955. At the time of introduction of these amendments in Parliament, the Hon’ble Minister for Revenue and Civil Expenditure gave an assurance that outstanding loans and advances which would be otherwise liable to be taxed as dividends in A. Y. 1955-56 would not be subjected to tax if it was shown that they had been genuinely refunded to the respective companies before 30th June 1955. Government felt that the same was necessary as the operation of section 12(1B) would otherwise lead to extreme hardships by covering within its ambit the aggregate of all outstanding loans of past years. Circular No. 20 (XXI—6)/55 was issued by the Central Board of Revenue on the 10th May 1955 so as to honour the assurance given by the Minister in Parliament.

Issue

Whether a circular issued by the CBDT is binding on the revenue?

Held

Supreme Court held that the aforesaid circular issued by the Board would be binding on all officers and persons employed in the execution of the Act. Supreme Court observed that the circular clarified that it was likely that some companies might have advanced loans to their shareholders as a result of genuine transactions of loans and the provision was not intended to affect such transactions. Therefore, past transactions which would normally have attracted the stringent provisions of section 12(1B) were substantially granted exemption from the operation of the said provisions if the past loans were genuinely refunded to the companies. Such circular issued by the CBDT would be binding on the revenue authorities. (AY. 1956-57) (CA No. 45 of 1964 dt. 28-10-1964)

Navnitlal C. Javeri v. K. K. Sen AAC (1965) 56 ITR 198 (SC)

Editorial : Supreme Court in ***Ellerman Lines Ltd v. CIT (1971) 82 ITR 913 (SC), K. P. Varghese v. ITO (1981) 131 ITR 597 (SC)/(1981) 24 CTR (SC) 358, UCO Bank v. CIT (1999) 237 ITR 889 (SC), Paper Products Ltd v. CCE (2001) 247 ITR 128 (SC)/(2001) 165 CTR (SC) 693, Commissioner of Customs v. Indian Oil Corporation Ltd. & Anr. (2004) 267 ITR 272 (SC)/(2004) 187 CTR (SC) 297/(2004) 136 Taxman 491 (SC), UOI v. Azadi Bachao Andolan (2003) 263 ITR 706 (SC)/(2003) 132 Taxman 373 (SC)/(2003) 184 CTR 450 (SC)*** have upheld the binding nature of CBDT Circulars/Instructions which are beneficial to the assessee even if they are not in accordance with the correct interpretation of the section.

In ***Hindustan Aeronautics Ltd. v. CIT (2000) 243 ITR 808 (SC)/(2000) 110 Taxman 311 (SC)/(2000) 160 CTR (SC) 524, CCE v. Ratan Melting & Wire Industries (2008) 220 CTR (SC) 98/(2008) 14 DTR (SC) 324, CIT v. Hero Cycles P. Ltd. (1997) 228 ITR 463 (SC)/(1997) 142 CTR (SC) 122*** Supreme Court held that though a CBDT Circular is binding on the authorities under the Act but when the Supreme Court or the High Court has declared the law on a question the same shall be binding and not the circular which is contrary to the view expressed in the decision of the Supreme Court or the High Court. In ***CIT v. Anjum M.H. Ghaswala (2001) 252 ITR 1 (SC)/(2001) 119 Taxman 352 (SC)/(2001) 171 CTR (SC) 1*** the Court held that a clarificatory note or press release issued by the CBDT does not have statutory force like circulars issued by the Board under section 119.

> *"The good man is the friend of all living things."*
>
> \- Mahatma Gandhi

58

S. 131 : Power regarding discovery, production of evidence,etc- Investigation and Enquiry – Summons under Customs Act – Presence of Advocate during interrogation of Petitioner – To be within visible range but beyond hearing range – Advocate must be prepared to be present for every summons made [Customs Act, 1962, S. 108]

Facts

The petitioner filed a writ petition seeking directions to allow its Counsel to be present at the time of his interrogation by the Custom Authorities.

Held

Section 108 of the Customs Act, 1962 gives any gazetted officer of customs the power to summon any person to give any evidence or produce documents. The section also states, that the person so summoned, is bound to attend and state the truth upon any subject with respect to which he is being examined or make statements and produce such documents and other things as may be required. The section does not expressly mention whether the Counsel of such person so summoned would be able to witness such inquiry/interrogation. However, in the present case, Supreme Court allowed the Counsel of the petitioners to be present during the interrogation of the petitioners. Supreme Court directed that during the interrogation the Counsel should be made to sit within a visible distance but beyond hearing range. It was also directed that the petitioner's counsel should always be prepared to be present whenever the petitioners are called upon to attend the interrogation. (Cr MP No. 10117 of 2012 (WP No. 29 of 2012 dt. 25-4-2012)

Vijay Sajnani v. UOI 2017 (345) ELT 323 (SC)/MANU/SC/1312/2012

Editorial : In ***Sangit Agarwal v. The Director General, Directorate of Revenue Intelligence 2017 (356) ELT 518 (Delhi.) (HC),*** the Court held that the authorities may permit the presence of an Advocate during interrogation of Petitioner, however he has to be within visible range but beyond hearing range and Advocate must be prepared to be present for every summons made.

> *"I do feel that spiritual progress does demand at some stage that we should cease to kill our fellow creatures for the satisfaction of our bodily wants."*
>
> \- Mahatma Gandhi

59

S.132: Search and seizure – Constitutional validity – Evidence found in illegal search – Can be used against the person from whose custody it was seized [S. 135, Rule 112, of the Income-tax Rules, 1962; Constitution of India, Art. 14, 19]

Facts

A search operation under section 132 of the Income-tax Act, 1961 was conducted at Assessee's business as well as residential premises and articles consisting of account books and documents, cash, jewellery were seized by income-tax authorities. The Assessee filed a petition in the High Court challenging that search and seizure in residential premises of the Assessee as *mala fide*, oppressive, indiscriminate and vexatious and illegal. The Assessee also challenged the use of the material gathered during the search on the basis that the material/evidences were collected based on an illegal search. The High Court dismissed the petition and held the search proceedings to be valid. The High Court also held that even if the search was held to be illegal, it would not prevent the income-tax authorities from relying on material gathered in the course of the such a search.

Issue

Whether the department could be restrained from using the information gathered from the documents which had been seized during a search which was held to be illegal?

Views

The Evidence Act, 1871, which is a law consolidating, defining and amending the law of evidence, permits relevancy as the only test of admissibility of evidence. Neither the Evidence Act, nor any other similar law in force excludes relevant evidence on the ground that it was obtained under an illegal search or seizure.

The power of search and seizure, is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have not subjected such regulations to constitutional limitations by recognition of a fundamental right to privacy, there was no justification to import it into a totally different fundamental right, by some process of strained construction.

The test to be applied, both in civil and in criminal cases, in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is relevant and therefore admissible, the court will not be concerned with how such evidence was obtained.

Held

Even assuming, the search and seizure were in contravention of the provisions of section 132 of the Income-tax Act, still the material seized was liable to be used subject to law before the income-tax authorities against the person from whose custody it was seized. (AY. 1969-70, 1970-71) (WPNos. 446 of 1971 & 86 of 1972; CA Nos. 1319 & 1320 of 1968 & W.P. Nos. 798 & 800 of 1966 dt. 14-12-1973)

Poran Mal v. Director of Inspection (1974) 93 ITR 505/1974 CTR 25 (SC)

Editorial: Earlier decisions on the similar issue may be referred ***ITO v. Sheth Bros (1969) 74 ITR 836 (SC), Comm. of Commercial Taxes v. R. S. Jhaveri (1967) 66 ITR 664 (SC)***

> *"Honest disagreement is often*
> *a good sign of progress."*
>
> \- Mahatma Gandhi

60

S. 133A: Power of survey – Statements recorded during survey – Evidentiary value – Unexplained investments – Statement obtained under survey would not automatically bind upon the assessee and that it is not conclusive piece of evidence by itself and that section 133A does not empower any Income-tax Officer to examine any person on oath and that solely on the basis of the statement given by one of the partner of the assessee - firm income is not assessable – Addition cannot be made merely on the basis of such statement [S. 69]

Facts

The assessee filed its return of income on 29.10.2001 disclosing an income of Rs.12,640. The return was processed under section 143(1) of the 'Act') on 27.8.2002 and notice under section 143(2) of the Act was issued on 27.8.2002 and served on the assessee on 24.9.2002. In the instant case, a survey action was conducted under section 133A of the Act on 24.7.2001 in the premises of the assessee and one of the partners of the firm, by name Asif Khan, in his sworn statement offered an additional income of Rs.20,00,000 for the assessment year 2001-02 and Rs.30,00,000 for the assessment year 2002-03. However, the said statement was retracted by the assessee through its letter dated 3.8.2001 stating that the partner Asif Khan, from whom a statement was recorded during the survey operation under section 133A, was new to the management and he could not answer to the enquiries made and as such, he agreed to an *ad hoc* addition, which could never be achieved by the business owing to the severe competition and to the legislation by the Government prohibiting smoking in public places. The assessee, thus, contended that the statement of Asif Khan recorded under section 133A has no evidentiary value. It was specifically contended that the power to examine a person on oath is specifically conferred on the authorities only during the course of any search under section 132(4) of the Act and therefore, it was requested that the survey operations would not serve any useful purpose and the sworn statement recorded during the survey should not be given any weightage. The AO came to the conclusion that he had reason to believe that the assessee had evaded production of stated books during the survey action and even after the survey action, as it could be seen from the survey folders. Accordingly, the AO came to the conclusion based on the admissions made by the assessee, which are directly relatable to the defects noticed during the action under section 133A of the Act, he recomputed the assessment and sought for the balance tax payable by his assessment order dated 30.3.2004. Aggrieved by the said assessment order the assessee preferred an appeal before the CIT(A), who, by order dated 30.11.2006, held the issue in favour of the assessee. On appeal, at the instance of the Revenue, the Tribunal holding that there was no infirmity in the order of the Commissioner, dismissed the Revenue's appeal. On revenue's appeal, High court dismissed the same after culling out following striking principles on the subject of evidentiary value of survey based statement under section 133A of the Act:

"From the foregoing discussion, the following principles can be culled out:

(i) An admission is an extremely important piece of evidence but it cannot be said that it is conclusive and it is open to the person who made the admission to show that it is incorrect and that the assessee should be given a proper opportunity to show that the books of account do not correctly disclose the correct state of facts, *vide* decision of the apex court in ***Pulkngode Rubber Produce Co. Ltd. v. State of Kerala [1973] 91 ITR 18***;

(ii) In contradistinction to the power under section 133A, section 132(4) of the Income-tax Act enables the authorised officer to examine a person on oath and any statement made by such person during such examination can also be used in evidence under the Income-tax Act. On the other hand, whatever statement is recorded under section 133A of the Income-tax Act is not given any evidentiary value obviously for the reason that the officer is not authorised to administer oath and to take any sworn statement which alone has evidentiary value as contemplated under law, vide ***Paul Mathews & Sons v. CIT [2003] 263 ITR 101 (Ker.)(HC)***;

(iii) The expression "such other materials or Information as are available with the Assessing Officer" contained in section 158BB of the Income-tax Act, 1961, would include the materials gathered during the survey operation under section 133A, *vide* ***CIT v. G. K. Senniappan [2006] 284 ITR 220 (Mad.) (HC)***;

(iv) The material or information found in the course of survey proceeding could not be a basis for making any addition in the block assessment, vide decision of this court in T. C (A) No. 2620 of 2006 (between ***CIT v. S. Ajit Kumar [2008] 300 ITR 152 (Mad.)(HC)***;

(v) Finally, the word "may" used in section 133A(3)(iii) of the Act, *viz.*, "record the statement of any person which may be useful for, or relevant to, any proceeding under this Act", as already extracted above, makes it clear that the materials collected and the statement recorded during the survey under section 133A are not conclusive piece of evidence by itself.

For all these reasons, particularly, when the Commissioner and the Tribunal followed the circular of the Central Board of Direct Taxes dated March 10, 2003, extracted above, for arriving at the conclusion that the materials collected and the statement, obtained under section 133A would not automatically bind upon the assesses we do not see any reason to interfere with the order of the Tribunal."

In revenue's civil appeal, the apex court has dismissed it by very short order " Heard learned counsel on both sides. Leave granted. In view of the concurrent findings of fact, this civil appeal is dismissed." (AY. 2001-02) (SLA (A) (C) No. 13224/2008 dt. 20-9-2012)

CIT v. S. Khader Khan Son (2012) 210 Taxman 248/79 DTR 184/254 CTR 228/ (2013) 352 ITR 480 (SC)

Editorial : View of Madras High Court in ***CIT v. S. Khader Khan Son (2008) 300 ITR 157 (Mad.)*** affirmed.

Merger Aspect : Since above apex court decision is an affirmation order of underlying high court decision, after the leave was granted and same was converted before apex court into a valid civil appeal, so as settled by Apex court in case of ***Kunhayammed & Ors v. State of Kerala & Anr. (2000) 245 ITR 360 (SC),*** the high court decision merges into Apex court order and same is now an Apex court order for purposes of attracting binding force under article 141 of the Constitution. For this reference may be made to latest apex court three judge bench dictum in case of ***Khoday Distilleries Ltd v. Mahadeshwara Sahkara Sakkae Karkhane Ltd (2019) 262 Taxman 279 (SC)*** which affirms above said merger principle reiterating ***Kunhayammed & Ors v. State of Kerala & Anr.***

This decision in S. Khader Khan case (supra) has been subject matter of immense judicial interpretation before various judicial forums and is a celebrated decision on the subject of evidentiary value of statement recorded under section 133A (survey operation) under the Act. Few notable High Court decisions favoring assessee where S. Khader Khan case is referred are: i) ***A. Thangavel.Nadar Stores v. ITO (2019) 417 ITR 50 (Mad) (HC)*** (reopening solely on basis of survey statement under section 133A quashed in writ petition by High court); ii) ***CIT v. P.Balasubramanian (2013) 354 ITR 116 (Mad) (HC).*** (same ratio as in S.Khader Khan case) iii) ***CIT v. Dhingra Metal Works (2010) 328 ITR 384 (Delhi) (HC)*** (same ratio as in S. Khader Khan case) iv) ***CIT v. IibsInfonet Pvt. Ltd. (2017) 394 ITR 538 (Delhi) (HC)*** Notably, even Kerala high court decision in case of ***Paul Mathews & Sons v. CIT (2003) 263 ITR 101 (Ker) (HC)*** as followed in S. Khader Khan is assesse favoring decision which is followed in S. Khader Khan case by High court. Some revenue favoring High Court decisions where S. Khader Khan case is referred are i) ***CIT v. Avinash Setia (2017) 395 ITR 235 (Delhi)(HC)*** ii) ***Raj Hans Towers Pvt Ltd v. CIT (2015) 373 ITR 9 (Delhi)(HC);*** iii) ***C. K. Abdul Azeez v. CIT (2019) 417 ITR 363 (Ker) (HC)***

In all such matters on above subject, it is notable that CBDT Instruction No. F. No 286/2/2003-IT (Inv.) dt. 10-3-2003 (April 2003 AIFTP Journal P. 25 and Letter [F. No. 286/98/2013-IT (INV-II) dt. 18012-2014) is normally referred to.

One recent amendment made in section 133A of the Act by Finance Act 2020 is worth noting where appropriate approval requirement is placed in the statute, which prior approval from higher authority of Joint director or Director as the case may be, has to be obtained by survey conducting authority (with effect from 01.04.2020). Further *vide* order under section 119 of the Act dated 13.08.2020,CBDT has prescribed that only officers posted in Directorate of investigation (investigation wing) and Commissionerates of TDS shall only act as "income tax authority" for purposes of power of survey under section 133A of the Act and competent authority for approval for such survey action shall be DGIT (Inv) for investigation wing and Pr.CCIT/CCIT(TDS) for TDS Charges, as the case may be (with effect from 13.08.2020).)

> *"You may think your actions are meaningless and that they won't help, but that is no excuse, you must still act."*
>
> - Mahatma Gandhi

61

S. 139AA: Return of income – Quoting of Aadhaar number – Legislative powers – Provision is held to be valid – Proviso to s. 139AA(2) cannot be read retrospectively as it takes away vested rights. It will only have prospective effect [Art. 14, 19(1)(g), 21]

Facts

Section 139AA of the Income-tax Act, 1961, inserted by the amendment to the said Act *vide* Finance Act, 2017, which mandates quoting of Aadhaar number in the PAN application forms as well as in the income-tax returns with effect from 1-7-2017. The proviso to the section provided for the rendering of PAN as void *ab initio* for failure to comply with the requirements of the section.

Issue

Whether proviso to section 139AA(2) which renders PAN void *ab initio* for failure to intimate Aadhaar number applies with retrospective effect?

Views

Section 139AA makes it compulsory for the assessees to give Aadhaar number which means insofar as income tax assessees are concerned, they have to necessarily enrol themselves under the Aadhaar Act and obtain Aadhaar number which will be their identification number as that has become the requirement under the Income-tax Act.

The competence of the Parliament cannot be questioned on the ground that it is impermissible only because under Aadhaar Act, the provision is directory in nature. It is the prerogative of the Parliament to make a particular provision directory in one statute and mandatory/compulsory in other. That by itself cannot be a ground to question the competence of the legislature.

The provision is aimed at seeding Aadhaar with PAN. One of the main objectives is to de-duplicate PAN cards and to bring a situation where one person is not having more than one PAN card or a person is not able to get PAN cards in assumed/fictitious names. In such a scenario, if those persons who violate section 139AA without any consequence, the provision shall be rendered toothless. It is the prerogative of the Legislature to make penal provisions for violation of any law made by it. The requirement of giving Aadhaar enrolment number to the designated authority or stating this number in the income tax returns is directly connected with the issue of duplicate/fake PANs.

As the requirements of section 139AA, found as not violative of Articles 14 and 19, there have to be some provision stating the consequences for not complying with the requirements of section 139AA. However, as far as existing PAN holders are concerned, since the impugned provisions are yet to be considered in the context of Article 21 of the Constitution, and is to be decided by the Constitution Bench a partial stay of the aforesaid proviso is necessary.

If failure to intimate the Aadhaar number renders PAN void *ab initio* with the deeming provision that the PAN allotted would be invalid as if the person had not applied for allotment of PAN would have rippling effect of unsettling settled rights of the parties. It has the effect of undoing all the acts done by a person on the basis of such a PAN. It may have even the effect of incurring other penal consequences under the Act for earlier period on the ground that there was no PAN registration by a particular assessee. The rights which are already accrued to a person in law cannot be taken away.

Held

The proviso to section 139AA(2) cannot be read retrospectively as it takes away vested rights. It will only have prospective effect. (WP(C) No. 247 of 2017/277 of 207/304 of 2017 dt. 9-6-2017)

Binoy Viswam v. UOI (Adhaar Card Linkage with Pan) (2017) 396 ITR 66/249 Taxman 290/296 CTR 17/153 DTR 209 (SC)

Editorial : In ***Hussain Indorewala v. UOI (2018) 408 ITR 338/303 CTR 641/168 DTR 113/257 Taxman 465 (Bom.)(HC)*** held that in case the system does not accept the return the assesssee is at liberty to file their return of income in physical form with jurisdictional Assessing Officer.

"Fear of disease killed more men than disease itself."

- Mahatma Gandhi

62

S. 143(2): Assessment – Notice – Failure to issue a notice u/s. 143(2) renders the assessment order void even if the assessee has participated in the proceedings – Deeming fiction does not operate to save complete absence of notice [S. 292BB]

Facts

A search and seizure operation was conducted at premises of the Assessee who was carrying on brokerage business. He submitted his return and assessment was completed under section 143(3) making addition on account of unexplained cash.

On Appeal, the CIT(A) deleted the addition.

The Department filed an appeal to the Tribunal. The Assessee filed cross objections challenging the jurisdiction of the AO on the ground that notice under section 143(2) had not been issued.

The Tribunal allowed the cross objection filed by the Assessee. This view was upheld by the High Court.

Issue

Whether section 292BB seeks to cure infirmities in the manner of service of notices or whether the non-issuance of the notice can be cured by the participation of the Assessee in the proceedings?

Views

The provision only cures the infirmities in the manner of service of notice and does not intended to cure complete absence of notice itself. The deeming fiction does not operate to save complete absence of notice.

Held

The failure to issue a notice under section 143(2) renders the assessment order void even if the Assessee has participated in the proceedings. Section 292BB does not save complete absence of notice. For section 292BB to apply, the notice must have emanated from the department. (CA Nos. 6261-6262 of 2019 dt. 13-8-2019)

CIT v. Laxman Das Khandelwal (2019) 417 ITR 325/266 Taxman 171/310 CTR 8/180 DTR 313 (SC)

Editorial: CIT v. Laxman Das Khandelwal (2019) 108 taxmann.com 182 (MP) (HC) is affirmed. ***ACIT v. Hotel Blue Moon (2010) 321 ITR 362 (SC)*** is referred.

> *“You can chain me, you can torture me, you can even destroy this body, but you will never imprison my mind.”*
>
> \- Mahatma Gandhi

63

S.143(3): Assessment - Amalgamation – Date of Amalgamation - Specified in scheme of amalgamation and approved by the Court without specifying any other date - Date specified in scheme should be taken as transfer date [S. 2(IB), Constitution of India, Art. 226, Companies Act 1956, S. 391, S. 394]

Facts

The merger scheme of the Companies was finalised in December 1982 and resolution was passed proposing to amalgamate with effect from 1-1-1982. The High Courts of Madras and Calcutta accorded sanction to the scheme and transfer of assets on 21-11-1983 and 11-1-1984, respectively. The orders sanctioning the scheme of amalgamation did not specify the date of amalgamation. The name of the assessee was, struck off from the register of companies on 21-1-1986. The AO issued the notice under section 142(1) to the subsidiary-company for the AYs 1984-85, 1985-86. The holding-company claiming itself as successor to the assessee filed writ petitions against the proceedings for assessment on the ground that the assessee was not in existence since 1-1-1982 when it had been amalgamated with it. The High Court dismissed the petition holding that the amalgamation became effective only when the Court approved the scheme of amalgamation and not at any earlier point of time. The High Court held that the operative dates would be 20-1-1984 and 24-2-1984, on which dates the High Courts of Madras and Calcutta High Courts approved the scheme and as the order was silent as regards the effective date being1-1-1982, the subsidiary company was in existence till 21-1-1986 in the register of companies, and it did not cease to exist as of fact on 1-1-1982.

Issue

Where a date of amalgamation is specified in scheme of amalgamation and the scheme of amalgamation is duly approved by Company Court without specifying any other date, could the date specified in scheme should be taken as 'transfer date'?

View

A reading of the above clauses of the scheme shows that according to the scheme, the entire undertaking of the subsidiary company shall be transferred to the holding company with effect from the transfer date and that the subsidiary company shall be amalgamated with the holding company with effect from the said date. Every scheme of amalgamation has to necessarily provide a date with effect from which the amalgamation/transfer shall take place. The scheme concerned herein does so provide, namely 1-1-1982. It is true that while sanctioning the scheme, it is open to the Court to modify the said date and prescribe such date of amalgamation/transfer as it thinks appropriate in the facts and circumstances of the case. If the Court so specifies a date, there is little doubt that such date would be the date of amalgamation/date of transfer. But where the Court does not prescribe any specific date but merely sanctions the scheme presented to it,as has happened in this case, it should follow that the date of amalgamation/date of transfer is the date specified in the scheme as 'the transfer date'. It cannot be otherwise.

Held

On appeal reversing the judgement the Court held that where a date of amalgamation is specified in a scheme of amalgamation and the scheme of amalgamation is duly approved by the Court without specifying any other date, date specified in scheme should be taken as transfer date. (AY. 1984-85, 1985-86) (CA Nos. 1661 & 1662 of 1992 dt. 27-11-1996)

Marshall Sons and Co (India) v. ITO (1996) 88 Taxman 619/(1997) 223 ITR 809/138 CTR 1(SC)/2 SCC 302

Editorial: Marshall Sons and Co. (India) Ltd. v. ITO (1992) 195 ITR 417 (Mad) (HC) reversed. In ***Dalmia Power Ltd v. ACIT [2020] 420 ITR 339/269 Taxman 352 (SC)*** the Court held that where pursuant to scheme of amalgamation approved by NCLT, transferor companies had been succeeded by appellants/transferee companies after due date for filing revised return, Department was to consider revised returns filed beyond prescribed timeline after taking into account scheme of amalgamation as sanctioned by NCLT. In ***PCIT v. Maruti Suzuki India Ltd. (2019) 416 ITR 613/265 Taxman 515/309 CTR 433/180 DTR 185 (SC)*** the Court held that the notice issued in the name of amalgamating entity after amalgamation is void. The amalgamating entity ceases to exist-Participation in the proceedings by the assessee cannot operate as an estoppel against law.

In ***Hindustan Lever & Anr v. State of Maharastra & Anr (2004) 9 SCC 438,*** the Court held that an order sanctioning a scheme of amalgamation u/s 394 read with section 391 of the Companies Act, 1956 is liable to be stamped in accordance with the provisions of the Bombay Stamp 1958 Act in its application in the State of Maharashtra

> *"I look only to the good qualities of men. Not being faultless myself, I won't presume to probe into the faults of others."*
>
> \- Mahatma Gandhi

64

S. 143(3): Assessment-Natural justice - Denial of opportunity to cross examine witness-Failure to give the assessee the right to cross-examine witnesses whose statements are relied upon results in breach of principles of natural justice. It is a serious flaw which renders the order a nullity [Central Excise Act, 1944, S. 3, Rules 1944, R. 173C)

Facts

The assessee was engaged in the business of manufacture and sale of ply wood. Some of the products were sold directly from the factory premises in South Andamans to certain buyers. The major portion of products manufactured were sold to other dealers from the assessee's numerous depots, situated at various places in the country.

The assessee had filed its declaration under section 173C of the Central Excise Rules showing the price of the goods at which they were sold ex-factory and delivery basis. The AO observed that there was a large price difference between the goods sold at ex-factory basis in comparison with the goods which were sold to the buyers from their depots.

While investigating this price differential, the statements of two customers were taken and relied on by the revenue to adopt the depot sale price as the value of the goods for excise purposes. The assessee *inter-alia* questioned the correctness of the statements of the aforesaid two witnesses and demanded right to cross-examine them.

The Tribunal rejected the plea of the assessee to cross-examine the dealers whose statements were relied upon by the AO on the basis that cross examination would not help the assessee as it would not bring out any material which would not already be in the possession of the appellant themselves.

Issue

Whether an assessee is entitled to cross examine a party whose statement is relied upon by the authorities when the assessee could have relied on alternate evidences.

Views

Not allowing the assessee to cross-examine the witnesses by the AO though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. The Tribunal simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellants themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to guess as to for what purposes the appellant wanted to cross-examine those dealers and what information the appellant wanted to extract from them.

Held

It was not for the authorities or the Tribunal to presuppose as to what could be the subject matter of the cross-examination. and make the remarks as mentioned above. The assessee was entitled to cross-examine the parties with a view as to discredit them. (CA No. 4228 of 2006 dt. 2-9-2015)

Andaman Timber Industries v. CCE (2015) 127 DTR 241/281 CTR 241 (SC)

Editorial : In ***Kishanchand Chellaram v. CIT (1980) 125 ITR 713 (SC)*** the Court held that the department is bound to provide an opportunity to the assessee to cross examine the piece of evidence on which it places reliance to draw an adverse inference to make any addition or disallowance.

> *"Champions are made from something*
> *they have deep inside of them –*
> *a desire, a dream, a vision."*
>
> \- Mahatma Gandhi

65

S.143(3): Assessment – Principle of *res-judicata* – Strictly *Res judicata* does not apply to income tax proceedings. However, where a fundamental aspect permeating through different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order it would not be at all appropriate to allow the position to be changed in a subsequent year [S. 11, 12]

Facts

The Assessee is a charitable trust established in 1861 and had been claiming exemption under section 11.

The question of assessing the income for the first time arose in the assessment year 1937-38.

For assessment years 1937-38 and 1938-39, the Commissioner deleted additions holding that the offerings made to the trust were not used for personal benefit and such offerings were exempt under section 4(3)(i) of the 1922 Act.

In assessment year 1939-40 the AO rejected the claim for exemption, but the same was allowed in appeal before the ACC.

Until assessment year 1963-64, the refund applications made by the assessee were accepted on the basis that income was exempt and that tax had been deducted at source.

For the first time claim for refund in the years 1964-65 to 1966-67 was not allowed and the assessee was treated as an AOP and taxed.

For the assessment years 1966-67 to 1969-70 assessments were completed and the AO did not accept the assessee's claim of exemption under section 11.

Issue

Whether, in the absence of any change in the circumstances, could the revenue reopen a question which had been decided upon in the earlier years?

Views

Strictly speaking *res judicata* does not apply to income-tax proceedings. Each assessment year is a separate a unit and what is decided in one year may not apply in the following year. However, where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.

Held

In the absence of any material change justifying the revenue to take a different view of the matter, the question should not have been reopened contrary to what had been decided by the Commissioner in the earlier proceedings. (AYs. 1964-65 to 1969-70) (CA Nos. 10574 to 10583 of 1983 dt. 15-11-1991)

Radhasaomi Satsang v. CIT (1991) 100 CTR 267/(1992) 193 ITR 321/60 Taxman 248 (SC)

Editorial : In ***Godrej & Boyce Manufacturing Co Ltd v. DCIT (2017) 394 ITR 449/247 Taxman 361/151 DTR 89/295 CTR 121 (SC) In Raja Jagdambika Pratap Narain Singh v. CBDT (1975) 100 ITR 698 (SC),*** the Court held that earlier decision of Appellate Tribunal does not operate as res judicata if in the subsequent years, more evidence is available. in ***PCIT v. C. U. Inspections India (P) Ltd (2018) 254 taxman 137 (Bom) (HC)*** the Court held that when the rate of tax if the income is offered in next year the department should not dispute the year of taxability followed ***CIT v. Nagri Mills Co Ltd (1981) 131 ITR 257 (Guj) (HC), CIT v. Excel Industries Ltd (2013) 358 ITR 295 (SC)***

> *"First they ignore you, then they laugh at you,*
> *then they fight you, then you win."*
>
> \- Mahatma Gandhi

66

S. 143(3) : Assessment – Affidavit – When a statement is given in affidavit the same is proved to be correct unless proved otherwise [S. 69A, High Denomination Bank Notes (Demonetisations) Ordinance, 1946, Indian Income-tax Act, 1922, S. 23]

Facts

The assessee firm was carrying on mill store business at Ahmedabad.

The Governor-General on 12-1-1946, promulgated the High Denomination Bank Notes (Demonetisations) Ordinance, 1946, and high denominations bank notes ceased to be legal tender on the expiry of 12-1-1946.

Pursuant to the Ordinance the assessee, on 18-1-1946, encashed high denomination notes of Rs. 1,000 each of the face value of Rs. 61,000.

After examining the entries in the books of account of the Assessee and the position of the cash balances on various dates and the nature and extent of the receipts and payments during the relevant period, the AO came to the conclusion that in order to sustain the contention of the appellants he would have to presume that there were eighteen high denomination notes of Rs. 1,000 each in the cash balance on 1st January, 1946, and that all cash receipts after 1-1-1946, and before 13-1-1946, were received in currency notes of Rs. 1,000. The AO, therefore, added the sum of Rs. 61,000 to the assessable income of the assessee from undisclosed sources.

Before the AAC the assessee produced affidavits from some of the parties to demonstrate that payment was received in Rs. 1,000 denomination notes. The ACC did not accept the statements contained in the said affidavits and dismissed the appeal

Issue

Whether facts put forth by the assessee in an affidavit could be disregarded without any material to dislodge the position taken by the assessee?

Views

Neither scrutiny was made by the AO or the AAC of the entries in the cash book nor were the entries challenged. No further documents or vouchers in relation to those entries were called for, nor was the presence of the deponents of the three affidavits considered necessary by either party and no cross examination of the deponents carried out by the Authorities. Under these circumstances it was not open to the Revenue to challenge the correctness of the cash book entries or the statements made by those deponents in their affidavits.

Held

Disregarding of the affidavits was based pure surmise and had no basis in the evidence, which was on the record of the proceedings. (AY. 1947-48) (CA No. 81 of 1954 dt. 10-5-1956)

Mehta Parikh & Co v. ITO (1956) 30 ITR 181 (SC)/AIR 1956 SC 554

Editorial: Followed in ***Daulat Ram Rawatmull v. CIT (1973) 87 ITR 349 (SC).*** Once an affidavit is furnished, it should be presumed to be a correct statement of facts. If these facts are to be controverted, either the deponent must be examined or evidence contrary to facts must be led. In the absence of these the affidavits could not be ignored.

> *"We notice that the mind is a restless bird; the more it gets the more it wants, and still remains unsatisfied. The more we indulge our passions the more unbridled they become."*
>
> \- Mahatma Gandhi

67

S. 144: Best judgment assessment-Arbitrary-Honest and fair estimate [S. 145(3)]

Facts

The assessee deals in precious and semi-precious stones. The AO noticed various defects in the books of account of the assessee. The AO therefore rejected the books of account and proceeded to make a best judgement assessment under section 144.

Issue

Whether there is necessarily some estimation involved in a best judgment assessment?

Views

The authorities concerned should try to make an honest and fair estimate of the income even in a best judgment assessment, and should not act totally arbitrarily, but there is necessarily some amount of guess work involved in a best judgment assessment, and it is the assessee himself who is to blame as he did not submit proper accounts.

Held

Even though there is always a certain degree of guess work in a best judgment assessment, the authority should try to make an honest and fair estimate of the income and should not act totally arbitrarily. (CA No. 5809 of 2006 dt. 14-12-2006)

Kachwala Gems v. Jt. CIT (2006) 206 CTR 585/(2007) 288 ITR 10/158 Taxman 71/196 Taxation 738/AIR 2007 SC 487 (SC)

Editorial : Earlier decision on the similar issue may be referred ***Joharmal Murlidar & Co v. Agri. ITO (1971) 79 ITR 6 (SC)***

> *"If patience is worth anything, it must endure to the end of time. And a living faith will last in the midst of the blackest storm."*
>
> \- Mahatma Gandhi

68

S. 144: Best Judgment Assessment - Bogus purchases – Unregistered dealers – Addition of alleged bogus purchase creditors after rejection of books of account - assessee brought on record, where CIT(A) in penalty appeal proceedings affidavits of 13 unregistered dealers out of whom 12 were examined by the Officer, accepted the explanation of assessee that said creditors are genuine and accordingly deleted the penalty under section 271(1)(c) of the Act. That The dealers stood by the assertion made by the assessee about the purchases on credit from them-Held Factual basis on addition was made in quantum proceedings stands dispelled by the affidavits and statements of the concerned unregistered dealers in penalty proceedings- Addition cannot be justified, much less, sustained (Other contentions raised by assessee not adjudicated)- Addition is held to be not justified [S. 68, 271(1)(c)]

Facts

The case of assessee was selected for scrutiny proceedings *vide* notice issued under section 143(2) of the Act by 'AO' for assessment year 1998-1999. In assessment order passed by 'AO' one of the addition contested before the apex court, was pertaining to unexplained cash credits under section 68 of the Act of Rs. 226,000 which pertained to purchase of marbles from unregistered dealers. This addition made in the assessment order passed by 'AO' was sustained successively and concurrently by CIT(A), ITAT and high court under section 68 of the Act, where they confirmed the 'AO' view that said creditors are bogus and are not genuine creditors. Although assessee raised a jurisdictional question that after books are rejected to estimate the profit, very same books cannot be relied to invoke section 68 of the Act qua stated purchase creditors, the same was rejected by High court. It viewed these credits were nothing but bogus entries and same are rightly added to the income of the assessee. In its appeal before the apex court assessee raised that jurisdictional contention again which is noted extensively in the order of apex court. However said jurisdictional contention on possible applicability of section 68 where books are rejected is not adjudicated in the order of apex court. Before apex court one interlocutory application was filed by assessee pointing to the CIT(A) order in penalty appeal proceedings under section 271(1)(c) of the Act vis-a-vis very same addition of alleged unexplained credits (which is contested on merits before apex court).In this order of CIT(A) deleting the penalty under section 271(1)(c) on very same additions under section 68 of the Act. The reason which weighed with CIT(A) leading to deletion of penalty under section 271(1)(c) was assessee produced affidavits of 13 unregistered dealers out of whom 12 were examined by the officer. In the examination in their statements no infirmity was found.. The dealers stood by the assertion made by the assessee about the purchases on credit from them; and which explanation has been accepted by the CIT(A) in paragraphs 17 and 19 of the penalty appeal order dated 13.1.2011.

Issue

Can addition made under section 68 of the Act in quantum assessment proceedings be sustained in wake of subsequent CIT(A) order deleting the penalty under section 271(1)(c) of the Act, on very same additions, after holding that assessee has proved genuineness of its purchase creditors (on basis of affidavits filed and their positive statements recorded) and which acceptance of genuineness of said purchase creditors in said penalty proceedings under section 271(1)(c) of the Act has attained finality?

Views

The court noted that *"… it has now come on record that the appellant/assessee in penalty proceedings offered explanation and caused to produce affidavits and record statements of the concerned unregistered dealers and establish their credentials. That explanation has been accepted by the CIT(A)* vide *order dated 13.1.2011."*

Held

Allowing assessee's appeal the court held that, the factual basis on which the Officer formed his opinion in the assessment order dated 30.11.2000 (for assessment year 1998-1999), in regard to addition of Rs.2,26,000, stands dispelled by the affidavits and statements of the concerned unregistered dealers in penalty proceedings. It was further noted that, this evidence fully supports the claim of the appellant/assessee. It observed that, *"The appellate authority vide order dated 13.1.2011, had not only accepted the explanation offered by the appellant/assessee but also recorded a clear finding of fact that there was no concealment of income or furnishing of any inaccurate particulars of income by the appellant/assessee for the assessment year 19981999. That now being the indisputable position, it must necessarily follow that the addition of amount of Rs.2,26,000 cannot be justified, much less, maintained."* Finally it was concluded by the court that, *"…accordingly, this appeal ought to succeed on this count alone and it would be unnecessary for us to dilate on other questions/contentions urged by the parties as referred to in the earlier part of this judgment. 17. Accordingly, this appeal is allowed. The addition of Rs.2,26,000/(Rupees two lakhs twenty-six thousand only) by the Officer under Section 68 of the 1961 Act, towards cash credit amount shown against the names of concerned unregistered dealers for the assessment year 19981999, is hereby set aside."* (AY. 1998-99) (CA No. 6110 of 2009 dt. 24-04-2020)

Basir Ahmed Sisodiya v. ITO (2020) 424 ITR 1/188 DTR 20/314 CTR 1/116 taxman.com 375 (SC)

Editorial : This decision is a peculiar decision where positive adjudication on facts in penalty proceedings has helped the assessee in deletion of the addition in quantum order.

> *"What is true of the individual will be tomorrow true of the whole nation if individuals will but refuse to lose heart and hope."*
>
> \- Mahatma Gandhi

69

S. 145: Method of accounting – A person cannot make a profit from himself- Revaluation is not taxable event [S. 4, Indian Income-tax Act, 1922, S. 13]

Facts

The assessee dealt in silver and shares and a substantial part of his holding were kept in silver bullion and shares. His business was run and owned by himself and his accounts were maintained according to the mercantile system. The stocks of silver bars and shares were valued at cost.

In the course of the year the appellant withdrew some bars and shares from the business and settled them on certain trusts. The assessee credited the business with the cost price of the bars and shares withdrawn.

Issue

Whether act of withdrawal resulted in income, profit or gain either to the assessee or to his business?

Views

The act of withdrawing silver bars and shares was not a business transaction and by that act the business made no profit or gain, nor did it sustain a loss, and the appellant derived no income from it. The assessee may have stored up a future advantage for himself but as the transactions were not business ones and as the assessee derived no immediate pecuniary gain the State cannot tax them, for under the Income-tax Act the State has no power to tax a potential future advantage. The State can tax only income, profits and gains made in the relevant accounting year. The business is owned and run by the assessee himself. It is wholly unreal and artificial to separate the business from its owner and treat them as if they were separate entities trading with each other and then by means of a fictional sale introduce a fictional profit which in truth and in fact is non-existent.

Held

A person cannot make a profit from dealing with himself. (AY. 1943-44) (CA No. 144 of 1952 dt. 9-10-1953)

Sir Kikabhai Premcahnd v. CIT (1953) 24 ITR 506/1953 AIR 509/1954 SCR 214

Editorial: In ***CIT v. Hind Construction Ltd (1972) 83 ITR 211 (SC),*** the Court held that no one can sell his goods to himself. A sale contemplates a seller and a purchaser. If a person re-values his goods and shows a higher value for them in his books, he cannot be considered as having sold these goods and made profits therefrom.

> *“People say true friends must always hold hands, but true friends don’t need to hold hands because they know the other hand will always be there.”*
>
> \- Mahatma Gandhi

70

S. 145: Method of accounting - Valuation of inventories – Finished goods - Goods valued below cost – Stock in trade- Rejection of method of valuation is held to be justified

Facts

The assessee is a limited liability company engaged in the business of manufacture and sale of paints. It contended before the authorities that it had been its consistent practice to value the goods in process and finished products exclusively at cost of raw materials and totally exclude overhead expenditure. The justification for this practice, according to the assessee, was that the goods being paints had limited storage life and, if not quickly disposed of, they were liable to lose their market value. This contention of the assessee was rejected by the ITO observing that at no time had the assessee claimed any deduction on account of deterioration or damage to goods. The officer held that there was no justification to recognize a practice, as claimed by the assessee, of valuing its stock otherwise than in accordance with the well-recognized principle of accounting which required the stock to be valued at either cost (raw material + overhead expenditure) or market price, whichever was the lower. The Tribunal rejected the assessee's submission. High Court accepted the contention of the assessee. Department preferred an appeal before Supreme Court.

Issue

Whether the Assessing Officer was justified in rejecting the method of valuation of inventories?

View

Any system of accounting which excludes, for the valuation of the stock-in- trade, all costs other than the cost of raw material for the goods in process and finished products, is likely to result in a distorted picture of the true state of the business for the purpose of computing chargeable income. Such a system may produce a comparatively lower valuation of the opening stock and the closing stock, thus, showing a comparatively low difference between the two. In a period of rising turnover and rising prices, the system adopted by the assessee, as found by the Tribunal, is apt to diminish the assessment of the taxable profit of a year. The profit of one year is likely to be shifted to another year which is an incorrect method of computing profits and gains for the purpose of assessment. Each year being a self-contained unit, and the taxes of a particular year being payable with reference to the income of that year, as computed in terms of the Act, the method adopted by the assessee has been found to be such that income cannot properly be deduced therefrom. It is, therefore, not only the right but the duty of the Assessing Officer to act in exercise of his statutory power, as he has done in the instant case, for determining what, in his opinion, is the correct taxable income.

Held

Section 145 confers sufficient power upon the officer- nay, it imposes a duty upon him - to make such computation in such manner as he determines for deducing the correct profits and gains. This means that where accounts are prepared without disclosing the real cost of the stock-in-trade, albeit on sound expert advice in the interest of efficient administration of the company, it is the duty of the ITO to determine the taxable income by making such computation as he thinks fit. ITO was justified in rejecting assessee’s method of valuation and in holding that assessee’s products were liable to be valued at 100 per cent of cost along with overhead expenditure. (AY 1963-64, 1964-65) (CA No. 1918-19 of 1976 dt. 13-12-1990)

CIT v. British Paints India Ltd. (1991) 188 ITR 44/54 Taxman 499 91 CTR 108 (SC)

Editorial: British Paints India Ltd. v. CIT (1978) 111 ITR 53 (Cal) (HC) reversed. The requisite Accounting Standardsand Income computation and disclosure (ICDS) clarify the valuation of inventories.

> *“Every moment of your life is infinitely creative and the universe is endlessly bountiful. Just put forth a clear enough request, and everything your heart desires must come to you.”*
>
> - Mahatma Gandhi

71

S. 147: Reassessment - Change of opinion-Deduction was allowed in the original assessment - on the same facts to hold that the excess deduction was allowed will be change of opinion - therefore, reassessment was held to be bad in law [S. 10A, 148]

Facts

The assessee was engaged in the business of development and export of computer software and human resource services.

Assessee filed its return declaring a loss after claiming a deduction common expenses from its two sources of income, namely, software development and human resource development. The assessee also claimed deduction under section 10A for the income from software development.

The return was selected for assessment under section 143(2) and a specific query was raised regarding the allocation of common expenses between the two heads, viz., software development and human resource development. The issue was duly explained and an order passed assessing the income as 'Nil'.

Subsequently a notice under section 148 was issued on the ground that an excess deduction under section 10A had been allowed.

The assessee filed objections against the proposed reopening. The objections of the assessee were rejected.

On writ, the High Court set aside reassessment notice.

Issue

Whether an assessment could be reopened on the issue of excess deductions claimed under section 10A, where during the original assessment proceedings, the question of allocation of expenses was considered?

Views

Before interfering with the proposed re-opening of the assessment on the ground that the same is based only on a change in opinion, the court ought to verify whether the assessment earlier made has either express or necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income.. If the assessment order is non-speaking, cryptic or perfunctory in nature, it may be difficult to attribute to the assessing officer any opinion on the questions that are raised in the proposed re-assessment proceedings.

In the present case, a bare perusal of the notice made it clear that the point on which the re-assessment proceedings were initiated, was well considered in the original proceedings.

Held

Initiation of the re-assessment proceedings under section 147, merely because of the fact that now the AO is of the view that the excess deduction was allowed, was based on nothing but a change of opinion on the same facts and circumstances which were already in his knowledge even during the original assessment proceedings. (AY. 2001-02) (CA No.2732 of 2007 dt. 24-4-2018)

ITO v. Techspan India (P) Ltd. (2018) 404 ITR 10/165 DTR 130/302 CTR 74/255 Taxman 152 (SC)

Editorial : Techspan India (P) Ltd v. ITO (2006) 283 ITR 212/203 CTR 550 (2007) 158 Taxman 182 (Delhi) (HC) in ***Dy. CIT v. Simplex Concrete Piles (India) Ltd. (2012) 79 DTR 82/254 CTR 221/210 Taxman 278/(2013) 358 ITR 129(SC)*** the Court held that subsequent reversal of Judgment by Supreme Court-Subsequent reversal of legal position by judgment of Supreme Court does not authorize department to re-open assessment, which stood closed on basis of law, as it stood at relevant time. Also refer ***CIT v. Kelvinator of India Ltd. (2010) 2 SCC 723/320 ITR 561/228 CTR 488/187 Taxman 312/34 DTR 49/216 Taxation 41 (SC) ACIT v. Marico Ltd (2020) 117 taxmann.com 244 (SC)***

> *"To me I seem to be constantly growing.*
> *I must respond to varying conditions,*
> *yet remain changeless within."*
>
> - Mahatma Gandhi

72

S. 153C: Assessment – Income of any other person – Search and seizure – Complying with the requirement of recording of satisfaction is mandatory – If AO of the searched person and the other person is same, a single satisfaction note prepared by the AO stating that documents seized belonged to the other person and not the searched person would tantamount to complying with the mandatory requirements of section 153C [S. 132(1), 133A, 158BD]

Facts

A search and seizure operation was conducted on 08-04-2010 at the residential and business premises of two individuals namely, Shri Tejwant Singh and Shri Ved Prakash Bharti along with their group of companies at Karnal, Panipat and Delhi. A survey under section 133A of the Act was also carried out at the business premises of the assessee at Karnal and Delhi. During the course of the search at the residential premises of Shri Ved Prakash (a director of the assessee company), a pen drive was found and seized from a vehicle parked in front of the building. After printing the contents of the pen drive, various documents were seized which contained details of cash receipts on sale of shops and offices of the assessee at Karnal.

As a consequence of the search and seizure a notice under section 153C of the Act was issued to the assessee by the assessing officer ('AO'). The AO of the assessee and the AO of the searched persons (i.e. Shri Tejwant Singh and Shri Ved Prakash Bharti) was the same. The assessment for AY 2008-09 was finalised by the AO after making various additions and the assessee challenged the assessment order mainly on the ground that the satisfaction note recorded under section 153C of the Act was invalid as there was no satisfaction note by the AO of the searched person. The CIT(A) dismissed the appeal of the assessee but the tribunal allowed the assessee's appeal without going into the merits of the case by holding that the satisfaction note recorded under section 153C of the Act in respect of the assessee (being a third party) was invalid. The Revenue filed an appeal to the High Court (HC) and the HC allowed the appeal by holding that compliance under section 153C of the Act existed. Further, the HC observed that the AO was justified in recording his satisfaction that the documents seized belonged to the assessee and set aside the order passed by the tribunal.

Issue

Whether the satisfaction note recorded by the AO complies with the provisions of section 153C of the Act and whether all the conditions required to be fulfilled have been satisfied before initiating the proceedings under section 153C of the Act. Further, where the AO of the searched person and the other person are the same, whether there is a need for two separate satisfaction notes recorded by the AO?

Views

The decision of ***CIT v. Calcutta Knitwears (2014) 362 ITR 673 (SC)*** held that for the purpose of section 158BD of the Act a satisfaction note was sine qua non and must be prepared by the AO before he transmits the records to the other AO who has jurisdiction over such other person. Further, even CBDT Circular No. 24 of 2015 dt. 31-12-2015 (2015) 380 ITR 32 (St) explained the requirement of ‘recording of satisfaction’ by the AO before issuing a notice under section 158BD/153C of the Act. Thus, it is observed that when proceedings are proposed to be initiated under section 153C of the Act against the “other person”, it must be preceded by a satisfaction note by the Assessing Officer of the “searched person”. It is further observed that the AO of “searched person” will record satisfaction that the seized documents belong/relates to “other person”.

However, in the decision of ***Ganpati Fincap Services (P.) Ltd. v. CIT (2017) 395 ITR 692(Delhi) (HC),*** the satisfaction note clearly recorded that the documents listed belong to the other person. The satisfaction note of the AO was of the “searched person” who also happened to be the AO of the “other person” and merely because the note did not categorically state that the documents did not belong to the “searched person” would not invalidate the assumption of jurisdiction under section 153C of the Act in the hands of the “other person”.

Held

The honourable Supreme Court observed that where the AO of the searched person and the other person are different and when the AO of the searched person is satisfied that the document seized belongs to a person other than the searched person, then the AO of the searched person after recording his satisfaction may transmit the records/documents/papers to the AO having jurisdiction over such other person. The AO shall forward his satisfaction note to the AO of the other person and is also required to make a note in the file of the searched person of doing so. The AO having jurisdiction over such other person, may after receiving the satisfaction note and upon examining the documents, proceed to issue a notice under section 158BD of the Act for the purpose of completing the assessment.

However, where the AO of the searched person and the other person is the same, it is sufficient that the AO records in the satisfaction note that the documents seized from the searched person belonged to the other person and the requirement of section 153C of the Act would be fulfilled. Thus, there can be one satisfaction note prepared by the AO and there would be no requirement to transmit the documents so seized from the searched person.

The satisfaction note of the AO recorded that the documents containing the details of cash receipts on sale of shops/offices at M/s Super Malls, Karnal belonged to the assessee (i.e. the other person). The AO is also satisfied that the documents on a pen drive are seized from the searched person which belong to the assessee. Thus, the mandatory requirements of section 153C of the Act have been complied with and the satisfaction note by the AO clearly states that the documents seized belong to the assessee and not the searched person. Thus, the Supreme Court held that the High Court was justified in holding that the requirements of section 153C of the Act were fulfilled by the AO before initiating proceedings under section 153C of the Act. (AY. 2008-09) (CA Nos. 2006 to 2013 of 2020 dt. 5-4-2020)

Super Malls (P.) Ltd. v. PCIT (2020) 423 ITR 281/187 DTR 257/313 CTR 501/115 taxmann.com 105 (SC)

Editorial: Order in ***PCIT v. Super Malls (P.) Ltd. (2017) 393 ITR 557 (Delhi) (HC)*** affirmed. In the case of assessment of ‘other person’ under section 153C of the Act, the satisfaction is of supreme importance. Two separate satisfactions are required where the AO of the searched person and the AO of the other person are different. However, a single satisfaction note will be sufficient compliance where the AO of ‘searched person’ and ‘other person’ is same.

> *“You may never know what results come of your actions, but if you do nothing, there will be no results.”*
>
> \- Mahatma Gandhi

73

S. 154: Rectification of mistake – Mistake apparent on the record must be an obvious and patent mistake – It should not require a long drawn process of reasoning where there may be conceivably two opinions - ITO was incompetent to pass orders under section 154 of the Act to rectify the assessment [Indian Income-tax Act, 1922 S. 17(1)]

Facts

The assessee was a firm registered under both the Indian Income-tax Act, 1922 as well as the Income-tax Act, 1961. The assessee firm had two partners who were assessed in India as non-residents. The assessment of the firm for the relevant assessment years was made on slab rates applicable to registered firms based on the respective Finance Acts. However, in the individual assessment of the partners who were non-residents, their respective shares in the income of the firm was included and assessed at the maximum rate of tax.

The assessee received a notice from the tax authorities stating that in the assessment for AY 1958-59 and 1960-61 to 1962-63, there were mistakes apparent on record as the assessee firm was not charged to tax at the maximum rate under section 17(1) of the 1922 Act. The tax authorities sought to rectify the assessment and enhance the tax under section 154 of the Act. The assessee contended that there was no mistake either apparent or otherwise and the AO had no power to invoke jurisdiction under section 154 of the Act. However, the AO went ahead and rectified the assessment by applying the provisions of section 17(1) of the 1922 Act and thereby raised a fresh notice of demand. The assessee challenged the validity of the rectification orders passed under section 154 of the Act by way of a writ. The High court held that there was no obvious or patent mistake in the assessment orders and the original assessments were *prima facie* in accordance with law and the ITO was incompetent to pass the impugned orders.

Issue

Whether it is within the powers of the AO/ITO to make the impugned rectification under section 154 of the Act to the original assessment orders and whether the mistake sought to be rectified is an obvious and patent mistake?

View

In the decision of ***Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Triumale [1960] 1 SCR 890 (SC),*** which was rendered in respect of scope of powers of a High Court under Article 226 of the Constitution, it was held that an error which has to be established by a long drawn process of reasoning on points, where there may conceivably be two opinions cannot be said to be an error apparent from the face of the record. Further, the decision of ***Sidhramappa Andannappa Manvi v. CIT [1952] 21 ITR 333 (Bom) (HC),*** it was held that a decision on a debatable point of law is not a mistake apparent from record.

Held

The Honourable Supreme Court analysed the provisions of section 17(1) of the 1922 Act, wherein, a person being a non resident would be taxable at the maximum rate plus super tax. However, section 17(1) can apply only to a 'person' as defined in section 2(9) of the 1922 Act. The expression person was defined to include only a HUF and a local authority. A firm was not considered a person as defined and hence the provisions of section 17(1) of the 1922 Act could not apply to the assessee firm. However, the provisions of section 2(31) of the Act defined a person to include a firm. Whether the definition contained in section 2(31) of the Act is an amendment of the law or merely declaratory of the law that was in force earlier was kept open by the Supreme Court. The Supreme Court held that since the application of the provisions of section 17(1) of the 1922 Act to the assessee was not free from doubt and there could be two opinions, the ITO was not justified in his view that there could be no two opinions. The Supreme Court further held that the ITO cannot go into the scope of the provisions of the Act in proceedings under section 154 of the Act as a mistake apparent on the record must be an obvious and patent mistake and not something which requires a long drawn process of reasoning where there may be conceivably two opinions. Hence, a decision on a debatable point of law is not a mistake apparent from the record. (AY. 1958-59, 1960-61 to 1962-63) (CA No. 1170 of 1968 dt. 5-8-1971)

T. S. Balaram ITO v. Volkart Bros (1971) 82 ITR 50 (SC)

Editorial: Refer, ***CIT v. Hero Cycles P. Ltd. (1997) 228 ITR 463 (SC),*** similar wordings are used in section 254(2) of the Act in ***CIT v. Ramesh Electric and Trading Co. 203 ITR 497 (Bom) (HC) and the ratio is equally applicable here. CBDT Circular No. 68 dt. 17-11-1971 (***1972) 83 ITR 6 (St), states that a mistake arising as a result of subsequent interpretation of law by Supreme Court would constitute a mistake apparent on the face of the record and also refer ***Poothomdu Plantates (P.) Ltd v. ITO (1996) 221 ITR 557 (SC).***

> *"To forgive is not to forget. The merit lies in loving in spite of the vivid knowledge that one that must be loved is not a friend. There is not merit in loving an enemy when you forget him for a friend."*
>
> \- Mahatma Gandhi

74

S. 168: Executors - Taxability of estate in the hands of executor –Representative assessee - Existence of Trust – Prior to trust – taxable as executor – not as trustee [S. 160]

Facts

One Mrs. Bhikhubai Chandulal Jalundhwala, a resident of Bombay, executed a will on 5-1-1962. She died three days after on 8-1-1962. During her life-time she was possessed of considerable properties, both movable and immovable. K.R. Patel, the appellant, and B.G. Amin, solicitor, since dead, were appointed as executors and trustees under the will. The executors and trustees under the will were directed first to pay all the debts, funeral, death and other testamentary expenses, estate duty, Government dues as soon as possible. Two immovable properties under the will were bequeathed to two different individuals. It was provided in the will that the executors and trustees should convey these immovable properties after obtaining probate of the will and until this was done, to deal with the rents and income arising therefrom in the same manner as the other estate.

On 19-6-1963, an application was filed by the executors and trustees under section 18 of the Bombay Public Trust Act, 1950, for registration of the public trust created under the will. The application was filed under protest. It was contended that it was not a case of creation of a trust under the will but was a case of assignment of power to deal with estate in the manner indicated in the will. However, it was held that the trust properties vested in the two executors and trustees as trustees under the terms of the will as well as under section 211(1) of the Indian Succession Act, 1925. It was also held that the trust was a public trust. The trust was registered on 29-12-1964.

Executors and trustees filed income-tax return for the assessment year 1964-65 and Return was signed as executors of the will.

Issue

Before the ITO, it was contended that the income-tax return was assessable in the hands of the executors and trustees as trustees and not as executors and that since the properties left behind by the testator were held under trust for wholly charitable and religious purposes, its income was exempt from tax under section 11(1) of the Act. Various other contentions were raised but all these were rejected by the ITO who assessed the income in the hands of the executors and trustees as executors.

View

Examining the will read with other clauses, it is apparent that the trust was to come into being only after funeral and other expenses were met, legatees paid and properties converted into cash by the executors and trustees. That the administration of the estate would come to an end and all the amount, thus, lying with the executors and trustees would form the corpus of the trust. Functions of the trustees and executors as imposed upon them did not come to an end till February 1964.

Held

It cannot be said that there was any trust created under the will till February 1964. Section 168(3) of the Act makes it clear that executor will continue to be assessed until the estate is distributed among the beneficiaries according to their several interests. (AY. 1964-65) (CA No. 5649 of 1990 dt. 27-8-1999)

K. R. Patel (Through legal heirs) v. CIT (1999) 239 ITR 738/106 Taxman 151/155 CTR 585 (SC)

Editorial: CIT v. K. R. Patel [1985] 151 ITR 250 (Bom) (HC) is affirmed. The contents of the will are very important to decide whether the executors are to be assessed as executors *per se*, or representative assessee or Trustees.

> *"Prayer is the key of the morning and*
> *the bolt of the evening."*
>
> - Mahatma Gandhi

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S. 194E: Deduction of tax at source - Non-resident – Payments to sports associations being in the nature of guarantee money were intricately connected with the event – Income accrues and arises in India and assessee was liable to deduct tax at source under section 194E - The obligation to deduct tax is not affected by the DTAA [S. 9(1), 115BBA]

Facts

The assessee is a committee formed by cricket boards of three countries namely India, Pakistan and Sri Lanka for the purpose of hosting the World Cup cricket tournament in these countries in the year 1996. The assessee was required to pay varying amounts to the cricket boards of different countries as well as to International Cricket Council ('ICC') in connection with conducting the preliminary phases of the tournament and for promoting the game in their respective countries. The assessee opened two bank accounts in London which were operated jointly by the representatives of India and Pakistan Cricket Boards where the receipts from sponsorship, TV rights etc. were deposited and expenses were met. Based on a mutual agreement, the surplus amount remaining in the bank account was to be divided equally between the cricket boards of India and Pakistan after paying a lump sum amount to the Sri Lankan board. Certain amount was transferred to the three co-host countries from the London bank accounts towards paying the fees of the umpires and referees.

The AO observed that the assessee had made payment to ICC as well as to the cricket control boards of different countries from its two London bank accounts without deducting tax under section 194E of the Act. Such payments would be taxable in India as per the provisions of section 115BBA of the Act and the assessee failed to deduct tax before making such payments. The AO passed an order under section 201(1) of the Act holding the assessee liable to pay tax on such amount that it had failed to deduct tax on. The AO computed the total short deduction under section 194E of the Act to be Rs. 2,18,29,300. The assessee filed an appeal before the CIT(A) which was disposed off and subsequently an appeal before the tribunal was filed where the tribunal remanded the matter back to the CIT(A). In the second round of litigation, the CIT(A) detailed out the actual payments made by the assessee and classified them into seven categories. The CIT(A) held that out of the seven payment categories, six categories of payments attracted the provisions of section 115BBA of the Act. However, for the seventh category of payment being Rs. 1,20,000 transferred from London bank account to Pakistan and Sri Lanka for disbursement of prize money for matches played outside India would not fall within the scope of section 115BBA of the

Act. Further, the CIT(A) observed that only 17 matches out of 37 matches were played in India and thus held that only 45.94% (i.e. 17/37) of the six categories of payments should be considered for the purpose of default under section 201(1) of the Act.

The issue before the Supreme Court was with regard to payments of two categories [namely sr. no. (vi) and (vii) comprising of guarantee money paid to Australia, England, New Zealand, Sri Lanka and Kenya with whom DTAA's exist of Rs. 8,85,000; and; guarantee money paid to Pakistan, West Indies, Zimbabwe and Holland of Rs. 7,10,000 respectively]. The Tribunal and HC held that the assessee ought to deduct tax at source in respect of the proportion of the total receipts which bears the same ratio as the number of matches played by each country in India.

Further, on the issue of applicability of DTAA, though not argued, the High Court held that irrespective of the DTAA, the obligation to deduct tax under section 194E of the Act had to be discharged once income accrues under section 115BBA of the Act since such a deduction was not the final payment of tax and could not be said to be an assessment of tax. The deduction had to be made and the assessee from whose could get credit of the same once it is found that the income in not eligible to be taxed. Further, the HC held that the distinction between the deduction at source by the payer is one thing and an obligation to pay tax was another.

Issue

Payments being in the nature of guarantee money made to non-resident sports associations from assessee's London bank account would be liable to tax in India and whether any income accrued or arose or was deemed to accrue and arise to the non-resident sports associations in India and the liability on part of the assessee to deduct tax at source under section 194E of the Act. Further, whether the HC could go into the issue of applicability of DTAA when the same was not argued before it?

Views

The decision of ***GE India Technology Cen. (P.) Ltd v. CIT [2010] 327 ITR 456 (SC)*** held that tax deduction at source applies only to those sums which are chargeable to tax under the Act. The expression "chargeable under the provisions of the Act" in section 195(1) is of utmost importance. A person paying interest or any other sum to a non-resident is not liable to deduct tax at source if such some is not chargeable to tax under the Act.

The decision of ***Vodafone International Holding B.V. [2012] 341 ITR 1 (SC)*** held that Section 195 casts an obligation on the payer to deduct tax at source from payments made to non-residents which payments are chargeable to tax. Such payments must have an element of income embedded in it which is chargeable to tax in India. If the sum paid or credited by the payer is not chargeable to tax then no obligation to deduct the tax would arise.

Further, the decision of ***Eli Lilly & Co (India) (P.) Ltd [2009] 312 ITR 225 (SC)*** considered whether tax deducted at source provisions are in the nature of machinery provisions enabling collection and recovery of tax forming an integrated code with the charging and computation provisions which determine taxability in the hands of the assessee.

Held

The Honourable Supreme Court observed that the non-resident sports associations to whom payments were made as guarantee money had participated in the event where the cricket teams of such associations played matches in India. The SC held that such guarantee money paid was intricately connected with the event where various cricket teams were scheduled to play and participated in the event and therefore the source of income was in India by playing matches in India. Further, the SC referred to the provisions of section 115BBA(1)(b) of the Act which stated that where the total income of a non-resident sports association includes any amount guaranteed to be paid or payable in relation to any game or sports played in India, the amount of income calculated in terms of the section would become payable. The expression 'in relation to' referred in section 115BBA of the Act emphasises the connection between the game or sport played in India and the guarantee money paid or payable to the non-resident sports association. Once such connection is established the liability under section 115BBA of the Act arises. The SC held that the decision of G.E. Technology Centre P. Ltd (supra) had no application to payments covered under serial number (vi) & (vii) with regard to guarantee money paid to sports associations as the payments represented amounts which could not be subject matter of charge under the Act.

On the issue of applicability of the DTAA, the Supreme Court observed that even though the matter was not argued before the High Court, yet it was dealt with by the High Court. The Supreme Court concurred with the view of the High Court that the obligation to deduct tax at source under section under section 194E of the Act is not affected by the DTAA. However, where the liability to tax is disputed by the assessee such benefit of the DTAA can be pleaded and the amount in question would be refunded along with interest, but that by itself, would not absolve the liability under section 194E of the Act.

Thus, it was concluded by the Supreme Court that the payment made to the Non-resident sports associations represented their income which accrued or arose or was deemed to have accrued or arisen in India and the assessee was thus liable to deduct tax at source under section 194E of the Act. (AY. 1995-96) (CA No 5749 of 2012 (SLP(C) Nos. 6829& 7315 of 2019 dt. 29-4-2020)

PILCOM v. CIT (2020) 425 ITR 312/188 DTR 1/314 CTR 39/(2020) 271 Taxman 200 (SC)

Editorial: PILCOM v. CIT [2011] 355 ITR 147/238 CTR 387/198 Taxman 555/10 taxmann.com 234 (Cal HC) affirmed.

> *"See the good in people and help them."*
>
> \- Mahatma Gandhi

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S. 195 : Deduction of tax at source – Payment to non-resident – Obligation to deduct tax arises only when a remittance is chargeable to tax under the Act – No obligation to deduct tax arises the moment a remittance is made [S. 192, 195(1), 195(2), 237]

Facts

The facts in the lead matter i.e. Sonata Information Technology Ltd were considered by the Supreme Court. The assessee is a distributer of imported pre-packaged shrink-wrapped standardized software from Microsoft and other suppliers outside India. Assessee has made payment to the suppliers which represented the purchase price of the software. The AO held that the payment made to the suppliers constituted royalty as the sale of software included a license to use which was deemed to accrue or arise in India and held that tax at source was liable to be deducted under section 195 of the Act. The CIT(A) upheld the decision of the AO. However, the tribunal held that the amount paid by the assessee to the foreign suppliers was not in the nature of royalty and did not give rise to any income taxable in India and hence there was no liability to deduct tax at source. The High Court accepted the department appeal and placed reliance on ***Transmission Corp. of A. P. Ltd v. CIT [1999] 239 ITR 587 (SC),*** where unless the payer made an application to the AO under section 195(2) of the Act and obtained a permission for non-deduction of tax it would not be permissible for the payer to contend that the payment made to the non-resident did not result in 'income' taxable in India and therefore there was no need to deduct tax at source.

Issue

On account of a remittance to a non-resident abroad by an Indian company, does the obligation to deduct tax at source arise the moment there is a remittance irrespective of it being chargeable to tax under the Act?

Views

The decision of ***CIT v. Cooper Engg. Ltd [1968] 68 ITR 457 (Bom HC)*** held that if the payment made to a non-resident is not chargeable to tax in India, then no tax is deductible at source even though the assessee may not have made an application under section 18(3B) [i.e. now section 195(2)].

The decision of ***Vijay Ship Breaking Corpn. v. CIT [2008] 314 ITR 309 (SC)*** held that the assessee was not bound to deduct tax at source once *Explanation 2* to section 10(15)(iv)(c) stood inserted as tax deduction at source arises only if the tax is assessable in India.

In ***Eli Lilly & Co (India) (P.) Ltd [2009] 312 ITR 225 (SC)***, the Court considered whether tax deducted at source provisions are in the nature of machinery provisions enabling collection and recovery of tax forming an integrated code with the charging and computation provisions which determine taxability in the hands of the assessee.

The decision of ***PILCOM v. CIT [2020] 271 Taxman 200 (SC)*** held that the obligation to deduct tax at source under section 194E is not affected by the DTAA and if the taxability is disputed by the assessee, the benefit of the DTAA can be pleaded and based on the case made out the amount would be refunded with interest but that would not by itself absolve the liability under section 194E of the Act.

Held

The Honourable Supreme Court analysing the provisions of section 195 of the Act held that the section imposes an obligation on any person responsible for paying to a non-resident any interest or any other sum which is chargeable under the provisions of the Act to deduct tax at the rates in force. The expression used in section 195(1) of the Act is 'chargeable under the provisions of the Act' which is of utmost importance. Therefore, a person paying interest or any other sum to a non-resident is not liable to deduct tax if such some is not chargeable to tax under the Act. Further, section 195 of the Act contemplates not merely amounts being pure income payments but also covers composite payments which have an element of income embedded in them and the payer is responsible for deducting tax at source in respect of such composite payments. Further, the CBDT Circular No. 728 dated 30-10-1995 has clarified that the person responsible for deducting tax can take into consideration the effect of the DTAA in respect of payments of royalty and technical fees while deducting tax at source.

The language used in section 195(1) of the Act is identical to the language used in section 18(3B) of the 1922 Act. The Supreme Court pointed out that the application under section 195(2) of the Act pre-supposes that the person responsible for making a payment to a non-resident is certain that tax is payable in respect of some part of the amount to be remitted to the non-resident but is not sure as to what should be such portion of the amount on which tax should be deducted. In such circumstances, an application under section 195(2) of the Act would be made to the AO/ITO(TDS) for determining the amount of tax to be deducted. Therefore, while deciding the scope of section 195(2) of the Act tax which is required to be deducted at source only out of such chargeable sum. Hence, the provisions of section 4, 5, 9, 90 and 91 of the Act as well as the provisions of the DTAA are relevant while applying the provisions of tax deduction at source. The Supreme Court held that section 195(2) and 195(3) are safeguards and based such reasoning on the decision of Transmission Corpn. of A.P. Ltd (supra). Thus, where a person responsible for deduction is fairly certain then he can make his own determination as to whether tax is deductible at source or not along with what the amount should be thereof.

The Supreme Court observed that section 195 of the Act fell in Chapter XVII which dealt with collection and recovery whereas Chapter XVII-B dealt with deduction of tax at source. Further, Chapter XVII uses a different expression and the expression 'sum chargeable under the provisions of the Act' is used only in section 195 of the Act. Similar sections being section 194C, 194EE and 194F of the Act provide for deduction of tax in respect of 'any amount' and do not use the expression used in section 195 of the Act. Thus, the SC had to give meaning to the expression 'sum chargeable under the provisions of the Act'. SC held that the section 195 had to be read in conformity with the charging provisions, i.e., sections 4, 5 and 9. Therefore, the obligation to deduct tax at source arises only when there is a sum chargeable to tax under the Act. The fact that the revenue has not obtained any information per se cannot be a ground to construe section 195 widely so as to require deduction of tax at source even in a case where an amount paid is not chargeable to tax in India.

The SC further refused to accept the contention of the department that the moment there is a remittance, the obligation to deduct tax arises as such a contention would mean that on mere payment income would be said to arise or accrue in India. This would cause the words 'chargeable under the provisions of the Act' used in section 195(1) of the Act to be obliterated. While interpreting a section one has to give weightage to every word used in that section. While interpreting the provisions of the Act one cannot read the charging sections of that Act *de hors* the machinery sections and the Act is to be read as an integrated Code. Thus, the expression in section 195(1) of the Act shows that the remittance has to be of a trading receipt where the whole or part of the amount is liable to tax in India and the payer would be liable to deduct tax at source only if the amount is assessable in India. Where the amount is not assessable in India there would be no question of deducting tax at source.

The Supreme Court observed the similarity between section 192 and 195 of the Act. The contention of the department that a payer making payment to a non-resident was necessarily required to deduct tax would lead to absurd consequence as the department would be entitled to appropriate the money deposited by the payer even if the sum is not chargeable to tax specially because there is no provision in the Act by which the payer could obtain a refund. Further, section 237 r.w.s 199 provides that it is only the recipient of the sum who could seek a refund.

The Supreme Court pointed out that the High Court did not go into merits of the case and directly concluded that the moment there is a remittance an obligation to deduct tax at source arises. This view of the High Court was overruled and the decision of the High Court was set aside for de novo consideration on merits. (CA Nos. 7541 & 7542 of 2010 dt. 9-9-2010)

GE India Technology Cen. P. Ltd. v. CIT [2010] 327 ITR 456/193 Taxman 234/234 CTR 153/44 DTR 201/10 SCC 29/7 taxmann.com 18 (SC)

Editorial: Decision of Karnataka High Court in ***CIT (IT) v. Samsung Electronics Co. Ltd. [2009] 185 Taxman 313*** reversed.

> *"Satisfaction lies in the effort, not in the attainment, full effort is full victory."*
>
> \- Mahatma Gandhi

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S. 245C : Settlement Commission - Application for settlement of cases - Undisclosed income - full and true disclosure – Revising the application during the course of proceedings is not permissible [S. 245D(4)]

Facts

A search and seizure action under section 132(1) of the Act was conducted at the premises of M/s Ajmera Housing Corporation and incriminating materials in the form of voluminous books of account, loose papers, files, hard disk, pen drives etc. were found and on that basis the income was assessed. The assessee approached the Settlement Commission by filing an application under section 245C(1) of the Act. The Settlement Commission called for report from the CIT as per the provisions of section 245D(1) of the Act. The CIT in his report alleged that the applicant has not made true and full disclosure of its income. Hence, the application shall not be entertained at all. The Applicant, thereafter, filed revised settlement application declaring higher undisclosed income. The Settlement Commission passed an order under section 245D(1) of the Act and decided to proceed with the application. During the course of hearing the Applicant made further disclosure of undisclosed income before the Settlement Commission. The Settlement Commission passed final order under section 245D(4) of the Act and settled the undisclosed income by observing that the Applicant had cooperated during the course of proceedings before it. The department being aggrieved by the order of the Settlement Commission filed a Writ before the Hon'ble Bombay High Court. The Hon'ble High Court set aside the order of the Settlement Commission holding that it had not given any finding as to whether there was full and true disclosure of income by the Applicant. The Hon'ble High Court further held that as the Settlement Commission has not apprised the department about the revised settlement application, the final order passed by it is against the principles of natural justice. Thus, the Hon'ble Bombay High Court has set aside the order of the Settlement Commission and remitted the entire issue back to it for deciding the same afresh as per the provisions of law. The assessee being aggrieved by the order of the Hon'ble Bombay High Court filed SLP before the Hon'ble Supreme Court. The Hon'ble Supreme Court set aside the order and remitted the issue back to the Bombay High Court on the ground that it had not taken into consideration second report of the Commissioner which approximately coincided with the figures arrived at by the Settlement Commission and accepted by the Applicant. As per the directions of the Hon'ble Supreme Court, Bombay High Court passed a fresh order and once again set aside the order of the Settlement Commission by holding that the Appellant had failed to make true and full disclosure initially as well as at the time of second disclosure and also for violation of principles of natural justice as proper opportunity was not given to department.

The Applicant being aggrieved by the decision of the Hon’ble Bombay High Court filed the present SLP before the Hon’ble Supreme Court.

Issue

Question arises as to whether disclosure of “full and true” particulars of undisclosed income and “the manner” in which such income had been derived are the pre-requisites for a valid application under section 245C(1) of the Act.

View

In the present case the Hon’ble Bombay High Court has remitted the issue back to the Settlement Commission for determination of total income, penalty etc. However, the Hon’ble Bombay High Court while setting aside the case, has not given any direction to examine the issue of maintainability of application under section 245C(1) of the Act in the absence of full and true disclosure which is sine qua non for deciding the settlement of cases before the Settlement Commission.

Held

Dismissing the petition, the Court held that, on perusal of provisions of section 245C(1) of the Act, it is clear that at the time of filing an application before the Settlement Commission the Applicant has to fulfill three conditions, namely: (i) disclose full and true disclosure of its undisclosed income, (ii) the manner of deriving the undisclosed income and (iii) the amount of additional tax payable on the undisclosed income. Therefore, unless the Settlement Commission records its satisfaction on this aspect, it will not have any jurisdiction to pass any order settling the case. Thus, the Hon’ble Bombay High Court was not justified in setting aside the proceedings before the Settlement Commission even though it was convinced that the Applicant had not made full and true disclosure of their income while making application under section 245C of the Act. Add (AY. 1989-90, 1990-91, 1991-92, 1992-93, 1993-94) (CA Nos. 6827, 6848 of 2010 dt. 20-8-2010)

Ajmera Housing Corporation v. CIT (2010) 326 ITR 642/193 Taxman 193/234 CTR 118/43 DTR 276 (SC)/8 SCC 739/(2011) 221 Taxation 1 (SC)

Editorial : Ratio is explained in ***PCIT v. Shreyansh Corporation (2020) 421 ITR 153/268 Taxman 334 (Guj) (HC) PCIT v. ITSC (2017) 249 Taxman 54/(2018) 409 ITR 495 (Guj.) (HC)***

Editorial : SLP of revenue is dismissed, ***PCIT v. Shree Aadhyashakti Enterprises (2018) 256 Taxman 70/406 ITR 40 (SC), CIT v. ITSC (2017) 244 Taxman 156 (Guj.) (HC),*** also refer, ***(WP No. 2562 of 2016 dt. 12-2-2017) PCIT v. ITSC (2017) 292 CTR 363/79 taxmann.com 186 (Bom) (HC)***

> *"Seek not greater wealth, but simpler pleasure;*
> *not higher fortune, but deeper felicity."*
>
> \- Mahatma Gandhi

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S. 245N: Advance rulings - AAR Rulings can be challenged but not directly in the Supreme Court [S. 245S, Constitution of India - Arts. 136, 226, 227]

Facts

The Petitioner before the Hon’ble Supreme Court is a company incorporated in USA and is engaged in the business of designing, developing, marketing and distributing outdoor apparel. The Petitioner, after obtaining approval from the RBI established a liaison office in Chennai for making purchases for its business. The RBI granted the permission with the condition that the office of the petitioner shall be purely for liaison activities and the liaison office will not undertake any other activity of trading, commercial or industrial nor shall it enter into any business contracts in its own name without the prior permission of the RBI. The Petitioner filed an application before the Authority for Advance Ruling [hereinafter referred to as “AAR”] on the questions relating to its transactions in its liaison office in India. The AAR gave its ruling in favour of the department and against the petitioner.

The Petitioner being aggrieved by the ruling of the AAR filed the present SLP before the Hon’ble Supreme Court of India.

Issue

Whether a ruling of AAR can directly be challenged before the Supreme Court under Article 136 of the Constitution or it has to be first challenged before the High Court under articles 226 and/or 227 of the Constitution.

View

AAR exercises judicial power and is a “tribunal” whose rulings can be challenged under Articles 136 and 227 of the Constitution. Binding nature of the AAR ruling does not affect the jurisdiction of the Court to entertain a challenge to the ruling under Article 136 or under Articles 226 and 227 of the Constitution. The ruling should in the first instance be challenged before the High Court. Ordinarily, an aggrieved party should not be encouraged to appeal directly to the Supreme Court unless it appears to the Court that the SLP raises substantial questions of general importance or a similar question is already pending before it for decision.

Held

Hon’ble Supreme Court rejected the SLP and granted liberty to the Petitioner to approach the High Court under Article 226 and/or 227 of the Constitution by observing that AAR is a body exercising judicial power conferred on it by Chapter XIX-B of the Act and is a tribunal within the meaning of the expression in Articles 136 and 227 of the Constitution. Sub-section (1) of section 245S of the Income Tax Act, 1961 makes the advance ruling pronounced by the AAR binding on the applicant, in respect of the transaction and on the Commissioner and the Income-tax Authorities subordinate to him in respect of the applicant. However, this would not affect the jurisdiction of either Supreme Court under article 136 of the Constitution or of the High Court under articles 226 and 227 of the constitution to entertain a challenge to the advance ruling pronounced by the AAR. Thus, it cannot be said that an advance ruling of the AAR can only be challenged under article 136 of the Constitution before the Hon'ble Supreme Court and not under Articles 226 and/or 227 of the constitution before the High Court. (SLP(C) 3318, 13760 and 31543 of 2011, CA Nos. 2996, 5839 of 2008, 6987 of 2010, 7035, 10064 and 11327 of 2011 dt. 30-7-2012)

Columbia Sportswear Company v. DIT (2012) 346 ITR 161/75 DTR 33/251 CTR 353/210 Taxman 42/2012 (283) ELT 321 (SC)

Editorial : From the Ruling of Columbia Sportswear Company, ***In re (2011) 337 ITR 407/243 CTR 42/59 DTR 233/201 Taxman 214 (AAR).***

"Real education consists in drawing
the best out of yourself."

- Mahatma Gandhi

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S.246A : Appeal - Commissioner (Appeals) - Appealable orders - Denial of liability to pay interest under section 139(8) and 215 of the Act can be challenged in appeal - waiver or reduction of such interests are not appealable orders [S. 246(c)]

Facts

The Appellant before the Hon'ble Supreme Court is a sterling company and is engaged in the business of export of manganese extracted from its manganese mines situated in the States of Maharashtra and Madhya Pradesh. The Appellant had filed its return of income for the AY 1967-68 beyond the due date prescribed under section 139 of the Act. The AO while finalizing the assessment levied interest under section 139(8) of the Act for delay in filing the return as well as under section 215 for delay in payment of advance tax. The Appellant being aggrieved by the action of the AO filed an appeal before the AAC challenging the additions made to the assessed income as well as levy of interest under section 139 and 215 of the Act. Pending the proceedings before the AAC, the Appellant sought professional help, wherein it has been informed that the issue of levy of interest under section 139 and 215 are not appealable. The Appellant as per the advice of the professional filed two revision application before the CIT objecting to the levy of interest under section 139(8) as well as 215 of the Act. In its application, the Applicant had explained the reasons for not filing of return within the stipulated period provided under section 139 of the Act as well as under estimation of advance tax. The Applicant had also mentioned in the application about the pendency of appeal before the AAC on these issues. The CIT was kind enough to intimate to the Applicant that in view of clause (b) of sub-section (4) of section 264 of the Act, he has no power to decide the issues raised in application as the same is subject matter of a valid appeal pending before the AAC. The Appellant, thereafter, made an application before the AAC for withdrawing the grounds challenging the levy of interest under section 139(8) as well as 215 of the Act as the same are not appealable. The AAC has not passed any separate order on the application made by the Applicant; however, in the order disposing off the appeal, he had not decided the issue of levy of interest challenged in the grounds of appeal. The CIT, thereafter, without appreciating the facts and circumstances of the case dismissed both the applications filed by the Applicant on the ground that the Applicant should have withdrawn the entire appeal and not only the grounds challenging the levy of interest. The Appellant being aggrieved by the order passed by the CIT filed Writ Petition before the Hon'ble Bombay High Court, which was dismissed in limine.

The Appellant being aggrieved by the order of the High Court preferred the present SLP before the Hon'ble Supreme Court.

Issue

Question that arose for the determination of Hon'ble Supreme Court was whether the levy of interest under section 139(8) and section 215 of the Act is part of assessment order and appealable within the meaning of provisions of section 246 of the Act.

View

Interest under section 139(8) as well as 215 is levied for the reason of non-filing of return in time or default in payment of advance tax as the department is deprived of the benefit of taxes for the period for which it has remained to be unpaid. Hence the levy of interest under section 139(8) and 215 of the Act is compensatory and not penal in nature. Further, the levy of interest is part of process of assessing the tax liability and passing of final assessment. Hence, the levy of interest under section 139(8) and 215 of the Act can be challenged in appeal before AAC where the ground is raised that the assessee is not liable to levy of interest at all.

Held

On appeal reversing the judgment, the Court held that levy of interest under sections 139(8) and 215 is part of assessment and, hence, Applicant can dispute such levy in appeal, if he limits himself to the ground that he is not liable to levy at all. However, order passed for waiver or reduction of interest under section 139(8) and 215 are not appealable as per the provisions of section 246(c) of the act. In the present case, the Applicant has not made any application before the ITO for reduction or waiver of interest under section 139(8) or under section 215, no question arose of the relevant authority having denied improperly a reduction or waiver of the interest and that being so, no revision petition could be maintained in that regard by the Applicant before the Commissioner. (AY 1967-68) (CA No. 1338 and 1340 of 1974 dated 15-7-1986)

Central Provinces Manganese Ore co Ltd v. CIT (1986) 160 ITR 961 (SC)/58 CTR 112/27 taxman 275 (SC)

Editorial : National Products v. CIT [1977] 108 ITR 935 (Kar) referred where the court has held that interest under sections 139 and 215 is part of the assessment. When such penal interest is levied the assessee is 'assessed', meaning thereby, he is subjected to the procedure for ascertaining and imposing liability on him. If the assessee denies his liability to be assessed under the Act, he has a right of appeal to the Appellate Assistant Commissioner against the order of assessment. Where penal interest is levied under section 215 by the order of assessment, the assessee may altogether deny his liability to pay such interest on the ground that he was not liable to pay advance tax at all or that the amount of advance tax determined by the Income-tax Officer as payable ought to be reduced.

> *“It is unwise to be too sure of one’s own wisdom.*
> *It is healthy to be reminded that the strongest*
> *might weaken and the wisest might err.”*
>
> \- Mahatma Gandhi

80

S. 251 : Appeal - Commissioner (Appeals) – Powers – Additional grounds can be raised during the course of appellate proceedings in respect of claims not made before Assessing Officer during the course of assessment proceedings

Facts

The Appellant before the Hon'ble Supreme Court is a Government Corporation engaged in jute industry. While filing the return for the assessment year 1974-75, the Appellant had not claimed any deduction on its liability to pay purchase tax under the provisions of the Bengal Raw Jute Taxation Act, 1941, as the Appellant was under the *bonafide* belief that it is not liable to pay purchase tax. However, the AO while passing the assessment order assessed the purchase tax. The Appellant being aggrieved by the assessment order preferred an appeal before the AAC. During the pendency of appeal proceedings, the Appellant raised an additional ground claiming deduction of certain amount on account of liability of purchase tax. The AAC permitted the assessee to raise the additional ground and after hearing the AO, accepted the assessee's claim and allowed the claim of the assessee. The department being aggrieved filed an appeal before the Appellate Tribunal. The Tribunal held that the AAC had no jurisdiction to entertain the additional ground or to grant relief to the assessee on a ground which had not been raised before the AO. The Tribunal further rejected the assessee's application for reference under section 256(1). On an application under section 256(2), the High Court also refused to call for a statement of the case.

The Appellant being aggrieved by the decision of the High Court filed present SLP before the Hon'ble Supreme Court.

Issue

Question that arose for the consideration of the Hon'ble Supreme Court was whether additional grounds can be raised before the appellate Authority in respect of a claim not made during the course of assessment proceedings.

View

There is no provision in the Act which put restrictions on the right of the assessee from raising an additional ground in appeal. Further, there is no provision in the Act placing restriction on the power of the appellate authority in entertaining an additional ground of appeal. In the absence of any statutory provision, the general principle relating to the amplitude of appellate authority's power being co-terminus with that of AO should normally be applicable. If the tax liability of the assessee is admitted and if the AO is afforded opportunity of hearing by the appellate authority in allowing the assessee's claim for deduction on the settled view of law, there appears to be no good reason to curtail the powers of the appellate authority under section 251(1)(a) of the Act.

Held

Reversing the order of the High Court, Hon'ble Supreme Court held that there may be several factors justifying the raising of additional ground in appeal, and each case has to be considered on its own facts. If the AAC is satisfied, he would be acting within his jurisdiction in considering the question so raised in all its aspects. Of course, while permitting the assessee to raise an additional ground, the AAC should exercise his discretion in accordance with law and reason. He must be satisfied that the ground raised was *bonafide* and that the same could not have been raised earlier for good reasons. The satisfaction of the AAC depends upon the facts and circumstances of each case and no rigid principles or any hard and fast rule can be laid down for this purpose. (AY. 1974-75) (CA No. 1935 of 1981 dt. 4-9-1990)

Jute Corporation of India Ltd. v. CIT (1991) 187 ITR 688/(1990) 53 Taxman 85/88 CTR 66 (SC)

Editorial : CIT v. Kanpur Coal Syndicate [1964] 53 ITR 225 (SC) [relied and followed] wherein it has been held that the scope of powers of CIT(A) is co-terminus with that of the Income-tax Officer. He can do what the Income-tax Officer can do and also direct him to do what he has failed to do.

> *"I have always held that social justice,*
> *even to the least the lowliest, is impossible*
> *of attainment by force."*
>
> \- Mahatma Gandhi

81

S. 252 : Appellate Tribunal - Power of Law Secretary - Power is confined to administrative supervision - Law Secretary has no jurisdiction to interfere with the judicial functioning of the Tribunal [S. 254, Contempt of Courts Act, 1971, S. 2]

Facts

A letter was sent by the Law Secretary, Ministry of Law and Justice to the President of the Tribunal stating that he was in receipt of a written complaint that in a particular case two conflicting orders were passed by the same Bench. It was stated therein that the Judicial Member passed the 'first draft order' in favour of the assessee and signed the same. Subsequently, the Accountant Member passed an order in favour of the Revenue, which was signed by both the members. The President was asked to send a report on the same within ten days. The President asked the two members to give their comments on the same. The members clarified that the first draft of the order was only signed by the Judicial Member and was not an order of the Tribunal for the purposes of the Act. It was clarified that pursuant to passing of the draft order, the members discussed the case among themselves and decided that the view taken therein was incorrect. Accordingly, the order deciding the issue in favour of the Department was passed by the Accountant Member and signed by both members. Before these comments could be communicated to the Law Secretary, he wrote another letter to the President stating therein that if no justification was given to him, adverse inferences will be drawn against the President as well. The Tribunal viewed these letters as interference with its judicial functioning and filed an application before the Supreme Court requesting it to issue a show cause notice of contempt against the Law Secretary.

Issue

What is the domain of Law Secretary's power over the functioning of the Tribunal?

Views

The Law Secretary argued that since his responsibilities extended to supervision over the functioning of the Tribunal, he was within his rights to ask for a report from the President. The Tribunal, on the other hand, argued that the Law Secretary's supervision over the Tribunal is limited to matters of administrative nature and he cannot be permitted to influence the judicial decisions of the members.

Held

The first draft prepared by the Judicial Member was not an 'order' since it was not signed by both the members. There was nothing wrong in the members discussing the matter and finally passing an order contrary to the first draft prepared by the Judicial Member. The supervision and control of the Law Secretary over the Tribunal is merely administrative in nature. The letters written by the Law Secretary in the present case sought to interfere with the judicial power of the members of the Tribunal, which is not permitted in law. The conduct of the Law Secretary in the present case, interfering with the judicial functioning of the Tribunal amounted to a gross contempt of Court. His apology before the Court was not accepted and a fine of Rs. 2000 was imposed for this contempt. (Contempt Petition No. 287 of 1998, Transfer Case No. 6 of 1997 dt. 17-11-1998)

ITAT Through President v. V. K. Agarwal (1999) 235 ITR 175/101 Taxman 382/150 CTR 513 (SC)

Editorial: The judgment is relevant, not just because it protects the judicial independence of the Tribunal from the Government, but also for the reason that the Supreme Court recognised that the Tribunal is a Court and held the Law Secretary to be in contempt. In a subsequent judgment in the case of ***Ajay Gandhi v. B. Singh (2004) 265 ITR 451 (SC),*** the Court again recognised that the Tribunal has the trappings of a Court.

> *"Gentleness, self-sacrifice and generosity are the exclusive possession of no one race or religion."*
>
> \- Mahatma Gandhi

82

S. 252 : Appellate Tribunal – Court - Ministry of law and justice - Judicial autonomy - Central Government cannot confer upon itself statutory power of transfer and posting of members of Income Tax Appellate Tribunal [S. 255]

Facts

The Tribunal is functioning since 21-5-1941. From its very inception, the President of the Tribunal has been exercising the power of transfer of the Judicial Members and the Accountant Members to the places where different Benches are functioning. The Ministry of Law and Justice in purported exercise of its power under Rule 10 of the Delegation of Financial Powers Rules, 1958, read with the Ministry of Finance O.M. No. F.10(13) B-Coord./79, dated 10-4-1975 and 8-3-1976 and in partial modification of the Department Letter No. F.3(10)/75 Admn. III (LA), dated 26-6-1978 directed that the President of India had been pleased to decide that President, ITAT shall henceforth submit all proposals for postings and transfers of members including Senior Vice-President and Vice-Presidents of the Income-tax Appellate Tribunal to the Ministry for prior approval.

The Appellant being aggrieved filed present Writ Petition before the Hon'ble Supreme Court.

Issue

Question that arose for the consideration of the Hon'ble Supreme Court was whether the Central Government can be said to have any power of transfer and posting of the members of the Tribunal?

Views

The Tribunal exercises judicial functions and has trappings of Court. The Tribunal functions under the Ministry of Law and Justice and the Law secretary is the member of the selection Board. The Ministry of law and Justice exercises a disciplinary power over the members of the Tribunal. The functions of the Tribunal being judicious in nature, the public have a major stake in its functioning, for effective and orderly administration of justice. The Tribunal, as far as possible, should have judicial autonomy. Central Government cannot confer upon itself statutory power of transfer and posting of members of Income Tax Appellate Tribunal. Long standing practice should be allowed to prevail over the stand of the respondents. The Court prescribed the guidelines regarding posting of members of the Tribunal.

Held

The Hon’ble Supreme Court held that keeping in view the fact that the independence of the Tribunal is essential; for maintaining its independence any power which may be conferred upon the executive authority must be proved to be in the interest of imparting justice. That long standing practice should be allowed to prevail over the stand of the respondents. However, the President cannot be said to have an unguided, unfettered and unlimited jurisdiction as the same may be flawed with great consequences.

Therefore, the following guidelines could serve the said purpose:

(i) Initial posting of a member shall be done by the Government in consultation with the President of the Tribunal.

(ii) Postings to different Benches shall be done by the President having regard ordinarily to the following:

(a) A member save and except for sufficient and cogent reasons shall not be posted at a place where he had earlier been practicing as an advocate or a Chartered Accountant, as the case may be.

(b) A member may not be posted at a place where any of his parents, spouse or other close relation is practicing as an Advocate or a Chartered Accountant in taxation matters.

(c) Save and except for sufficient and cogent reasons, the member shall not be posted at a place for a period exceeding five years. Ordinarily, a member may not be posted at a place where he was earlier posted unless a period of two years has elapsed.

(iii) The President shall keep the Government informed about the orders of posting. The Government, if it so thinks fit, shall have the liberty to bring to the notice of the President of the Tribunal relevant facts including that transfer and posting of a member is not in conformity with the aforementioned guidelines. It shall also be at liberty to bring to the notice of the President any case of extreme hardship which may be faced by a member by reason of such an order of transfer and posting.

(iv) The Government shall have further liberty to request the President to transfer a member from a particular Bench when it is in public interest or in an exceptional circumstances. The President of the Tribunal, it goes without saying, shall consider the same in proper perspective. If the President refuses to comply with the request of the Central Government, although the transfer is in public interest in such a case it would be open to the Central Government to pass order of transfer. (TP No. 5 & 6 of 1997 dt. 5-1-2004)

Ajay Gandhi & Anr. v. B. Singh & Ors. (2004) 265 ITR 451/134 Taxman 537/186 CTR 506/179 Taxation 433 (SC)

Editorial : Independency of the Appellate Tribunal is up held, guidelines are framed for transfer of Honourable members of the Appellate Tribunal.

"A 'No' uttered from deepest conviction is better and greater than a 'Yes' merely uttered to please, or what is worse, to avoid trouble."'

- Mahatma Gandhi

83

S. 254(1) : Appellate Tribunal – Duties - Even where the appellant does not appear on the date of hearing, appeal has to be decided on merits [Indian Income-tax Act, 1922, S, 33(4), Appellate Tribunal Rules, 1946, Rule 24]

Facts

The assessee's appeal before the Tribunal was dismissed for default of non-appearance. The assessee filed an application seeking restoration of the appeal so that it could be considered on merits. The Tribunal held that there was no sufficient cause for restoration and the application was rejected.

Issue

Can the Tribunal dismiss an appeal for non-appearance by a party, without going into the merits of the case?

Views

The assessee argued that once an appeal is validly filed before the Tribunal, the same must be adjudicated upon considering the merits of the case in view of the clear language of section 33 of the 1922 Act (corresponding to section 254 of the 1961 Act). The Department argued that Rule 24 of the Appellate Tribunal Rules permits the Tribunal to dispose off an appeal for default of non-appearance without considering the merits of the case.

Held

The Supreme Court concurred with the assessee and held that the language of the section requires the Tribunal to dispose off an appeal filed before it on merits after considering the submissions made by the parties and that the Tribunal cannot dispose off an appeal simply for the default of non-appearance by the appellant. It was further held that the Rule which permits such a dismissal, i.e., Rule 24 is inconsistent with the language of the provision and is therefore not valid. (AY. 1956-57) (CA No. 1515 of 1968 dt. 24-2-1969)

CIT v. S. Cheniappa Mudaliar (1969) 74 ITR 41 (SC)

Editorial : The same view has been taken by the Supreme Court in the case of ***Balaji Steel Re-Rolling Mills v. CCE & Customs (2014) 272 CTR 205 (SC).***

On the other hand, the Supreme Court in the cases of ***Sunderlal Mannalal v. Nandramdas Dwarkadas [AIR 1958 MP 260]*** and ***New India Assurance Co. Ltd. v. R. Srinivasan [(2000) 3 SCC 242]*** has held that a Court or a Tribunal can dismiss an appeal for non-persecution.

> *"It is the quality of our work which will please God and not the quantity."*
>
> \- Mahatma Gandhi

84

S. 254(1): Appellate Tribunal – Powers - Tribunal has jurisdiction to decide a question of law raised for the first time before it

Facts

The assessee made a fresh claim for the first time before the Tribunal by way of an additional ground. The Tribunal declined to entertain the ground as it was not raised before the lower authorities.

Issue

Can a fresh claim be made for the first time before the Tribunal?

Views

The assessee argued that there is nothing in the language of section 254 which prevents the Tribunal from considering a fresh claim made before it. The Tribunal, on the other hand, held that it could only consider the questions arising out of the order of the CIT(A).

Held

The Supreme Court held that section 254 is couched in the widest possible terms and there is nothing in the provision which stops the Tribunal from entertaining a claim, which has not been raised before the lower authorities. The purpose of the assessment proceedings is to determine the correct amount of taxable income and there is no reason that an assessee should be prevented from raising a ground before the Tribunal, if an income, which is not chargeable to tax as per law has been assessed by the AO. The only caveat is that the facts pertaining to such a ground must be on record. Followed ***Jute Corporation of India Ltd. v. CIT (1981) 187 ITR 688 (SC)*** (AY. 1978-79). (Transfer case 4 of 1988 dt. 4-12-1996)

National Thermal Power Co. Ltd. v. CIT (1998) 229 ITR 383/157 CTR 249 (SC)

Editorial : CIT v. Sinhgad Technical Education Society (2017) 397 ITR 344/156 DTR 161/297 CTR 441/250 Taxman 225 (SC). The view has been followed by the Bombay High Court in the case of ***CIT v. Pruthvi Brokers & Shareholders (2012) 349 ITR 336 (Bom)(HC).*** In the case of ***Ultratech Cement Ltd. v. ACIT (2017) 408 ITR 500 (Bom) (HC)*** it was held that where the necessary evidence pertaining to the additional ground was not on record and the assessee could not satisfy the authorities as to why the ground could not be raised before the lower authorities, the same was not to be admitted.

> *"Man becomes great exactly in the degree in which he works for the welfare of his fellow-men."*
>
> - Mahatma Gandhi

85

S. 254(1) : Appellate Tribunal - Powers – No power to give any directions with respect to an assessment year not covered by the appeal [Indian Income-tax Act, 1922, S. 33(4)]

Facts

The AO made an addition on account of cash credits during the relevant assessment year. In the appeal before the Tribunal, while the amount of addition was reduced, the income of the relevant assessment year and the preceding assessment year was clubbed to an even figure of Rs. 1,00,000. It was noted that the assessee undertook to file a voluntary return of income, based on the Tribunal's findings.

Issue

Can the Tribunal give findings pertaining to an assessment year not covered by the appeal?

Views

The assessee argued that the addition made by the Tribunal was with the consent of the parties. Therefore, no grievance can be raised before the Court. The department argued that there was no sanction in law permitting the Tribunal to give findings pertaining to an assessment year, other than the year, which is the subject matter of an appeal before it.

Held

The Supreme Court held that the approach adopted by the Tribunal was incorrect. It was only permitted to give directions pertaining to the assessment year before it, and not pertaining to any other year. Further, the manner in which the income for the two years was clubbed on an *ad hoc* basis was not justifiable. (AY. 1953-54) (CA No. 2459 of 1966 dt. 14-2-1969)

CIT v. Manick Sons (1969) 74 ITR 1 (SC)

Editorial : Section 150 of the Income-tax Act, 1961 does provide for a situation where the Tribunal can give findings pertaining to an assessment year other than the year before it. The corresponding provision under the Indian Income-tax Act, 1922 was the second proviso to section 34(3). However, this provision was not considered by the Supreme Court.

> *"The true measure of any society can be found in how it treats its most vulnerable members."*
>
> \- Mahatma Gandhi

86

S. 254(1): Appellate Tribunal - Power of enhancement - Tribunal has no power of enhancement

Facts

The assessee claimed a certain amount as depreciation. The AO allowed the claim in part and disallowed the balance depreciation. On appeal, the Tribunal held that the assessee was not entitled to depreciation at all. Therefore, the entire claim was directed to be disallowed.

Issue

Can the Tribunal take back a benefit conferred by the AO or enhance the assessment?

Views

The assessee relied on the Supreme Court's judgment in the case of ***Hukumchand Mills Ltd. v. CIT (1967) 63 ITR 232 (SC)*** to argue that the Tribunal does not have the power to enhance an assessment. The department supported the order of the Tribunal.

Held

The Supreme Court accepted the assessee's contention and held that the Tribunal has no power to take back a benefit conferred by the AO, i.e., the Tribunal does not have the power of enhancement. (AY. 1991-92) (CA No. 955 of 2009 dt. 12-2-2009)

MCorp Global Pvt. Ltd. v. CIT (2009) 309 ITR 434/178 Taxman 347/222 CTR 110/19 DTR 153/211 Taxation 197 (SC)/3 SCC 420

Editorial : Similar view has been taken in the case of ***State of Kerala v. Vijaya Stores (1979) 116 ITR 15 (SC).*** However, the Karnataka High Court in the case of ***Fidelity Business Services India P. Ltd. v. ACIT (2018) 257 Taxman 266 (Karn) (HC)*** has taken a contrary view.

> *"If we could change ourselves, the tendencies in the world would also change. As a man changes his own nature, so does the attitude of the world change towards him."*
>
> \- Mahatma Gandhi

87

S. 254(1) : Appellate Tribunal – Duties - Precedent – Judicial discipline – Orders of the constitutional bench binding on subsequent bench – All courts and Tribunals shall follow the judicial discipline in letter and spirit [Customs Act, 1962, S. 25, 130E(b). Central Excise Act, 1944, S. 35]

Facts

The appellant company had entered into a joint venture with another company for the purpose of construction of road as a contractor of National Highways Authority of India (NHAI). The Contract for the construction was awarded to the Joint venture of the appellant, namely "Gammon Atlanta JV". The Central Government had issued exemption notification No. 17/2001/Cus. exempting goods of specified description from levy of custom duty. The said exemption was, however, subject to certain conditions enumerated in the notification. One of the conditions was that the goods shall be imported by a person who has been awarded a contract for the construction of roads by the specified authorities. The appellant, being the lead partner in the joint venture, imported a machinery required for the construction of the road and claimed the exemption from custom duty as per the notification. However, the Adjudicating Authority rejected the claim of exemption on the ground that the machinery is not imported by the person who was awarded the contract (the JV) but by one of the constituents of the JV (the appellant). The appeal filed by the appellant before the Commissioner of Customs (Appeals) was allowed on the ground that the appellant was not an outsider and the import was made in the name of the appellant due to some technical reasons. The revenue carried the matter in further appeal to the Tribunal. The Tribunal allowed the appeal of the revenue and confirmed the view taken by the Adjudicating Authority. The Tribunal, *inter alia*, held that the benefit of the exemption notification cannot be availed by the joint venture also because it is nothing more than an association of two persons, having no identity in law. Against the order of the Tribunal, the appellant filed an appeal to the Supreme Court.

Issue-1

Whether a joint venture is a legal entity akin to a partnership and the general principles of the Indian Partnership Act, 1932 are applicable to the joint venture.

Views-1

The Supreme Court in the case of ***New Horizons Ltd. & Another v. Union of India & Others (1995) 1 SCC 478*** has held that a joint venture is a legal entity with all the trappings of a partnership under the Indian Partnership Act, 1932 and therefore the general principles of the said Act are applicable to the joint venture.

Held-1

The decision of the Supreme Court in New Horizons (supra) recognizes a joint venture to be a legal entity in the nature of a partnership of the constituent companies. As a natural corollary the JV between the appellant and Atlanta could be treated as a legal entity with the character of a partnership in which the appellant was one of the constituents.

Issue-2

Whether import of machine by Gammon can be considered to be an import by a person who has been awarded a contract for construction of the roads in India so as to fulfil the condition of the exemption notification.

Views-2

In identical fact situations in the cases of ***IVRCL Infrastructures & Projects Ltd. v. C.C. Chennai (2004) 166 ELT 447;*** and ***Techni Bharathi Ltd. v. C.C. Mumbai (2006) 198 ELT 33,*** when machinery for a road project was imported by one of the constituents of the joint venture, the benefit of the same exemption notification has been granted by the Tribunal. The said orders of the Tribunal having been accepted by the revenue it cannot be permitted to take a different stand on the same point in the case of the appellant.

Held-2

The Supreme Court took the cognizance of the finding of facts as recorded by the Tribunal that the placement of import order was by the appellant and not the joint venture and the payment was also made by the appellant from its own account and not from the joint venture account. The Supreme Court, further observed that it was not the case of the appellant either before the Adjudicating Authority or before the Appellate Authority or before the Court that the import of machine was by or on behalf of the joint venture. As such, the inevitable conclusion was that import of the machine by appellant cannot be considered as an import by the joint venture and therefore neither the joint venture nor the appellant fulfil the requirement of the exemption notification.

However, after deciding the issue on merits, the Hon. Supreme Court expressed their deep concern on the conduct of the two Benches of the Tribunal while deciding the appeals in the cases of IVRCL Infrastructure & Projects Ltd (supra) & Techni Bharathi Ltd. (supra). Despite the above decisions of a co-ordinate Bench, the Tribunal still thought it fit to proceed to take a view totally contrary to the view taken in the earlier judgment, thereby creating a judicial uncertainty with regard to the declaration of law involved on an identical issue in respect of the same exemption notification. The Supreme Court emphasized, that if a Bench of a Tribunal, in identical fact situation, is permitted to come to a conclusion directly opposed to the conclusion reached by another Bench of the Tribunal on earlier occasion, that will be destructive of institutional integrity itself. What is important is that the Tribunal is an institution and not the personality of the members constituting it. If a Bench of the Tribunal wishes to take a view different from the one taken by the earlier Bench, the propriety demands that it should place the matter before the President of the Tribunal so that the case is referred to a larger Bench, for which the provision exists in the Act itself. In this context, the Supreme Court reproduced the observations by a three judge bench of the Supreme Court in Sub-inspector ***Rooplal & Another v. Lt. Governor & Others (2000) 1 SCC 644*** as under :

> *"At the outset, we must express our serious dissatisfaction in regard to the manner in which a Coordinate Bench of the Tribunal has overruled, in effect, an earlier judgment of another Coordinate Bench of the same Tribunal. This is opposed to all principles of judicial discipline. If at all, the subsequent Bench of the Tribunal was of the opinion that the earlier view taken by the Coordinate Bench of the same Tribunal was incorrect, it ought to have referred the matter to a larger Bench so that the difference of opinion between the two Coordinate Benches on the same point could have been avoided. It is not as if the latter Bench was unaware of the judgment of the earlier Bench but knowingly it proceeded to disagree with the said judgment against all known rules of precedents……."*

The Supreme Court concurred with the said observations and directed that that all the Courts and various Tribunals in the country shall follow these salutary observations in letter and spirit.

Issue-3

Whether a beneficial and promotional exemption notification has to be construed liberally

Views-3

As held by the Supreme Court in ***Commissioner of Customs (Preventive), Mumbai v. M. Ambalal & Co. (2011) 2 SCC 74***, a beneficial and promotional exemption notification has to be construed liberally.

Held-3

The Supreme Court referred to and relied upon its earlier decision in the case of ***Novopan India Ltd., Hyderabad v. Collector of Central Excise & Customs (1994) Supp (3) SCC 606*** wherein it was held that the principle that in case of ambiguity, a taxing statute should be construed in favour of the assessee does not apply to the construction of an exception or an exempting provision, they have to be construed strictly. Applying the principle, the Supreme Court held that in the instant case, the language of the condition in the exemption notification is clear and unambiguous and hence there is no need to resort to the interpretative process in order to determine whether the said condition is to be imported with strict or liberal construction. (CA. No.5166 of 2003 dt. 6-7-2011)

Gammon India Ltd. v. CCES, Mumbai 2011 (269) ELT 289 (SC)/(2011) 12 SCC 499/MANU/SC/0739/2011

Editorial : The Bombay High Court in the case of ***Hatkesh Co-op Housing Society Ltd. (2016) 243 Taxman 213 (Bom.) (HC)*** has held that when identical issue had earlier arisen before Co-ordinate Bench of the Tribunal on identical facts and view had been taken on the issue then judicial discipline would demand that subsequent Bench of Tribunal hearing same issue should follow the view taken by its earlier Co-ordinate Bench. However, if Tribunal had different view than the view taken by its Co-ordinate Bench on identical issue, then order taking such different view must record its reasons as to why it did not follow earlier order of Tribunal on identical issue, which could only be on one of well settled exceptions which affect binding nature of earlier order. It could also depart from earlier view of Tribunal, if there was difference in facts from earlier order of Co-ordinate Bench but same must be recorded in the order.

Further not dealing with a decision of the Co-ordinate Bench of the Tribunal cited by the assessee has been held to make the impugned order a non-speaking order and therefore in breach of principles of natural justice. [***DSP Investment Pvt. Ltd. v. ACIT (Bom) (HC) (ITA No. 2342 of 2013 dt. 8-3-2016 www. itatonline.org]***

> *"It is the faith that steers us through stormy seas, faith that moves mountains and faith that jumps across the ocean.*
>
> \- Mahatma Gandhi

88

S. 254(1) : Appellate Tribunal - Precedent – Judicial discipline demands that subordinate authorities shall accept the decisions of Tribunal as binding precedent [Constitution of India, Art. 136, Customs Act, 1962, S. 17, 130E(b)]

Facts

The petitioner, a manufacturer of footwear, imported a consignment of 28500 dozens of pair of soles. When the first consignment arrived at Cochin, the Customs Authorities raised an objection that the goods imported were not soles but they were complete footwear. On this count, the consignment was confiscated by the authorities. Appeal filed before the Central Board of Customs and Excise by the petitioner was disposed of on 5-4-1980. Allowing the appeal, the Board held that the goods imported cannot be described as footwear though they are in finished condition. The Government of India issued a notice to the petitioner seeking to revise the order of the Central Board in exercise of its power of revision *suo motu*. Meanwhile, a second consignment arrived on 6-6-1981. The Custom Authorities raised the same objection again and issued a show cause notice to the petitioner for confiscation of the goods.

The petitioner preferred a writ petition before the Delhi High Court challenging the show-cause notice issued by the Collector of Customs. In the same writ petition, the petitioner also challenged the notice issued by the Government of India proposing to revise the order of the Central Board dated 5-4-1980. The Delhi High Court quashed the notice given by the Government of India proposing to revise the earlier order of the Central Board of Customs and Excise on the ground that it was barred by limitation. However, as regards the Show-cause notice issued by the Collector of Customs for the second consignment, the High Court held that it is open to Collector to come to his own conclusion on merits of the case and hence there was no occasion for quashing the show cause notice. The petitioner appeared before the Collector and brought to its notice the earlier order of the Central Board dated 5-4-1980, wherein the similar goods were held to be covered by the Exemption Notification No. 29 of 1979. The Collector, however, did not agree with the appellant and held that the goods in question are fully finished goods identifiable as chappals. He observed that no expertise is required to insert the straps into them to make them suitable for wearing by human beings. He also held that the earlier order of the Central Board was confined to the consignment which was the subject matter of consideration by the Board and the same does not apply to other consignments. He also observed that in any case, the Board's order is now under review in pursuance of the show cause notice issued by the

Central Government. Against the order of the Collector, the appellant approached the Supreme Court under Article 136 of the Constitution.

Issue

Whether in a case where the goods which were considered in the order of the Central Board dated 5-4-1980 and the goods which are subject matter of the appeal are identical, the Collector was justified in taking the position contrary to the order of the Central Board

Views

The Collector was bound by the judicial order made by the Central Board of Customs and Excise when the goods which were considered in the said order dated 5-4-1980 and the goods which were subject matter of the appeal are identical.

Held

The Supreme Court held that the Collector was bound to follow the orders of the Board unless there was an order of a higher authority or the jurisdictional High Court or Supreme Court to the contrary. So far as the Collector is concerned, the order of the Board was binding upon him provided the goods were identical specially when the order of the Board was in the case of the appellant himself. The Supreme Court, however, did not express any opinion as to whether the goods considered in the order and the goods imported under the present consignment are identical. This being a matter of fact to be examined, the Supreme Court remitted the matter back to the Appellate Collector for disposing of the same in accordance with law and in light of the observations made by the Supreme Court. (dated 26-8-1993)

Khalid Automobiles v. UOI (1995) Supp.(4) SCC 652/1997 96 ELT 509 (SC) MANU/SC/1518/1995

Editorial : The ratio is applicable to other similar statutes including Income-tax Act, 1961. In ***Russel Properties (P) Ltd v. A. Chowdhury, Addl CIT (1977) 109 ITR 229 (Cal) (HC)*** it is held that an assessment order passed by ITO following an earlier decision of the Tribunal in which the Tribunal followed Supreme Court decision cannot be said to be erroneous and hence not amenable to CIT's revisional jurisdiction under section 263. In ***Shri Govindram Seksaria Charity Trust v.. ITO (1987) 168 ITR 387 (MP)(HC)***, where the Tribunal set aside the order of the CIT u/s. 263 of the Act and the department was aggrieved by the order of the Tribunal, it was held that till the time the order of the Tribunal was not set aside, the assessing officer cannot proceed with the order u/s. 143(3) r.w.s. 263 of the Act, though the department might be aggrieved. In ***Siemens India Ltd v. ITO (1983) 143 ITR 120 (Bom) (HC) (at, 139)*** court held that merely because an appeal has been filed or a special leave application is pending against it does not denude the decision of its binding effect.

> *"My religion is based on truth and non-violence. Truth is my God. Non-violence is the means of realising Him."*
>
> \- Mahatma Gandhi

89

S. 254(2) : Appellate Tribunal - Rectification of mistake apparent from the record – Non consideration of paper book filed is a mistake apparent from the record – Direction to hear the appeal afresh considering the documents already filed in the paper book

Facts

The appellant claimed that it had filed two paper books, Paper Book – I and Paper Book – II during the appellate proceedings before the Tribunal. Paper Book I contained Page Nos. 1 to 40 and the Paper book – II contained Page Nos. 1 to 90. There was no dispute about the paper book I being available on records. Paper book II, as per the claim of the assessee, was filed during the course of the hearing before the Tribunal. First part of Paper Book II i.e. Page Nos. 1 to 6 was containing the order of the Tribunal in the first round of hearings, *vide* which the matter was set aside to the assessing officer. Part – 2 of the Paper Book II contained another set of papers from Sr. No. 1 to 90. This contained the paper book filed before the CIT (A) in the fresh round of litigation, which the CIT (A) had not admitted. The Tribunal passed order dated 12th October, 2012. In the order of the Tribunal none of the papers contained in the Paper Book I or Paper Book II were referred to.

The assessee filed a Miscellaneous Application u/s. 254(2) of the Act and claimed that there was a mistake apparent from the records in as much as the documents filed *vide* both the Paper Books have not been considered. The said Miscellaneous Application was decided *vide* order dated 12th May, 2015. *Vide* this order, the Tribunal accepted the fact that the Paper book I was filed/tendered during the hearing, leading to the order dated 12th October, 2012. However, it is an admitted position that the document referred to in Paper book I, would have no bearing to the result arrived at, in the order dated 12th October, 2012 passed in appeal. So far as Paper book II was concerned, the Tribunal observed that no such compilation had been filed before it during hearing, leading to the order dated 12th October, 2012. In view of this, the Miscellaneous Application of the assessee was dismissed.

The assessee filed a writ petition before the Hon. Bombay High Court against the order of the Tribunal dated 12th May, 2015 dismissing the Miscellaneous Application. Before the Bombay High Court, the Registrar of the Tribunal filed an affidavit stating that on verification of the record, it is found that there was one compilation of Paper book I containing 40 pages and there was another compilation *viz*: Paper book II containing 6 pages, namely order of the Tribunal dated 25th April, 2006 passed in respect of Assessment Year 1996-97. On oath, the affidavit stated that no other documents/Paper book is available in the record of the case with the Tribunal. The assessee also filed an affidavit of director of the assessee company. This affidavit had as an annexure a communication from the advocate who appeared for the petitioner in the appeal proceedings. Both these documents *inter alia* stated that the compilation of documents (Paper book II) was filed on 22-9-2012. However, the advocate in his communication had neither categorically stated the number of pages which Paper Book II contained nor did it state that the second paper book was in two parts i.e. from Page 1 to 6 and another from Page No. 1 to 90. The Index to the second paper book also did not make any reference of documents being filed along with it, containing compilation of pages 1 to 90, which were sought to have been filed before the CIT(A). Considering these factors, the Bombay High Court held that there was no fault of the Tribunal in rejecting the assessee's rectification application specially taking into account the conduct of the assessee. The High Court *inter alia* held that the proceedings for rectification are not a proceeding to recall so as to have the matter reheard on merits by relying upon the evidence which were never produced before the Tribunal. ***[Nisha Synthetics Ltd. v. ITAT and Others (2017) 145 DTR 346 (Bom)].*** The assessee filed a Civil Appeal before the Supreme Court against the order of the Hon. Bombay High Court.

Issue

The issue before the Hon. Supreme Court was whether the Tribunal had committed a mistake apparent from record in not considering the documents in the paper books filed while deciding the appeal and hence the order of the Tribunal was subject to rectification u/s. 254(2) of the Act.

Views

Before the Supreme Court, the assessee submitted that even on the materials admitted to have been filed before the ITAT i.e. Paper Book I containing Page Nos. 1 to 40, the appellant can make out its case which has been admittedly filed by the assessee, though not as claimed by the assessee before the High Court.

Held

The Supreme Court held that even going by the records which were found to have been received by the Tribunal, the Tribunal could have been directed to consider the case of the appellant.

The Supreme Court, therefore, directed the Income Tax Appellate Tribunal, to hear the appeal of the appellant afresh on the basis of the documents, which have already been found to be filed by the appellant. The Supreme Court also clarified that the order passed by the High Court shall not stand in the way of the Tribunal in passing the orders. (CA No. 10236 of 2016 (S.L.P.(C) No. 29739 of 2016 dt. 21-10-2016)

Nisha Synthetics Ltd. v CIT (2017) 145 DTR 345/291 CTR 328 (SC)

Editorial : The judgment of the Bombay High Court in ***Nisha Synthetics Ltd. v. ITAT & Ors (supra)*** is set aside. Also refer ***CCE Coimbatore v. Kwality Fun Foods & Restaurant P. Ltd. (2010) 259 ELT 641 (SC),*** where the Tribunal had failed to advert even to the basic facts and disposed of the appeals in a summary manner, the order of the Tribunal was set-aside and remitted for fresh consideration

> *"In prayer it is better to have a heart without words than words without a heart."*
>
> \- Mahatma Gandhi

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S. 254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Effect of not considering decision of Jurisdictional High Court/Supreme Court

Facts

The assessee, a stock exchange, was a company registered u/s. 25 of the Companies Act, 1956. As a 'stock exchange', it was a 'charitable institution' entitled to exemption under ss. 11 and 12 of the Act. On application by the assessee, the registration u/s. 12A was granted to the assessee. The registration was granted with a condition that the same will be examined on a year to year basis. In the Return of Income filed for A.Y. 1996-97, the assessee declared Nil taxable income claiming exemption u/s. 11 of the Act. The Return was initially processed u/s. 143(1)(a) of the Act. Later the assessee was served with a notice u/s. 154 of the Act proposing rectification in its case and withdrawing the exemption u/s. 11. The assessee replied to the notice that the exemption was claimed in accordance with section 12A and it was entitled to the exemption u/s. 11. The regular assessment in the case of the assessee was completed by order dated 3-12-1999 u/s. 143(3) of the Act rejecting the claim of exemption u/s. 11 of the Act. The CIT (A) confirmed the order of the assessing officer and dismissed the appeal of the assessee. On further appeal, the Tribunal confirmed that the authorities were right in not granting exemption. The appeal of the assessee was accordingly dismissed by the Tribunal on 27th October, 2000.

The Gujarat High Court in the case of ***Hiralal Bhagwati v. CIT (2000) 246 ITR 188 (Guj) (HC)*** had held that the Trust was entitled to exemption u/s. 11 of the Act on the facts similar to that of the assessee. The aforesaid decision was rendered few months prior to the order of the Tribunal in the case of the appellant. However, unfortunately the said decision was not cited before the Tribunal at the time of hearing of the appeal. The appellant later on took a note of the aforesaid decision and thereafter filed a Miscellaneous Application before the Tribunal u/s. 254(2) of the Act on 13th November, 2000. The Tribunal allowed the Miscellaneous Application and held that there was a 'mistake apparent from the record' which required rectification. Accordingly, it recalled its earlier order passed in appeal on 27th October, 2000. The Tribunal relied upon the decision in the case of ***Hiralal Bhagwati v. CIT (supra)*** and also in ***Suhrid Geigy Ltd. v. CIT (1999) 237 ITR 834 (Guj)(HC)***

Dissatisfied with the order passed by the Tribunal in miscellaneous application, rectifying a 'mistake apparent from record' and recalling its earlier order, the Revenue filed a writ petition before the Gujarat High Court, which was dismissed by the High Court on 31st March, 2003. ***[Asstt. CIT v. Saurashtra Kutch Stock Exchange Ltd. (2003) 262 ITR 146 (Guj) (HC)].*** The revenue filed appeal against the said decision of the Gujarat High Court before the Hon. Supreme Court.

Issues

Whether the Tribunal was right in exercising power under sub-s. (2) of s. 254 of the Act on the ground that there was a 'mistake apparent from the record' committed by the Tribunal while deciding the appeal and whether it could have recalled the earlier order on that ground. Secondly,

Whether on merits, the assessee is entitled to exemption as claimed.

Views

Before the Supreme Court, the Revenue contended that the Tribunal committed an error of law and of jurisdiction in exercising power under sub-s. (2) of s. 254 of the Act and in recalling its earlier order passed in appeal. It has no power to review its own decisions. Power under s. 254(2) can be exercised in case of any 'mistake apparent from the record'. According to the counsel, even if the order passed by the Tribunal was incorrect or wrong in law, it would not fall within the connotation 'mistake apparent on record'. The order of the Tribunal has attained finality in accordance with sub-section (4) of section 254 of the Act and such finality cannot be disturbed by resorting to sub-section (2) of the section 254. The revenue also argued that even on merits of the case, the assessee's claim was not maintainable. The Tribunal had relied on the decision of the Gujarat High Court in the case of Hiralal Bhagwati (supra), but a contrary view taken by the Supreme Court in ***Delhi Stock Exchange Association Ltd. v.. CIT (1997) 225 ITR 235 (SC).*** The revenue contended that in view of the declaration of law by the Supreme Court, the assessee was not entitled to the exemption on merits of the case.

Per Contra the assessee supported the order passed by the Tribunal in the Miscellaneous Application and recalling of its earlier order. The assessee argued that the Tribunal was functioning by exercising its powers in the State of Gujarat and, being an inferior Tribunal, it was subject to the supervisory jurisdiction of the High Court of Gujarat under Article 227 of the Constitution. The Tribunal is, therefore, bound by a decision of the High Court of Gujarat. The issue that came up for consideration before the authorities related to exemption u/s. 11 to the trust which has been considered by the Gujarat High Court in the case of Hiralal Bhagwati (supra). All the authorities under the Act including the Tribunal were bound by the said decision. Therefore, there was a mistake apparent from record and the Tribunal was bound to recall its earlier order, which has been done. There cannot be any illegality in the Tribunal's action recalling the earlier order. The assessee also argued that the Tribunal has not allowed its appeal nor has quashed the assessment order and accordingly there was no prejudice caused to the revenue due to mere recalling of the order. As regards the merits of the claim, the assessee contended that the assessee was entitled to the exemption. The assessee contended that the view taken by the Gujarat High Court in the case of Hiralal Bhagwati (supra) had been approved by the Supreme Court in the case of ***Asstt. CIT v. Surat City Gymkhana, (2008) 5 DTR 115 (SC).*** It was, therefore, submitted that there is no substance in the appeal of the department and the appeal deserves to be dismissed.

Held

The Supreme Court observed that by the order in the Miscellaneous Application, the Tribunal has merely recalled its earlier order in appeal and the same will be heard again. The appeal is filed by the revenue. The assessee has no grievance against the impugned order and therefore, it would not be appropriate for the Supreme Court to decide on the merits of the matter. The Supreme Court accordingly refrained from expressing any opinion on the second question relating to the merits of the matter.

Thereafter the Supreme Court took cognizance of the provisions of section 254. The Supreme Court observed that sub-section (2) of the section covers two distinct situations : (i) It enables the Tribunal at any time within four years from the date of the order to amend any order passed under sub-section (1) with a view to rectify any mistake apparent from the record; and (ii) It requires the Tribunal to make such amendment, if the mistake is brought to its notice by the assessee or the AO. There is, however, no dispute by and between the parties that if there is a 'mistake apparent from the record' and the assessee brings it to the notice of the Tribunal, it must exercise power under sub-section (2) of section 254 of the Act. The Supreme Court appreciated that though the power to review the order (as contended to have been done by the revenue) is not available to the Tribunal under section 254, the power to rectify the mistake apparent from the record (as contended to have been done by the assessee) is certainly available under section 254 of the Act.

Accordingly, the Supreme Court observed that the main question is as to what constitutes a mistake apparent from the record for the purpose of section 254(2) of the Act? The Supreme Court referred to decisions in the cases of ***T.S. Balaram, ITO v. Volkart Bros. (1971) 2 SCC 526; Hari Vishnu Kamath v. Syed Ahmad Ishaque (1955) 1 SCR 1104; Batuk K. Vyas v. Surat Municipality I LR 1953 Bom 191 : AIR 1953 (Bom) 133; Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale (1960) 1 SCR 890***. The Supreme Court finally held that a patent, manifest and self-evident error which does not require elaborate discussion of evidence or argument to establish it, can be said to be an error apparent on the face of the record and can be corrected while exercising certiorari jurisdiction (rectification). An error cannot be said to be apparent on the face of the record, if one has to travel beyond the record to see whether the judgment is correct or not. An error apparent on the face of the record means an error which strikes on mere looking and does not need long drawn out process of reasoning on points where there may conceivably be two opinions. Such error should not require any extraneous matter to show its incorrectness. To put it differently, it should be so manifest and clear that no Court would permit it to remain on record. If the view accepted by the Court in the original judgment is one of the possible views, the case cannot be said to be covered by an error apparent on the face of the record. The Supreme Court held that non-consideration of a decision of jurisdictional Court or of the Supreme Court can be said to be a “mistake apparent from the record”.

In view of these observations, the Supreme Court concluded that the Tribunal has not committed any error of law or of jurisdiction in exercising power under sub-section (2) of section 254 of the Act and in rectifying “mistake apparent from the record”. Since no error was committed by the Tribunal in rectifying the mistake, the High Court was not wrong in confirming the said order. Both the orders were held to be strictly in consonance with law and no interference was called for. (AY. 1996-97) (CA No. 1171 of 2004 dt. 15-9-2008)

ACIT v. Saurashtra Kutch Stock Exchange Ltd. (2008) 305 ITR 227/12 DTR 346/219 CTR 90/173 Taxman 322 (SC)

Editorial : In ***CIT v. Honda Siel Power Products Ltd v. CIT (2007) 295 ITR 466 (SC)***, the Court held that the non consideration of the decision of a Co-ordinate Bench of the Tribunal is a mistake apparent from the record. In ***CIT v. VLS Finance Ltd (2008) 310 ITR 224 (Delhi) (HC)***, ***Kailasnath Malhotra v. JCIT (2009) 34 SOT 541 (TM) (Mum) (Trib)***, it was held that non-consideration of decision of Supreme Court or Jurisdictional High Court is a mistake apparent from record and rectifiable under section 254(2) of the Act. Refer CBDT Circular No. 68 dt. 17-11-1971 (1972) 83 ITR 6 (St).

> *“Life is an aspiration. Its mission is to strive after perfection, which is self-realization. The ideal must not be lowered because of our weaknesses or imperfections.”*
>
> \- Mahatma Gandhi

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S. 254(2) : Appellate Tribunal - Rectification of mistake apparent from record – Not considering the decision of a co-ordinate Bench of the Tribunal is a mistake apparent from records

Facts

Assessee company had taken a term loan in foreign exchange for import of machinery. The liability of the assessee to repay the loan in terms of rupees went up by Rs. 7,10,910 on account of fluctuation in foreign exchange rate during the F.Y. 1990-91 relevant to A.Y. 1991-92. While filing the Return of Income for A.Y. 1991-92, the assessee enhanced the WDV of the block of assets by Rs. 7,10,910 in accordance with the provisions of section 43A of the Act and claimed depreciation on such enhanced amount of WDV. The assessing officer came to the conclusion that such revision in the actual cost was not permissible. As per the assessing officer the adjustment to the actual cost of the machinery was permissible only, if the liability is actually paid and in the case where the liability of loan remains unpaid such adjustment was not allowable. On appeal to the CIT (A), the CIT (A) allowed the claim of the assessee. While allowing the claim of the assesse, the CIT (A) relied on his own order in another case namely, Samtel Colour Ltd. The department preferred appeal to the Tribunal. During the course of the hearing before the Tribunal, the assessee brought on record that the order of the CIT (A) in the case of Samtel Colour Ltd. has also been confirmed by the Tribunal. The assessee also filed a copy of the order of the Tribunal in the case of Samtel Colour Ltd. However, the Tribunal decided the appeal of the department against the assessee. While deciding the appeal, the Tribunal failed to take cognizance of the order of the Co-ordinate Bench of the Tribunal in the case of Samtel Colour Ltd., which was filed by the assessee.

The assessee preferred a Miscellaneous Application against the order of the Tribunal under section 254(2) of the Act. The assessee contended before the Tribunal that the non-consideration of the decision of the co-ordinate bench was a mistake apparent from the records and hence the order passed in the appeal requires to be rectified. The Tribunal acknowledged the mistake on its part in not following the said order of the co-ordinate bench and rectified the order in appeal accordingly. The revenue filed an appeal to the Delhi High Court against the order of the Tribunal in the Miscellaneous Application. The Delhi High Court held that under section 254 of the Act, there is no inherent power available to review its own order. Considering that no express power has been given to the Tribunal, it is not permissible to the Tribunal to indirectly review its order under section 254(2) of the Act. The action of the Tribunal amounted to review of the order already passed by the Tribunal and the same is not permissible under section 254(2) of the Act. The High Court also held that the fact that a decision of co-ordinate bench was cited and placed on record but the same had escaped attention of the bench can hardly be construed as a mistake apparent from the record. Accordingly, the Delhi High Court set aside the order passed by the Tribunal in the Miscellaneous Application ***[CIT v. Honda Siel Power Products Ltd. (2007) 293 ITR 132 (Delhi)(HC).*** Aggrieved by the said order of the Delhi High Court, the assessee preferred the appeal to the Supreme Court.

Issue

The issue before the Hon. Supreme Court was whether not considering the decision of a co-ordinate bench is a mistake apparent from records and therefore whether the Tribunal was justified in correcting the same u/s. 254(2) of the Act.

View

The Supreme Court observed that the expression "rectification of mistake from the record" occurs in section 154. It also finds place in section 254(2). The purpose behind enactment of section 254(2) is based on the fundamental principle that no party appearing before the Tribunal, be it an assessee or the Department, should suffer on account of any mistake committed by the Tribunal. This fundamental principle has nothing to do with the inherent powers of the Tribunal. One of the important reasons for giving the power of rectification to the Tribunal is to see that no prejudice is caused to either of the parties appearing before it by its decision based on a mistake apparent from the record. The Supreme Court also explained that "Rule of precedent" is an important aspect of legal certainty in rule of law. That principle is not obliterated by section 254(2) of the IT Act, 1961. When prejudice results from an order attributable to the Tribunal's mistake, error or omission, then it is the duty of the Tribunal to set it right. Atonement to the wronged party by the Court or Tribunal for the wrong committed by it has nothing to do with the concept of inherent power to review.

Held

The Supreme Court held that in the present case, the Tribunal was justified in exercising its powers under section 254(2) when it was pointed out to the Tribunal that the judgment of the co-ordinate Bench was placed before the Tribunal when the original order came to be passed but it had committed a mistake in not considering the material which was already on record. The Tribunal has acknowledged its mistake and has accordingly rectified its order. The High Court was not justified in interfering with the said order. (AY. 1991-92) (CA No. 5412 of 2007 dt. 26-11-2007)

Honda Siel Power Products Ltd. v. CIT (2007) 295 ITR 466/165 Taxman 307/213 CTR 425 (SC)

Editorial : In the case of ***Lachmandas Bhatia Hingwala Pvt. Ltd. v. ACIT (2011) 330 ITR 243 (Delhi) (HC)***, the full bench of the Delhi High Court following the decision of Supreme Court in Honda Siel Power Products Ltd. (supra) has held that under section 254, fundamental principle is that no party appearing before the Tribunal should suffer on account of any mistake committed by the Tribunal and no prejudice is caused to either of the parties before the Tribunal which is attributable to the Tribunal's mistake, omission or commission and if the same error is a manifest error, then the Tribunal would be justified to recall its order. While exercising the power of rectification under section 254(2), Tribunal can recall its order in entirety, if it is satisfied that prejudice has resulted to the party which is attributable to the Tribunal's mistake, error or omission and which error is a manifest error and it has nothing to do with the doctrine or concept of inherent power of review.

> *"My imperfections and failures are as much a blessing from God as my successes and my talents and I lay them both at his feet."*
>
> \- Mahatma Gandhi

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S.260A : Appeal to High Court – Before pronouncing judgment the substantial question of law must be formulated – If the High Court is of the view that an appeal also involves any other substantial question of law other than that formulated earlier, it should for reasons to be recorded, first formulate the question and then hear the same – amount received towards non-compete covenant is a capital receipt not chargeable to tax [S. 4, 28(ii)(a), 260A(4), Code of Civil Procedure, 1908, S. 100]

Facts I

The Assessee, who was the Chairman and Managing Director of Central Distillery and Breweries Ltd. (CDBL), along with his family members was holding substantial part of shares in the said company which they sold to three companies of the Shaw Wallace Company Group (SWC group). As a consequence thereof, management and control of the said company was also irrevocably handed over to a representative of the SWC group. By a separate Deed of Covenant, only the Assessee gave a non-compete covenant to the purchaser companies for which it received an independent consideration. The Assessee claimed the amount received towards non-compete as capital receipt not chargeable to tax, while the AO concluded that this was a colourable device to avoid tax and assessed the same as business income being compensation for termination of management under section 28(ii)(a) of the Income-tax Act. One of the reasons given by the AO and as emphasized by the High Court was that the consideration towards non-compete was more than ten times the aggregate consideration for transfer of shares. Though the CIT(A) had upheld the view taken by the AO, the Tribunal by a majority decision (reference being made to a Third Member in view of difference of opinion between the Division Bench) accepted the Assessee’s claim. In the appeal filed by the Revenue before the High Court the substantial questions of law as urged emphasized on application of section 28(ii) to the facts of the present case. The High Court agreed with the AO that the Deed of Covenant cannot be regarded as a separate document and hence the receipt was not towards non-compete. It, however, held that the said amount should be assessed as capital gains being a part of the full value of consideration received for the transfer of shares.

Issue I

Whether it was open for the High Court to pronounce on an issue other than the substantial question of law as earlier framed, and the procedure to be followed for consideration of such question.

Views I

Referring to sub-sections (4) and (6) of section 260A of the Income-tax Act and section 100 of the Code of Civil Procedure, 1908, the Court has concluded that the High Court can pronounce judgment on an appeal only after first formulating the substantial question of law. If it wishes to hear the appeal on any other substantial question of law, it may, for reasons to be recorded formulate and hear such questions, if it is satisfied that the case involves such question. The High Court may also determine an issue, though raised, which has not been determined by the Appellate Tribunal or wrongly determined by it. Referring to its earlier judgments in the case of ***Kshitish Chandra Purkait v. Santosh Kumar Purkait (1997) 5 SCC 438, Dnyanoba Bhaurao Shemade v. Maruti Bhaurao Marnor (1999) 2 SCC 471*** and ***Biswanath Ghosh v. Gobinda Ghosh (2014) 11 SCC 605***, it has been emphasized that proceeding to hear the appeal without formulating the substantial question of law involved in the appeal is illegal and is in abnegation or abdication of the duty cast on Court. Even after formulation of the substantial question of law, it will amount to denial of natural justice, if a fair or proper opportunity is not afforded to the opposite side. That this procedure should also apply to any other substantial questions of law as later sought to be framed by the Court which should be done only after recording of reasons. The finding as given by the High Court holding the consideration towards non-compete as chargeable to tax as capital gains being full value of consideration for transfer of shares has been set aside as clearly contrary to section 260A(4).

Held I

In the appeal under section 260A of the Act, the High Court can determine any other substantial question than the one earlier formulated by it, provided the said question is involved in the case, an opportunity of hearing is given to the opposite side and reasons are recorded in support of formulation of such question.

Issue II

Whether the consideration received as per the Deed of Covenant towards non-compete could be regarded as full value of consideration for transfer of shares and assessable as capital gains or for termination of management and control of the said company and assessable as business income as per section 28(ii) of the Income-tax Act.

Views II

Relying on its earlier judgments in the cases of ***CIT v. Walchand & Co. (1967) 3 SCR 214, J. K. Woollen Manufacturers v. CIT (1969) 1 SCR 525, CIT v. Panipat Woollen & General Mills Co. Ltd. (1976) 2 SCC 5, Shahzada Nand & Sons v. CIT (1977) 3 SCC 432, S. A. Builders Ltd. v. CIT (2007) 1 SCC 781*** and ***Hero Cycles (P) Ltd. v. CIT (2015) 16 SCC 359*** and applying the principle of commercial expediency, it is concluded that where payment is real, made in the character of a trader and laid out or expended wholly and exclusively for the purpose of the business, then, it is not for the Revenue to determine the necessity or quantum thereof. Hence, execution of Deed of Covenant and the fact relating to receipt towards non-compete being in excess of ten times the full value of consideration for transfer of shares should not be relevant. For this purpose, the Court has also referred to the fact that shares of the face value of Rs.10 per share and market value of Rs.3 per share was sold for Rs.30 per share. That the assessee was Chairman and Managing Director of CDBL for a period of 35 years and hence had acquired considerable knowledge, skill, expertise and specialization in its business. That whether the assessee was a probable or perceptible threat or competitor to the SWC group was to be considered by the purchaser of shares and not the Revenue. Lastly, based on its judgment in the case of ***Guffic Chem (P.) Ltd. v. CIT (2011) 4 SCC 254 t***he consideration for non-compete has been accepted as a capital receipt not chargeable to tax.

Held II

Amount received towards non-compete has been accepted as such on the facts of that case and hence was a capital receipt not chargeable to tax. (AY.1995 -96) (CA No 12044 of 2016 dt. 22-7-2020)

Shiv Raj Gupta v. CIT (2020) 425 ITR 420/315 CTR 601/117 taxmann.com 871 (SC)

Editorial : Receipt towards non-compete is chargeable to tax as business income in view of insertion of clause (va) in section 28 by the Finance Act, 2002 with effect from 01.04.2003 i.e., from assessment year 2003-04. However, the discussion on commercial expediency i.e., whether an expenditure ought to have been incurred or the quantum thereof, is the prerogative of the businessman and could not be gone into by the Revenue would be relevant for allowance of a deduction under section 37 or disallowance under section 40A(2) of the Income-tax Act or application of the transfer pricing provisions.

> *"You don't know who is important to you until you actually lose them."*
>
> \- Mahatma Gandhi

93

S. 261: Appeal to Supreme Court – Doctrine of merger – Dismissal of special leave petition – Dismissal of Appeal - Grant of interest free loan or loan at a concessional rate of interest does not result in benefit or perquisite to the employee [S. 17(2) 40A(5), Constitution of India, Art. 133, 136]

Facts

Assessee company had advanced interest free loans to its employee directors where the Revenue was alleging use of interest bearing borrowed funds for giving the loan. According to the Revenue, this resulted in a taxable perquisite in the hands of the director under section 17(2) of the Income-tax Act and also invoked the then section 40A(5) of the said Act enabling disallowance of remuneration paid to the employees in excess of the specified limits. The said proceedings related to AY 1979-80 wherein the AO's stand had been confirmed by the High Court. Subsequent thereto, since in the cases of ***P. Krishna Murthy v. CIT (1997) 224 ITR 183*** and ***CIT v. M. K. Vaidya (1997) 224 ITR 186*** a view was taken that no benefit or perquisite arises, the reference application for AY 1980-81 was decided in favour of the Assessee by the High Court. Appeal filed by the Revenue from the said order based on a certificate granted by the High Court under section 261 of the Act had been dismissed stating "the appeal is dismissed". The relevant proceedings before the Supreme Court related to AY 1979-80.

Issue I

Whether granting of an interest free loan or a loan at concessional rate of interest would give rise to benefit or perquisite in the hands of the employee.

Views I

Court has referred to the fact that sections 17(2) and 40A were amended by the Taxation Laws (Amendment) Act, 1984 with effect from 01.04.1985 to include the difference in the rate of interest as a benefit or perquisite based on the rate of interest as notified by the Central Government to be charged by it from its employees on similar loans. This amendment was omitted by the Finance Act, 1985 with effect from 01.04.1985. Therefore, it stood omitted from the date on which it was to become effective. Referring to this legislative history, the Court has held that an amending provision can certainly give guidance for interpretation of an existing provision and concluded that subsequent omission of the amendment brought in to make the benefit or perquisite arising from an interest free loan or loan given at a concessional rate of interest would show that the Parliament never intended the same to be otherwise treated as a taxable benefit or perquisite. At another place, the cardinal rule of construction of a fiscal statute has been emphasized that, even if two views are possible, the view which favours the assessee must be accepted. With respect to section 40A(5), the Court has also approved the conclusion reached by the Andhra Pradesh High Court in ***CIT v. Vazir Sultan Tobacco Co. Ltd (1998) 173 ITR 290(AP) (HC)*** and the Calcutta High Court in ***CIT v. P. R. S. Oberoi (1990) 183 ITR 103 (Cal) (HC)*** and ***Indian Oxygen Ltd. v. CIT (1994) 210 ITR 274 (Cal) (HC)*** that disallowance could be made of an expenditure incurred by the assessee which it claims as a deduction and no deduction of expenditure had been claimed by the employer in this regard. It has also rejected Revenue's submission that if the money was not lent to the employee it would have been placed on a fixed deposit or invested in some other profitable manner as importing a fiction into the section which cannot be permitted.

Held I

Granting of a interest free loan or a loan at concessional rate of interest by an employer to its employee does not result is a taxable benefit or perquisite unless specifically so provided.

Issue II

In what circumstances the High Court Order will merge with that of the Supreme Court.

Views II

Referring to the distinction between a special leave petition under article 136 of the Constitution and an appeal provided in article 133 thereof, the Court has held that when a special leave petition is dismissed the Court does not comment on the correctness or otherwise of the order from which leave to appeal is sought. It means that the Court does not consider it to be a fit case for exercise of jurisdiction. Whereas, when an appeal under article 133 is dismissed, though by a non speaking order, the doctrine of merger applies. In such a case the Supreme Court upholds the decision of the High Court or Tribunal from which the appeal arose. Based thereon, the Court has held that dismissal of the appeal for AY 1980-81 should be binding on them, in the present proceedings relating to AY 1979-80.

Held II

Doctrine or merger would apply to dismissal of an appeal filed before the Supreme Court under article 133 of the Constitution but not to a simplicitor dismissal of a special leave petition filed under article 136 thereof. (AY. 1979-80) (CA Nos. 657 of 1994 and 4012-13 of 1998 dt. 10-4-2000)

V. M. Salgaocar & Bros. (P.) Ltd. v. CIT (2000) 243 ITR 383/160 CTR 225/110 Taxman 67 (SC)

Editorial: For the principle on doctrine of merger, reference may also be made to ***Kunhayammed & Others v. State of Kerala 245 ITR 360 (SC)*** and ***Principal CIT v. Maruti Suzuki India Ltd. 416 ITR 613.*** It also requires consideration, whether this judgment could be relied upon as a precedent for non-chargeability of savings in costs as income.

> *"When I admire the wonders of a sunset or the beauty of the moon, my soul expands in the worship of the creator."*
>
> \- Mahatma Gandhi

94

S. 262: Appeal to Supreme Court – New ground relating to same issue allowed to be raised for the first time – Pure question of law [S. 43B, West Bengal Excise (Manufacture of Country Spirit in Labelled and Capsuled Bottles) Rules, 1979, R. 6]

Facts

The Assessee had imported spirit from outside West Bengal in terms of rule 6 of the West Bengal Excise (Manufacture of Country Spirit in Labelled and Capsuled Bottles) Rules, 1979 during assessment years 1984-85 and 1985-86. Apart from the fee which was payable by the manufacturer for the privilege of manufacturing of country spirit in labelled and capsuled bottles, an additional fee was payable on the import of spirits. Clause (a) of section 43B as inserted by Finance Act, 1983 only applied to any amount payable as tax or duty. Subsequently, the said clause was substituted by the Finance Act, 1988 with effect from 01.04.1989 to include any amount also payable as a cess or fee. Deduction of the said fee was denied by the AO invoking the provisions of section 43B of the Income-tax Act which was upheld by the CIT(A) holding fee payable to the Government by whatever name called as a duty. The Tribunal had however deleted the disallowance holding that section 43B as it then stood did not apply to fee. The High Court upheld the Tribunal's order holding that the amount paid by the assessee was neither a duty nor a cess or fee but was a price for the grant of the privilege. For the first time before the Supreme Court, the Revenue urged that the duty was in the nature of a countervailing duty which the State Government was competent to levy under entry 51 of List II to the Constitution of India. Assessee urged before the Court that this issue had not been raised by the Revenue even before the Tribunal.

Issue

Whether it was competent for the Supreme Court to allow a new issue to be raised in an appeal for the first time before it arising under section 262 of the Income-tax Act.

Views

According to the Court, the issue relating to treatment of the said payment as countervailing duty had neither been raised before the Tribunal or in the reference application. However, it has concluded that the Tribunal as well as the High Court erred in not dealing with the same. Nevertheless, the Revenue has been granted the benefit of doubt that this is what was intended to be argued. Apart from this, it has also been observed that they cannot shut out what is a pure question of law

Held

The Court has entertained the new issue and remanded the matter back to the Tribunal for deciding the same. (AY. 1984-85, 1985-86) (CA Nos. 8667-8688 of 1997 & Ors, dt. 2-3-2006)

CIT v. Varas International P. Ltd (2006) 284 ITR 80/204 CTR 120/155 Taxman 202 (SC)

Editorial: In ***CIT v. Jhabua Power Ltd (2013) 262 CTR 277/93 DTR (SC) 469/217 Taxman 399 (SC)*** also the Supreme Court realizing that a fresh issue was raised before them for the first time remanded the matter back to the Tribunal for reconsideration.

> *"We may stumble and fall but shall rise again; it should be enough if we did not run away from the battle."*
>
> \- Mahatma Gandhi

95

S. 263: Revision by Commissioner – Assessment order is neither erroneous nor prejudicial to the interests of the Revenue when two views are possible – two views should exist at the time when the revision order is passed [S. 80HHC]

Facts

Assessee was eligible for claiming deduction under section 80HHC of the Income-tax Act as it was engaged in export of goods. At one stage of computation of such deduction it had incurred a loss which it ignored for further computation. In the assessment order passed by the AO this position stood accepted. Commissioner exercised revisionary jurisdiction under section 263 of the said Act and directed the AO to set off the loss and hence compute the income eligible for deduction at a lower amount. According to him, ignoring the loss in the computation of deduction had rendered the assessment order to be erroneous insofar as it was prejudicial to the interests of the revenue. Subsequently, by Finance Act, 2005 with retrospective effect from 01.04.1992, a proviso was inserted below section 80HHC(3) of the said Act to provide that the loss has to be set off. The Tribunal and the High Court had held the assumption of revisionary jurisdiction by the Commissioner to be invalid.

Issue

Whether the jurisdictional pre-conditions in section 263 i.e., the assessment order being erroneous and prejudicial to the interests of the revenue were fulfilled in the present case.

Views

Relying on earlier judgment in the case of ***Malabar Industrial Co. Ltd. v. CIT (2000) 243 ITR 83 (SC),*** the Court has held that when the AO adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views were possible and the AO has taken one view with which the Commissioner does not agree it cannot be treated as an erroneous order prejudicial to the interests of the revenue, unless the view is unsustainable in law. It has further observed that existence of two views has to be seen when the Commissioner passed the revision order. For existence of two views reference has also been made to the fact that section 80HHC stood amended several times.

Held

Based on the above, it is held that it is not permissible to the Commissioner to exercise revisionary jurisdiction under section 263 of the Income-tax Act when, at the time of passing the revision order, two views were possible on an issue and the AO had adopted one of the views. (AY. 1992-93) (CA Nos. 5555-55556 of 2005, dt. 1-11-2007)

CIT v. Max India Ltd. (2007) 295 ITR 282/213 CTR 266/(2008) 166 Taxman 188/204 Taxation 1 (SC)

Editorial: The aforesaid view has been subsequently taken by the Supreme Court in ***CIT v. Kwality Steel Suppliers Complex 395 ITR 1/157 DTR 1/297 CTR 553/250 Taxman 23 (SC).*** Further, in ***CIT v. G. M. Mittal Stainless Steel (P.) Ltd. 263 ITR 255,*** the Supreme Court has held that the assessment order cannot be held to be erroneous even when the AO has followed a High Court judgment which has been subsequently reversed by the Supreme Court.

> *"Always aim at complete harmony of thought and word and deed. Always aim at purifying your thoughts and everything will be well."*
>
> \- Mahatma Gandhi

96

S. 269UD: Purchase of property by Central Government - Order by appropriate authority for purchase by Central Government of Immoveable property - Chapter XX-C- Constitutional validity of the said chapter – Principles of natural justice to be followed though not specifically provided – Adverse order to be supported with reasons – Interpretation of statues – Rule of reading down the provision [S. 269UA, 269UC, 269UE]

Facts

The Petitioner in that case was the intending purchaser of leasehold rights in a plot of land and ownership rights in the structure standing thereon. The appropriate authority passed an order for purchase of the said property by the Central Government. The said Order was challenged by way of a writ petition before the Delhi High Court which matter came to be transferred to the Supreme Court as a test case. The Petitioner had challenged the constitutional validity of the provisions of Chapter XX-C along with the action of the appropriate authority. *Inter alia* the challenge included passing of the Order in violation of the principles of natural justice and no reasons being given in support of the conclusion to order pre emptive purchase. The Attorney General did not press his contentions on this part of the challenge. The Court has dismissed the challenge to the constitutional validity on certain aspects and read down some provisions with which we are not concerned with in view of the fact that these provisions are ineffective in relation to immovable property transferred after 30.06.2002.

Issue

Whether the order passed by the appropriate authoring directing pre emptive purchase of immovable property without affording any opportunity of hearing to the concerned parties and giving reasons in support of the conclusion reached by him is bad in law.

Views

Generally the requirement of giving a reasonable opportunity of being heard before an order is made which would have adverse civil consequences for the parties has to be read into the provisions of the relevant sections. In the absence of the same, the validity of the section would be open for serious challenge. Though it has recognized that there could be situations which could demand the exclusion of the rules of natural justice by reason of diverse factors like time, place, the apprehended danger and so on, but declined to accept the Revenue's submission that the time limit provided to the appropriate authority in the said chapter was so short as to preclude an enquiry or show cause altogether. Moreover, this would also ensure fair play in the proceedings. Accordingly, though not specifically provided it has read the requirement of reasonable opportunity of hearing being given into the provisions of Chapter XX-C. Court has also agreed that recording of reasons before passing of the order is also necessary because this would enable a party to challenge an adverse order as erroneous, irrational or being based on irrelevant facts and considerations. This would also act as a deterrent against possible arbitrary action by the quasi-judicial or the executive authority invested with judicial powers. (Followed ***Karaipak v. UOI AIR 1970 SC 150, Olga Tellis v. Bombay Municipal Corpn. [1985] Suppl. 2 SCR 51 at 89, UOI v. Col. J.N. Sinha [1971] 1 SCR 791)***

Held

The requirement relating to compliance with the principles of natural justice and giving of reasons in support of an adverse order has to be read into the provisions though not specifically provided. (TC No 26 of 1987 dt. 17-11-1992)

C. B. Gautam v. UOI (1993) 199 ITR 530/110 CTR 179/65 Taxman 440 (SC)

Editorial: Chapter XX-C comprising of sections 269U to 269UO were inserted by the Finance Act, 1986 and was effective only in relation to any immovable property effected on or before 30.06.2002. However the principles of natural justice enunciated therein has universal application. At one place in the judgment, the Court has also referred to various factors which would justify the difference between the alleged fair market value and the actual consideration for which the transfer takes place which might be relevant for the purposes of sections like 43CA, 50C and 56(2)(x) of the Income-tax Act.

> *"A small body of determined spirits fired by an unquenchable faith in their mission can alter the course of history."*
>
> \- Mahatma Gandhi

97

S. 271(1)(c): Penalty -Concealment of particulars of income – inaccurate particulars of income- Making of claim which is not sustainable in law - Claim made in the return cannot be held to be furnishing inaccurate particulars [S. 14A, 143]

Facts

The Assessee, being a company, filed its return of income (ROI) on 31.01.2001, declaring a loss of Indian Rupees Twenty-six Lakh Fifty-four Thousand Five Hundred and Fifty-Four. Scrutiny under section 143(3) of the Income Tax Act, 1961 (Act) was conducted whereby an addition in respect of interest expenditure was made. Consequently, penalty proceedings under section 271(1)(c) of the Act were initiated against the Assessee company by reason of concealment of income/ furnishing of inaccurate particulars of income. The justification for this interest expenditure claimed by the Assessee company in its ROI was that the expenditure was incurred towards making payment of interest on loans borrowed by the Assessee company for purchase of IPL shares in light of its business policies.

The Assessee company received a notice to show cause why such penalty proceedings should not be initiated against it, to which it respondent by the way of its reply dated 22.03.2006 asserting that the details mentioned in its ROI were correct and that neither was there any concealment of income nor were inaccurate particulars furnished. The Assessee company contended that the disallowance of the expenditure was made only due to a difference of opinion and further that only disallowance of an expenditure could not be the premise for levying of penalty under the Act. It was the submission of the Assessee company that in its own case in the Assessment Year 2000-2001 (A.Y.), the CIT(A) had deleted the disallowance of interest expenditure, the same being upheld by the ITAT on appeal. However, this was disputed by the learned Additional Solicitor General since an appeal against the order of the ITAT for A.Y. 2000-2001 was pending before the Hon’ble High Court. For the present A.Y. 2001-2002, the CIT(A) deleted the penalty amount of Indian Rupees Eleven Lakh Thirty-seven Thousand Nine Hundred and Forty-nine under section 271(1)(c) of the Act. The revenue department being aggrieved by the order of the CIT(A), filed an appeal before the ITAT, which upheld the order passed by the CIT(A). the order of the ITAT was appealed against in the High Court by the revenue department wherein once again, the appeal was decided in favour of the Assessee company.

Issue

Whether the Assessee company is liable to pay the penalty amounting to Indian Rupees Eleven Lakh Thirty-seven Thousand Nine Hundred and Forty-nine under section 271(1)(c) of the Act?

Views

Section 271(1)(c) of the Act is only applicable when the conditions precedent stated therein are fulfilled, i.e., the Assessing Officer (AO) must be satisfied that an Assessee has concealed income or furnished inaccurate particulars of income and only then can penalty be levied. A mere making of a claim, which by itself, is not sustainable under law would not amount to furnishing of inaccurate particulars of income. Therefore, as a matter of fact, since there was no finding by any authority that the details submitted by the Assessee company were erroneous or false, no question of initiating penalty proceedings against the Assessee company would arise. Only the act of the Assessee company in claiming an expenditure in its ROI, whether such claim was acceptable or not to the revenue department, would, in isolation, not invite penalty under the provisions of section 271(1)(c) of the Act.

Held

Dismissing the appeal, the court held that the CIT(A), the ITAT and the High Court had correctly reached the conclusion that the Assessee company had fully furnished all relevant details of its income and expenditure in its ROI, which were in themselves, not found to be incorrect and therefore could not be viewed as inaccurate or a concealment. The words used under section 271(1)(c) of the Act are plain and simple, and unless the case of the Assessee is strictly covered by words in this provision, no penalty can be invoked. By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing in accurate particulars. Merely because the Assessee claimed of deduction of interest expenditure has not been accepted by the Revenue, penalty under section 271(1)(c) is not attracted. If the contention of the revenue is accepted, the Assessee would be liable to penalty under section 271(1)(c) in every case where the claim made by the Assessee is not accepted by the AO for any reason. The court held that this cannot be the intention of the legislature. (AY. 2001-02) (CA No. 2463 of 2010 dt. 17-3-2010)

CIT v. Reliance Petroproducts (P) Ltd. (2010) 322 ITR 158/36 DTR 449/189 Taxman 322/230 CTR 320 (2011) 220 Taxation 278 (SC)

Editorial: In ***CIT v. Khody Eswarsa & Sons (1972) 83 ITR 369 (SC),*** where the Court held that findings given in assessment proceedings would be relevant and admissible materials in penalty proceedings, but those findings cannot operate as *res judicata* because the two are independent proceedings and considerations arising in two proceedings are different. In ***Price Waterhouse Coopers Pvt. Ltd. v. CIT (2012) 348 ITR 306/253 CTR 1/77 DTR 153/211 Taxman 40 (SC)*** the court held that inadvertent human error occurred due to a *bonafide* mistake. Therefore, penalty held not to be leviable. The Hon'ble Bombay High Court in ***CIT v. Shri Samson Perinchery 2017 SCC OnLine Bom 7579/(2017) 392 ITR 4*** held that the show case notice served upon the Assessee must indicate whether the penalty would be initiated for either concealment of income or furnishing of inaccurate particulars of income.

> *"Freedom is not worth having if it does not include the freedom to make mistakes."*
>
> \- Mahatma Gandhi

98

S. 275: Penalty – Concealment – Limitation – Appeal – Supreme Court – Questions of law raised first time – Matter set aside to Tribunal [S. 254(1), 261, 271(1)(a), 271(1)(c), 271D]

Facts

The facts of the present case as follows, have been culled out from order dated 15.07.2016 passed by the ITAT, Kolkata, after remand by the Supreme Court of India, in ***ITO, Kolkata v. Kedia Power ltd ITA No. 1516/Kol/2008.*** Assessment of the return submitted by the Assessee company was undertaken by the concerned ITO under sections 143(3) and 147 of the Income-tax Act, 1961 (Act) *vide* order dated 19.02.2004 and subsequently, penalty was levied by the ACIT under section 271D of the Act through order dated 29.03.2007.

During the appellate procedure, it was only on appeal to the jurisdictional High Court that for the first time the revenue department raised two questions of law which have been reproduced below,

"(a) Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal failed to appreciate that the period of limitation in the instant case is governed by the provisions of Section 275() (sic) as the penalty was initiated in the assessment order itself and the penalty order was issued within time in accordance with the provisions of Section 275(1)(a) of the Income Tax Act, 1961?

(b) Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal was justified in coming to the conclusion that the order of penalty was barred under provisions of Section 275(1)(c) and failed to consider that penalty was initiated in the assessment order itself and the same was issued within time and in accordance with Section 275(1)(a) of the Income-tax Act, 1961?"

On appeal to the Supreme Court of India, the question before the bench was whether the abovementioned questions of law could be raised before the High Court for the first time without any mention in the earlier stages of appeal.

Issue

Whether two specific questions on limitation raised for the first time before the Court could be entertained by High Court without having been raised before the lower courts?

View

Ordinarily, an appeal before the jurisdictional High Court can only be in respect of issues which were raised before first appellate authority and therefore any question of law not raised before the first appellate authority cannot be permitted to be raised before High Court for the first time.

Held

The questions of law on Limitation raised for the first time before Hon'ble Supreme Court on the applicability of whether order of penalty was barred by limitation under the provisions of sections 275(1)(a) or 275(1)(c) of the Act. The same should first be answered by the ITAT and then by the High Court, therefore, the matter was remanded to the ITAT and the judgements and order passed by the High Court and ITAT were set aside. (CA No. 5503 of 2013 dt. 15-7-2013)

CIT v. Jhabua Power Ltd. (2013) 262 CTR 277/217 Taxman 399 (SC)/(2015) 13 SCC 443

Editorial: The matter after being remanded by the Hon'ble Supreme Court was taken up for hearing by the ITAT in ***ITO, Kolkata v. Kedia Power ltd ITA No. 1516/Kol/2008,*** wherein the question of law whether the penalty order passed by ACIT, Range-7 Kolkata under section 271D of the Act is covered under sections 271(1)(a) or 271(1)(c) of the Act (sic), was answered as being covered under section 275(1)(c) of the Act (sic).

> *"I call him religious who understands the suffering of others."*
>
> \- Mahatma Gandhi

99

S. 276: Offences and prosecutions – Pendency of appeal before Tribunal – Stay of prosecution proceedings under the Income-tax Act, 1961 during the pendency of assessment proceedings before authorities was held to be justified [S. 277, 278B; Constitution of India, Art. 226, Code of Criminal Procedure, 1973, S. 482]

Facts

Before the jurisdictional Metropolitan Magistrate, there were pending 12 complaints and cases lodged against one Bhupen Champaklal Dalal and another (the Respondents) for offences punishable under the Income Tax Act, 1961 (Act). At the same time, appeals against assessment of income by the Assessing Officer (AO) were preferred before either the CIT(A) or the ITAT. Therefore, the Respondents had filed for a stay of criminal proceedings on the basis of the reasoning that appeal proceedings were pending before the authorities under the Act, which would have an effect and be relevant to the criminal proceedings instituted against the Respondents.

The Metropolitan Magistrate, after considering the position of law and the possibility of conflict passed an interim order putting a stay upon the framing of charge and discharge or acquittal but allowing collection of evidence, for the period of pendency of appeals against the assessment. Revision petitions were filed against the said order before the Sessions Court, by those aggrieved by it. However, the Sessions Court chose not to interfere with the order passed by the Metropolitan Magistrate and dismissed the review petitions. Thereafter on appeal by the way of a writ petition to the jurisdictional High Court, a plethora of decisions on the subject were taken into consideration and the High Court passed an interim order granting a stay of proceedings before the Metropolitan Magistrate.

It was against the impugned interim order of the High Court that special leave petitions were filed before the Supreme Court of India.

Issue

Whether a stay of proceedings can be granted in a criminal prosecution when appeals against an assessment order are pending before authorities under the Act?

View

The prosecution under criminal law and proceedings arising out of assessments under the Act are, undoubtedly, independent in nature and there is no legal encumbrance against the initiation of criminal proceedings vis-à-vis the pendency of appellate proceedings under the Act. However, a wholesome rule must be employed in cases where courts have taken the view that each set of proceedings would have bearing upon the conclusions reached by the courts. Reliance was placed upon a decision of the same court in ***G. L. Didwania v. ITO 1995 Sup (2) SCC 724*** wherein the fact pattern was similar to the present case.

Held

Dismissing the petitions of the revenue department, the Hon’ble Supreme Court held that in the event that the ultimate result of the proceedings before the appellate authorities had a definite bearing on the cases alleged against the Respondents, the High Court would be justified in granting interim stay when the quantum appeals were pending before the appellate authorities under the Act. The Hon’ble Supreme Court held that despite the stay on criminal prosecution, the work of recording of evidence would proceed during the pendency of the appeals. Therefore, it was held that there was no reason for interference in the interim order passed by the High Court and the appeals were dismissed. (SLP (Cr. No. 2430/2995 & 3141 of 2000 dt. 17-2-2001)

CIT v. Bhupen Champak Lal Dalal (2001) 248 ITR 830/116 Taxman 746/167 CTR 283 (SC)

Editorial: The decision of the Bombay High Court in ***Bhupen Champaklal Dalal v. Sandeep Kapoor [2001] 248 ITR 827*** was affirmed, with a reference made to ***P.Jayappan v. S.K Perumal, ITO (1984) 149 ITR 696 (SC).***

“It is health that is real wealth and
not pieces of gold and silver.”

- Mahatma Gandhi

100

S. 276C : Offences and prosecutions - Wilful attempt to evade tax - When Concealment penalty is deleted on merits - Automatic cancellation of prosecution [S. 271(1)(c), 278B Indian Penal Code 1860, 34, 120B, 193, 196, 420, Code of Criminal Procedure Code, 1973, 397, 401]

Facts

The Assessee is a partnership firm engaged in the business of construction and sale of flats. The Assessee filed revised Returns of Income (ROI) as per the approved valuer's report for AY 1983-84 to 1986-87 on 4.11.1987 as the original ROIs were found to be defective with regard to cost of construction. The revised ROI were accepted by the Department and assessments were completed. The assessing authority treated the difference between the income as per original ROI and revised ROI as concealed income. The ACIT levied penalties under s. 271(1)(c) of the Income-tax Act, 1961 (IT Act) for all the aforesaid four AYs. Accordingly, penalty proceedings were initiated. CIT(A) confirmed the Penalty Order under section 271(1)(c) of AO and thereafter prosecution proceedings were initiated for a conspiracy to evade tax under section 276C and 278B of IT Act along with Section 120B, 34, 193, 196 and 420 of the Indian Penal Code, 1860 (IPC) before Addl. Chief Metropolitan Magistrate. On 24.10.1996, the appellants had preferred an appeal before the Appellate Tribunal against the consolidated order passed by CIT(A) on 18.07.1990 for asst. yrs. 1983-84 to 1986-87. The Appellate Tribunal after verifying the records, found that the additions were on the basis of settlement between the assessees and the Department and represents voluntary offer made by the assessee and, therefore, in such circumstances the ITAT applying the principles laid down in the case of ***Sir Shadilal Sugar & General Mills Ltd. & Anr. v. CIT (1987) 64 CTR (SC) 199 : (1987) 168 ITR 705 (SC)*** held that there was no concealment of income by the assessee and accordingly the penalties were cancelled and allowed the appeals. The appellants thereupon moved an application before the Addl. Chief Metropolitan Magistrate, (E.O.II), Egmore, Chennai, by filing MP No. 614 of 1996 in CC No. 425 of 1990 praying the Court for adjourning the proceedings in the above case, however the learned Magistrate permitted the appellants to mark the order of the Appellate Tribunal in evidence at the appropriate stage of trial for which prosecution has no objection. Thereafter the appellants preferred a criminal revision under sections 397 and 401 of the Criminal Procedure Code, 1973, (CrPC) before the High Court for setting aside the order passed by the Addl. Chief Metropolitan Magistrate, dated 21.07.1997. The Madras High Court rejected the criminal revision *vide* its impugned order held that the Appellate Tribunal's order was not applicable since it was not marked as defence document whereas the fact remains that the order was passed at a subsequent date. Whereas the fact remains that the defence documents were marked earlier to the order dated 24.10.1996 passed by the Appellate Tribunal which was immediately thereafter brought to the notice of the trial Court even by the prosecution in their own application.

Issue

Question arises that whether prosecution under Section 276C of the IT Act survives after cancellation of penalty under Section 271(1)(c)?

View

In the case of ***G.L. Didwania & Anr. v. ITO (1997) 140 CTR (SC) 273 : (1995) Supp. (2) SCC 724,*** the Supreme Court held that the whole question was whether the appellant made a false statement regarding the income which according to the assessing authority had escaped assessment and so far as this issue was concerned, the finding of the ITAT was conclusive and hence the prosecution cannot be sustained. Accordingly, this Court quashed the criminal proceedings and allowed the appeal filed by the assessee.

Held

The penalties levied under Section 271(1)(c) of the IT Act were cancelled by the respondent by giving effect to the order of the Appellate Tribunal. It is settled law that levy of penalties and prosecution under Section 276C of the IT Act are simultaneous. Hence, once the penalties are cancelled on the ground that there is no concealment, the quashing of prosecution under Section 276C is automatic. In this instant case, the charge of conspiracy has not been proved to bring home the charge of conspiracy within the ambit of Section 120B of IPC. As there was absence of dishonest and fraudulent intention, the question of committing offence under Section 420 of the IPC does not arise. (AY. 1986-87) (CRA Nos. 212-2013 of 1998 dt. 28-1-2004)

K. C. Builders v. ACIT (2004) 265 ITR 562/135 Taxman 461/186 CTR 721/179 Taxation 418 (SC)

Editorial: In ***Shastri Sales Corporation & Ors. v. ITO(1998) 229 ITR 628 (Bom.) (HC)*** the Court held that, prosecution could not be continued on the same facts and grounds as the penalty had been cancelled. In ***Bhupen Champaklal Dalal v. Sandeep Kapoor (2001) 248 ITR 827/167 CTR 281//118 Taxman 258 (Bom.) (HC)***, prosecution for alleged offences under ss. 276C, 277 and 278B stayed during pendency of appeals filed by the petitioner-accused against the reassessment orders; in case the appeals are dismissed, the criminal prosecutions are to proceed.

> *"Service which is rendered without joy helps neither the servant nor the served. But all other pleasures and possessions pale into nothingness before service which is rendered in a spirit of joy."*
>
> - Mahatma Gandhi

101

S. 281B: Provisional attachment- Recovery-Stock Exchange Card - Stock Exchange Rules clearly indicate that on right of nomination vesting in the Stock Exchange under the rules, that right belongs to Exchange absolutely - The membership right is not the property of assessee – Cannot be attached [S. 226(3), The Stock Exchange, Ahmedabad]

Facts

Upon the death of its member, Rajesh Shah on 07.02.1994, the appellant resolved to dispose of his membership rights in the stock exchange by inviting offers with a minimum floor price of Rs. Twenty Five Lakhs. A provisional attachment order, dated 15.02.1994, under Section 281B of the Income-tax Act, 1961 (IT Act, 1961) was issued by the ACIT in respect of Stock Exchange Card in the name of Rajesh Shah and margin money and security deposits kept by him with the Stock Exchange. The stand of Stock Exchange is that under its rules, bye-laws and regulations on the death or default of a member, member's right of nomination ceases and it vests in the Exchange and belongs absolutely to the exchange and the Governing Board is entitled to deal with or dispose of such right of membership as it may think fit. On 5.12.1994, the Governing Board of the Stock Exchange passed resolution disposing of membership right of deceased Rajesh Shah vested in the Stock Exchange in favour of UTI Security Ltd. for Rs. Twenty Seven Lakhs. A garnishee notice dated 14.06.1995, under Section 226(3) of the IT Act, 1961, in the sum of Rs. Twelve Lakhs Twenty Four Thousand Eight Hundred and Eighty Seven was also issued to the executive director, Stock Exchange, by the ACIT. In reply thereto, the Stock Exchange reiterated the stand that no amount was due from it to Rajesh Shah or his legal heirs and the Exchange does not hold any money for and on behalf of Rajesh Shah or his legal heirs. The plea of the Stock Exchange was not acceptable to the respondent. Thereafter, the appellant-Stock Exchange filed a writ petition in the High Court challenging the orders of provisional attachment and the garnishee notice. The writ petition has been dismissed by the High Court which judgment is under challenged in this appeal.

Issue

Whether the Stock Exchange Card in the name of Rajesh Shah was the property belonging to the assessee and after his demise devolved upon his legal representatives and heirs or it was a personal permission in favour of the deceased and right of nomination of the legal representative and heirs after his death has ceased and the said right has vested in the Exchange?

View

On examination of various rules of the Stock Exchange relating to membership and payment of outstanding dues of an ex-member, it is clear that right of membership is merely a personal privilege granted to a member, it is non-transferable and incapable of alienation by the member or his legal representatives and heirs except to the limited extent as provided in the rules on fulfilment of conditions provided therein. The nomination wherever provided for is not automatic and hedged by rules. On its vesting the right of nomination belongs to the Stock Exchange absolutely. The consideration received by the Stock Exchange on exercise of the right of nomination vesting in it, is to be applied in the manner provided in Rule 16.

Held

Membership of the Stock Exchange is a personal permission from the Exchange to exercise the rights and privileges attached thereto. It is not a private asset. That was a case of a defaulter but in principle it would make no difference as under rules both in the case of the death or default of a member, his right of nomination ceases and vests in the Stock Exchange. The heirs and legal representatives had informed the Stock Exchange that they were unable to meet the liabilities of the deceased and did not pay or satisfy the dues and claims as required under Rule15 of. Under these circumstances the Governing Board exercised the right of nomination in respect of membership of Rajesh Shah which had vested in the Stock Exchange. In the present case Rule 16 was properly applied by the Stock Exchange. The membership right in question was not the property of the assessee and, therefore, it could not be attached under Section 281B of the IT Act. No amount on account of Rajesh Shah was due from or held by the Stock Exchange and, therefore, Section 226(3) of the IT Act could not be invoked. We are unable to sustain the judgment under appeal holding that in substance the right of membership or membership card was a right of property which could be attached under Section 281B of the IT Act. The order of provisional attachment dated 14/02/1994, and garnishee notice dated 14.06.1995, issued under Section 226(3) are quashed. ***(Vinay Bubna v. State Exchange, Mumbai & Ors. (1999) 155 CTR 519/97 Comp Cas 874/6 SCC 215 (SC) relied on) (CA Nos. 1727 (NT) of 1998 and 7571 of 1999 dt. 2-3-2001)***

Stock Exchange Ahmedabad v. ACIT (2001) 248 ITR 209/115 Taxman 471/186 CTR 285 (SC)

Editorial: Decision of the Gujarat High Court in ***Stock Exchange, Ahmedabad v. ACIT [1998] 231 ITR 906 (Guj) (HC)*** reversed. The Apex Court relied on this decision and the decision of ***Vinay Bubna (Supra) i***n the case of ***Techno Shares***

& Stocks Ltd. v. CIT (2010) 327 ITR 323 (SC) to hold that the Membership Card ceases to be an asset only when the member commits a default in which event the card vests in the Exchange free from all encumbrances.

> *"Man falls from the pursuit of the ideal of plain living and high thinking the moment he wants to multiply his daily wants."*
>
> \- Mahatma Gandhi

102 – 2. Andhra Pradesh Electricity Duty Act, 1939

S. 3: Levy of a duty in certain sales of electrical energy - Levy of duty under AP/MP Electricity Duty Act-purported to be enacted under entry 53 in List II to the Seventh Schedule to Constitution- State not authorized to levy electricity duty on interState sales of electricity-Sixth Amendment to Constitution - scope of entries 53 and 54 - Whether electricity is goods - whether interstate sales thereof taxable under CST Act, 1956 [S. 2, 6, Constitution of India Art, 132, 139A, 145, 245, 246, 269, 286, 287, 366, Central Sales Tax Act, 1956, S 3, Indian Electricity Act, 1910, S. 39]

Facts

NTPC had thermal power stations in the State of Andhra Pradesh(AP) and was generating and distributing electricity to the State of Goa and electricity Boards of Karnataka, Kerala and Tamilnadu. The State of AP sought to levy duty under the AP Electricity Duty Act, 1939. The charging section of the Act showed that NTPC was “licensee’ as per the definition thereof and duty was leviable on all sales of energy subject to some exclusions and certain conditions as regards rate charged to consumers. The said levy was contested in AP High Court on the ground as to whether entry 53 under List II of Seventh Schedule to the Constitution of India authorizes the State of AP to levy such duty.

Similarly, State of Madhya Pradesh(MP) also sought to levy duty under MP Electricity Duty Act, 1949 on NTPC. The charging section therein provided for levy on electrical energy sold or supplied to consumers or consumed by oneself. Further, there was MP Upkar Adhinium, 1981 under which energy development cess was levied on the units of energy sold or supplied to consumers or consumed by itself. In MP too, the NOTPC was supplying electricity to Electricity Boards in nearby States.

Both the states argued that sale of electricity to Boards of other states is complete in the generating states i. e. AP and MP itself. The bulk power supply agreements with them showed that metering was done within the state. The delivery was complete at that point. The wheeling loss, wheeling charges, transmission loss and transmission charges while delivering the electricity to home state of buyers is on their account. NTPC loses control over the electricity supplied to the buyer once delivery is made. Payment made by beneficiaries is based on the delivery at the metering point. All these clauses show that the sale is complete within the state and it is not an inter-State sale as averred by NTPC. The state has power to levy duty on such sales.

The High Court of AP held that the State is incompetent to levy such duty. The State of AP filed an appeal before Supreme Court against this order. Similar issue had arisen in the State of MP and NTPC made an application under Article 139A to move the matter from M P High Court to Supreme Court along with above matter. Both cases heard by the Supreme Court having similar facts.

View

The Court examined the amendments brought in by the Sixth Amendment to Constitution on 11-09-1956 in Articles 269, 286, Entry 54, insertion of entry 92A in List I etc. The Central Sales Tax Act, 1956 was enacted to formulate principles for determining as to when a sale can be said to have taken place in the course of inter-State trade (section 3) and levy, collection and distribution of such taxes. The Court referred to ***Bengal Immunity Co. Ltd. v. State of Bihar.*** The Larger Bench ruled by majority that an inter-State sale or purchase continues to be so irrespective of the State where the sale can be held to be located under the general law or by the fiction created by the Explanation below clause (1) of the Article 286. The situs of the sale is wholly immaterial so far as its inter-State character is concerned. It further ruled that until Parliament by law made in accordance with clause (2) below Article 286 provides otherwise, no State can impose or authorize the imposition of any tax on sale or purchase of goods taking place in the course of inter-State sale or commerce. In short, it was held that Explanation below clause (1) of Article 286 as it existed before Sixth Amendment to Constitution could not be applied for the purpose of interpreting Article 286(2).

The Court also noted that amendment in section 6 (charging section) of the CST Act w. e. f. 01-04-1973 which exempted specifically inter-State sale of electricity. The Statement of Objects and Reasons (SOR) thereof mentioned that exemption of inter-state sales of electricity was dependent upon rate of tax within the state. Therefore, Parliament specifically exempted it by amending section 6. This asserts the point that inter-State sales of electricity were liable to central sales tax prior to this amendment.

The Court also noted that electricity was "goods" in terms of its definition under Article 366(12) of the Constitution as held in ***CST v. MP Electricity Board, Jabalpur***. It can be abstracted, transmitted, sold and has all attributes of "goods" though it cannot be stored or preserved. Its special phenomenon is it is instantly sold and consumed after it is produced/generated. It also referred to the ratio of the judgment in ***Indian Alluminium Co. v. State of Kerala*** where it is observed that all the three steps namely, sale, supply and consumption of electricity take place simultaneously without any hiatus. This is a distinguishing property of electricity. In ***Burmah Shell Oil Storage & Distributing Co. v. Belgaum Borough Municipalities***, it was held in the context of entry 52 that act of sale is merely the means for putting the goods in the way of use of consumption. Entry 52 dealt with "Taxes on the entry of goods for consumption, use or sale therein. The ultimate destination of goods is use or consumption.

The Court sought to allot the same meaning to word "sale" in entry 53 of List II of 7th Schedule, which deals with "Taxes on sale or consumption of electricity". It held that entry 53 should be read in the light of above decisions as "Taxes on consumption or sale for consumption of electricity". By reading entry 53 this way, the conflict between entry 53 and 54 ceases to exist and two can be harmonized and read together. Electricity as goods is also covered by entry 54 which is subject to entry 92A of List I. Thus, sale of electricity for consumption within the state alone is taxable as per entry 53. The interstate sales of electricity would be governed by entry 92A and consequently by CST Act. The observations in C. P. Motor Spirits Act were important in this respect which stated that two entries in the list may overlap and sometimes may appear to be in direct conflict with each other. The Court should strive to search for reasonable and practical construction to seek reconciliation and try to give effect to all of them. Thus, two entries 53 and 54 were interpreted as above to reconcile the overlapping or conflict between them.

The contention of the Revenue to the effect that there is no specific mention of entry 92A of List I in entry 53 of List II and therefore, even interstate sales of electricity can be taxed thereunder, was negated by the Court since the bans imposed under Articles 269 and 286 would apply irrespective of the language used in the entries in the Seventh Schedule. The said entries are heads or fields of legislative empowerment but the competence to legislate has to be traced from the Constitution. Refer, ***Calcutta Gas Co. v. State of WB.*** The prohibition on taxing of inter-State sales of electricity would squarely apply to entry 53 of List II as well.

The inter State movement of the electricity is in pursuance of sale contracts with bulk buyers like Electricity Boards and hence, interstate sales. The Court also observed that situs of sale can be determined by competent legislation or by Judgement law but none of them or a contractual obligation can fix the situs as opposed to section 3 of the CST Act read with restrictions in Articles 269 and 286. Under the MP Electricity Duty Act, 1949, "Consumer" is given an extended meaning to include a person who receives electricity without having regard to its consumption and a person who receives electricity in bulk and forwards it onwards for distribution without having regard to the fact whether it is transmitted outside state or consumed within state. Such definition will have to be read down to mean only persons who receive electricity for consumption within the state. Otherwise, it will result in multiple taxation of electricity both in the generating state and consuming state considering territorial nexus which is certainly not the legislative intention.

Thus, it is held that electricity is goods and interstate sale thereof is taxable under the CST Act. The State cannot levy electricity duty on interstate sales of electricity under Entry 53. (CA No. 3112 of 1990)/(TC (C) 3 of 1998) dt. 22-04-2002)

State of A. P. v. National Thermal Power Corporation Ltd. (2002) 5 SCC 203/ AIR 2002 SC 1895/(2002) 127 STC 280 (SC)

Editorial: Under GST law, rate of tax on Electricity is nil. But nevertheless, electricity is goods. Supply includes sale and supply is subjected to tax under Article 246A. The same conflict can arise in case entry 53 and GST law since IGST Act covers interstate supplies. But it is now clear that no electricity duty can be levied on inter-State supplies which is the domain of IGST Act.

> *"Man's happiness really lies in contentment. He who is discontented, however much he possesses, becomes a slave to his desires."*
>
> \- Mahatma Gandhi

103 – 3. Andhra Pradesh General Sales Tax Act, 1957

S. 2(h): Goods - Canned software-Whether goods - meaning of software-when uploaded on physical medium, becomes marketable goods - properties such as capable of being possessed, stored, transferred, transmitted, bought and sold makes such software "goods" [S. 2(n), 5, Constitution of India, Art. 366(12) Customs Act, 1962, S. 12, 14, Indian Electricity Act, 191O, S. 39, Transfer of Property Act 1982, S. 4]

Facts

The appellants provide, *inter-alia,* computer consultancy services and also sell custom-made software which are uploaded on the computers of the customers (uncanned software) and computer software packages off-the-shelf (canned software). The appellants are licensees for the canned software since the owner thereof is another person. In case of canned software, the assessing officer under the AP General Sales Tax Act held that they were "goods" liable to sales tax. The first appellate authority, Tribunal as well as the High Court dismissed the appeal of the appellants.

Issues 1

Whether canned software are "goods" liable to sales tax?

View

The appellant's contention before the Court was that "canned software" is nothing but a series of commands issue to the hardware of the computer that enables the computer to complete a designated task. To make this task effective, the sequence of instructions is required to be stored physically on a magnetic medium such as CD-ROM, Floppy Disc, etc. Software comprises of programs, data and documents. It is an intellectual property and not any commodity covered by definition of "goods" under either APGST Act or Constitution. They are intangible goods which are not perceived as "goods". The magnetic tapes or discs are only means of transmitting the intellectual creations from the originator to the user. The job of transmission could have been done by personal instructions of the originator in which case there would not have been any goods or tax thereon. Therefore, they are not goods. Upon sale of disc or floppy, there is no transfer of all the rights that the owner has. For example, right to produce and sell more copies, right to change the underlying work, right to license its use to others, right to transfer the copyright itself. These are incorporeal incidents which are not transferred along with the medium like disc/floppy.

On the other hand, the revenue argued that the term "goods" was very wide and included tangible as well as intangible goods. The properties which are capable of being abstracted, consumed or used and/or transmitted transferred, delivered, stored or possessed are "goods" for the purpose of Sales Tax Act.

Various judgements referred to bring home the point that even intangible/ incorporeal properties are goods.

CST v. M P. Electricity Board (1969) 1 SCC 200 (SC)-Electricity is goods.

H. Anraj and Govt. of TN (1986) 1 SCC 414 (SC)-Beneficial right in a lottery ticket is goods.

State of A. P. v. National Thermal Power Corporation Ltd (2002) 5 SCC 203(SC)-Electricity is goods.

Associated Cement Companies Ltd. v. Commr. of Customs (2001) 4 SCC 593 (SC) - Technical material in the form of drawings, manuals, discs etc are goods.

The Court observed that there is no difference in a book, canvas painting, music cassette and software package on a disc. In all such cases, intellectual property is incorporated on a media for transfer. Thus, it is held that branded or unbranded software are goods provided they have the characteristics of being bought and sold, transferred, transmitted, possessed, stored etc. The Court also observed that it was not required to comment upon unbranded/customized software because in such case, questions like situs of the contract of sale and whether the contract is service contract can arise.

Per S. B. Sinha J. (concurring)- Considering the definition of "goods' under Article 366(12) of the Constitution, Sec. 2(1)(h) of the APGST Act, Sale of Goods Act and dictionary meaning, it was inferred that it covers all intangible and tangible goods as also corporeal and incorporeal goods, commodities, materials and articles. The judgments of American courts were also considered to observe that software is treated as "goods" even by these Courts. An article written by Linda A. Sharp, J.D. titled "Computer Software or Printout Transactions as Subject to State Sales Tax or Use Tax" noted the development in technology and law and observed that tape containing a copy of canned program does not lose its tangible character because its content is a reproduction of the product of intellectual efforts and is comparable to a phonorecord which does not become intangible because it is reproduction of product of artistic efforts. The article referred to a number of decisions treating software as goods.

The Court observed that form of delivery of software, magnetic tape or electronic transfer via modem, is of no relevance. Software is ultimately recorded and stored in physical form on a physical object. The essence of the transaction was not merely to obtain intangible knowledge or information but to obtain recorded knowledge stored in some physical form which transforms it into a corporeal property. The software when loaded on a physical medium becomes a marketable commodity and hence “goods” provided it has attributes like (a) its utility (b) capable of being bought and sold (c) capable of being transmitted, transferred, delivered, stored and possessed. If a software, whether customized or not customized, satisfies these tests, it has to be treated as “goods”. [CA Nos. 2582 of 1998 and 2584-86 of 1998 dt. 05-11-2004]

Tata Consultancy Services v. State of AP (2004) 271 ITR 401/192 CTR 257/141 Taxman 132/137 STC 620(SC)/(2005) 1 SCC 308 (SC)/AIR 2005 SC 371

Editorial. Branded/canned software are treated as “goods” whereas the question relating to unbranded/customized software is not decided. Under GST law, development, design, programming, customization, adaptation, upgradation, enhancement, implementation of information technology software is treated as “service” as per entry 5(d) of the Schedule II. But branded software continue to be goods.

> *“Infinite striving to be the best is man’s duty; it is its own reward. Everything else is in God’s hands.”*
>
> - Mahatma Gandhi

104 – 4. Andhra Pradesh Value Added Tax, 2005

S. 4(7): Works Contract – Contractor & Sub-contractor – Only one taxable event in works contract, that is incorporation of goods in the works – tax leviable only once on transfer of property from sub-contractor directly to the employer – No liability of main contractor [Central Sales tax Act, 1956, S. 3, 4, 5, Constitution of India, Art. 366(29A(b)]

Facts

Petitioner is a contractor who had sub-contracted part of the works contract to another person. Department sought tax from Petitioner on the entire contract on the basis that there are two deemed sales: one from the sub-contractor to the Petitioner and another from the Petitioner to the employer.

Issue

Whether there are two or only one “deemed sale” and whether main contractor is liable to pay tax on the portion of the works contract which is sub-contracted?

View

Under Article 366(29A)(b), tax is levied on transfer of property in goods involved in the execution of works contract. There can be only one transfer of property in goods, in a works contract, when the goods are incorporated in the works. The goods are purchased by the sub-contractor and therefore he is owner of those goods. When the goods are subsequently used in the execution of the works contract, the transfer of property in goods takes place by way of accretion and hence the employer becomes the owner. Petitioner has no role to play and there is no transfer of property to or from the Petitioner in respect of these goods which fall within the sub-contractor’s scope of work.

Held

Petitioner is not liable to pay tax on the goods which are used by the sub-contractor in the execution of works contract. (CA No. 5239 of 2008 (Arising out of SLP (C) No. 12482 of 2007 dt. 26-8-2008)

State of Andhra Pradesh v. Larsen & Toubro Ltd. (2008) 9 SCC 191/(2008) 17 VST 1 (SC)

Editorial: This decision furnishes some first principles for application to new GST regime, though this must be done cautiously since the statutory framework has now changed. Under GST the term "Works Contract" have been defined under S. 2(119) and relates to only immovable property and is treated as the supply of services.

> *"It is any day better to stand erect with a broken and bandaged head then to crawl on one's belly, in order to be able to save one's head."*
>
> \- Mahatma Gandhi

105 – 5. Bombay Sales Tax Act, 1959

S. 2(11): Dealer - Business - Trust - Sale of books, booklets, pamphlets, photos, stockers and other publications containing the message of Sai Baba - Trust is held to be not dealer – Whether a particular person is a dealer or/and whether he carries on business are the matters to be decided on the facts and circumstances of each case [S. 2(5A), 2(19), 3]

Facts

The respondent assessee was a trust created by some devotees of Saibaba of Shirdi with an object of spreading message of Saibaba. In furtherance and to accomplish this object, the trust published some books, pamphlets and other literature containing such messages and sold them at nominal price to recoup only cost. The sale proceeds go to the trust in form part of the trust property to be utilised only for furthering the objects of the trust. There was a specific clause in the Trust Deed that if the Trust is unable to carry out its specific objects, the balance funds of the Trust would be returned to Shirdi Sansthanam. The Trust sought determination of the question under section 52(1)(a) of the Act from the Commissioner whether it is a "dealer" and it carries on "business" as defined under the Act. The Deputy Commissioner of Sales Tax held that the Trust was a "dealer" and was carrying on "business" to the extent of such publication and sale of books and other literature, in view of the amended definition of "business" w.e.f. 16-08-1985.

Issue

1) **Whether Trust is a "dealer" under section 2(11) of the Act?**

2) **Whether Trust is carrying on "business" as defined under section 2(5-A) of the Act qua its activity of publishing and selling books, pamphlets and other literature containing message of Saibaba?**

View

The main object of the Trust is spreading messages of Saibaba which is charitable in nature and does not amount to "business" as can be inferred from the Trust Deed and object clause therein. The activity of publishing literature containing such message is only ancillary or incidental to the main activity and does not amount to "business" unless an independent intention to carry on business can be established. The onus to prove such intention lies on the department who alleges that it is business activity. The definition of "dealer" in section 2(11) presupposes that the person carries on "business". If the main activity is not business, then incidental activity also cannot be business and such person cannot be held as "dealer".

The question of profit motive or no profit motive would arise only if the person carries on an activity in the nature of trade, commerce, manufacture or adventure in the nature of trade or commerce. In case of the present Trust, the activity did not amount to "business" irrespective of profit motive. However, the Court noted that whether a person is a "dealer" or carries on "business" has to be examined on the facts of each case and no general conclusion can be drawn.

State of TN v. Board of Trustees of the Port of Madras was referred to drive home a point that "business" is a term normally used in taxing statute to denote occupation, profession which occupies time, labour and attention of a person, normally with a profit motive and with a degree of continuity and not just for sport or pleasure. The expression "carrying on business" means more than just buying and selling the goods. The volume, frequency, continuity and regularity of transactions in a class of goods, ordinarily with a motive to earn profit, decide whether a person is carrying on business or not. Even if profit motive is statutorily excluded from the definition of "business", yet the person could be doing business.

The case of ***State of Bombay v. Ahmedabad Education Society*** was also considered. The main object of the society in that case was to establish a college and spread education. For the purpose, it had to construct a building. It established a brick kiln for use in construction. The scrap of the bricks and surplus quantity was sold by it at cost price. It was held that society was not doing "business" qua the sale of bricks but the said activity was just incidental to the main object which was not "business". Many other decisions e.g. ***Giridharilal Jivanlal v. CST, Tirumala Tirupati Devasthanam, v. State of Madras, State of TN v. Cement Research Institute of India, Indian Institute of Technology v. State of UP*** etc. were discussed and finally the Court concluded that the main activity must be "business" in order to make the ancillary/incidental activities as "business" unless it is established that such activities were actually carried out as business. [CA Nos. 9445 of 1996 and 1716 of 1999 dt. 22-03-2002]

CST v. Sai Publication Fund (2002) 4 SCC 57/(2002) 122 STC 288 (SC)/(2002) 122 Taxman 37/177 CTR 1/258 ITR 70 (SC)

Editorial :The term "business" is defined under section 2(17) of the CGST/ SGST Act. The clause (a) thereof states that "any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit" is business and clause (b) states that "any activity or transaction in connection with or incidental or ancillary to sub-clause (a)" is also business. The definition indicates that the main activity must amount to business in order to make the incidental activity also a business. The condition of profit motive is excluded but basically the activity must be in the nature of trade, commerce, manufacture etc. Thus, the ratio of above judgment may be applicable to GST as well but the issue needs to be contested before appropriate forum. The impact of exemption notifications under Central Tax (rates) may also be considered while deciding the liability under the CGST Act.

> *"Before the throne of the Almighty, man will be judged not by his acts but by his intentions. For God alone reads our hearts."*
>
> \- Mahatma Gandhi

106 – 5. Bombay Sales Tax Act, 1959

S. 25: Registration - Retrospective cancellation of Registration-Rights of purchaser - Registration certificate (RC) of supplier in force at the time of purchase - RC cancelled thereafter with retrospective effect-assessing officer disallowed the resale claim of same goods - Rights of the purchaser are not affected by subsequent cancellation of Registration certificate - Resale claim is allowable

Facts

The respondents who were registered dealer under the Bombay Sales Tax Act, 1959 (BST Act) purchased goods from one M/s Sulekha Enterprises who were also registered under the BST Act. The said supplier issued an invoice with a certificate that his RC was in force on the date of sale. The respondent effected resale of the same goods based on this certificate. The assessing officer disallowed the claim of resale on the ground that RC of the supplier was cancelled from a retrospective date which was prior to the date of purchase. He also levied penalty. The first appellate authority and Tribunal upheld the disallowance but Tribunal deleted the penalty.

Issues

(a) Are the purchases from Sulekha Enterprises to be treated as from an unregistered dealer on the ground that their RC was cancelled on August 25, 1967, but operative with effect from January, 1967 and the said purchases were made prior to August, 25, 1967?

(b) Can the purchaser rely on the certificate issued by the seller to the effect that his RC was in force as on the date of sale?

View

The Supreme Court concurred with the High Court decision that the rights of the purchaser are not affected by subsequent cancellation of RC though with retrospective effect. A purchasing dealer is entitled by law to rely upon the certificate of registration of the selling dealer and to act upon it. Whatever may be the effect of a retrospective cancellation upon the selling dealer, it can have no effect upon any person who has acted upon the strength of a registration certificate when the registration was valid and in force.. The argument on behalf of the department that it was the duty of persons dealing with registered dealers to find out whether a state of facts exists which would justify the cancellation of registration; must be rejected. Accepting such argument would only lead to modifying the provisions of law.

Held

The resale claim in the hands of the purchaser is allowable. Cancellation of RC of the seller subsequently from an anterior date would not change the rights of the purchaser. [CA No. 1506 of 1982 dt. 7.2.1996]

State of Maharashtra v. Suresh Trading Company 1996 (3) SCALE 536/(1997) 11 SCC 378/(1998) 109 STC 439 SC

Editorial: The decision has not considered any equivalent provision like sec. 48(5) of the MVAT Act, 2002 wherein actual payment of tax into the Govt. treasury is quintessential to claim set off on the purchases. Mere certificate of the supplier whose RC is cancelled would not suffice. The case related to the claim of resale which was not liable to tax under section 8 of the BST Act.

Under CGST/SGST Act too, section 16(2)(c) stipulates that input tax credit (ITC) is not admissible unless the tax charged on the inward supply is actually paid to the credit of appropriate Govt. either through cash or through eligible ITC. Ratio of this judgement may be useful in cases where the supplier has not uploaded the sale invoices in his return for outward supplies.

> *"An eye for an eye only ends up making the whole world blind."*
>
> \- Mahatma Gandhi

107 – 6. Central Excise Act, 1944

S. 2(f)(i): Manufacture includes any process- Incidental or ancillary to the completion of a manufactured product – "Manufacture" – Process of cold rolling of hot rolled strips – Extended period of limitation [Central Excise Tariff Act, 1985, S. 11A]

Facts

Assessee is engaged in the process of cold rolling of hot rolled stainless steel patta/patti on job-work basis. Purpose of cold rolling is only to reduce the gauge of the SS patta/patti. The Department had taken the view that this process amounts to "manufacture" as per Section 2(f) of the Central Excise Act, 1944 and that the extended period of limitation was invokable under section 11A of that Act. There was a difference of opinion between the Judicial and Technical Member of the CESTAT. After reference to the Third Member, the entire process was taken note of by the Third Member in detail and he held that the process amounts to "manufacture" and that the extended period of limitation was validly invoked.

Issue

Whether process of cold rolling of hot rolled strips amounts to "manufacture" and whether the extended period of limitation is invokable?

View

The Supreme Court affirmed the view of the Third Member which gave elaborate reasons for holding that the process amounts to "manufacture". As far as extended period of limitation is concerned, the Court also upheld the view of the Tribunal which had held that several manufacturers which dealt with similar activity to that of Assessee were treating the process as "manufacture" and that prior judgments of the Tribunal had held that the process amounted to "manufacture" and hence he could not claim that there was *bonafide* belief in not levying duty.

Held

The process of cold rolling of hot rolled strips amounts to "manufacture" and the extended period of limitation is invokable. (CA No. 5784-5788 of 2007 and 9196-9202 of 2012 dt. 14-12-2015)

Gujarat Industries Ltd. v. CCE (2016) 14 SCC 690/(2016) 53 GST 303 (SC)/2015 (326) ELT 625 (SC)

Editorial : The view of the Tribunal seems to be influenced by the fact that the Tariff and the HSN seem to treat the process as "manufacture", though other reasons are also given by the Tribunal. Again, while discussing the question of extended period of limitation, the Tribunal has taken the view that the Tariff having specifically treated the process as manufacture, the assessee could not have entertained *bonafide* belief that the process was not in fact manufacture. The Supreme Court has merely reproduced the judgment of the Tribunal and affirmed it without looking into the question whether the Tariff can control the meaning of the word "manufacture" in the Act. In ***Moti Laminates (1995) 3 SCC 23***, the Supreme Court had held that the Tariff entries are irrelevant in deciding whether goods were manufactured or not.

> *"If you take care of your immediate surroundings, the universe will take care of itself."*
>
> \- Mahatma Gandhi

108 – 6. Central Excise Act, 1944

S. 3 : Levy of Duty – Various charges recovered from customer – Part of transaction value [S. 4, 4(3)(d)]

Facts

The Respondent company manufactures dissolved and compressed industrial gases, liquid chlorine and other allied products. These articles were supplied to the customers in containers. In some cases the containers was provided by the Respondent to the customers on rent whereas in others the customers bring their own containers. The Respondent charges the customers certain amounts under different heads and treat the said amounts as their income from ancillary or allied ventures. Present appeal was filed questioning the charges realized by the Respondent taken into account for determination of levy of tax. There was a conflicting view between the two decisions of this Court in ***UOI. v. Bombay Tyre International Ltd. and Ors. (1984) 1 SCC 467*** and ***CCE Pondicherry v. Acer India Ltd. (2004) 8 SCC 173,*** and the matter was referred to the larger bench by an order dated 30.07.2009.

Issue

Whether S. 3 and 4 of the Act, despite being interlinked operate in different fields, in the light of amendments to the S. 3, 4 and 4(3)(d) of the Act and charges such as packing charges, container charges, facility charges, delivery and collection charges, repair and testing charges etc would form part of transaction value or not.

View

The measure of the levy must not be confused with the nature thereof though there must be some nexus between the two. But the measure cannot be controlled by the rigors of the nature. The measure is the value and value is related to price. The price charged at the stage of clearance, in addition to manufacturing cost and manufacturing profit, can include certain value additions and inclusions which enrich the value of the product to make it suitable for sale or to facilitate such sale. At this stage, impost has nothing to do with the sale. The impost is on manufacture. But it is the value up to the stage of the first sale that is taken as the measure. Doing so does not introduce any inconsistency between the nature and character of the levy and the measure adopted. The amendment of Section 3 to the Act incorporates the essentials of a changed concept of charging of tax on additions to the value of goods and services at each stage of production and also engrafts in the statute what was judicially held to be permissible additions to the manufacturing cost and manufacturing profit in Bombay Tyre International

Ltd. (supra). This fundamental change really finds reflection in the definition of 'transaction value' as defined by Section 4(3)(d) of the Act which was brought into force by the Amendment Act, 2000. It statutorily engrafts the additions to the 'normal price' under the old Section 4 as held to be permissible in Bombay Tyre International Ltd. supra. There is no discernible difference in the statutory concept of 'transaction value' and the judicially evolved meaning of 'normal price'.

Held

The measure of the levy contemplated in Section 4 of the Act will not be controlled by the nature of the levy. So long a reasonable nexus is discernible between the measure and the nature of the levy both Section 3 and 4 would operate in their respective fields. The charges so realized by the respondent company shall form part of the transaction value for the levy of tax. (CA No. 3159 of 2004 & Ors dt. 11-5-2018)

CCE Indore v. Grasim Industries Ltd. (2018) 7 SCC 233/AIR 2018 SC 3158/(2018) 68 GST 569 (SC)/2018 (360) ELT 769 (SC)

Editorial: Section 9 of CGST Act is the charging section. Section 7 covers scope of supply. Section 15 provides for value. Section 15(2)(c) includes incidental expenses charged to the recipient by the supplier for anything done by the supplier in respect of supply of goods or services or both at the time of or before the delivery of the goods or supply of services. Hence, expenses charged by the supplier in relation to such supply would form part of value. Therefore, the ratio of the above ruling, to this extent, may be relevant for construing section 15(2)(c).

> *"The golden rule of conduct is mutual toleration, seeing that we will never all think alike and we shall always see Truth in fragment and from different points of vision."*
>
> \- Mahatma Gandhi

109 – 6. Central Excise Act, 1944

S. 4: Valuation of excisable goods for purpose of charging of duty of excise - Assessable value - Captive consumption - Profit margin - cost of production and notional profit to be added, are to be determined before deciding whether there is any shortfall of duty - Case remanded for fresh decision considering costing principles laid down in Cadbury's case [Central Excise (Valuation) Rules, 1975, Rule 6(b)(ii)]

Facts

The assessee was removing goods manufactured in one factory to its other units for captive consumption and was discharging the duty liability on the assessable value determined on the basis of cost of production as per Rules 6 (b)(ii) of the Central Excise (Valuation) Rules, 1975.

Issues

Whether the cost of production will be determined based on the actual cost of production at the factory of production alone or the costs of production in all the units of the assessee together will be taken into consideration?

View

The Court observed that it was common ground between the parties before the Tribunal that the cost of production under erstwhile Rule 6(b)(ii) of Central Excise (Valuation) Rules, 1975 will have to be determined based on the actual cost of production at the factory of production alone and not the costs of production in all the units of the assessee together. The Court referred to the judgment of ***CCE Pune v. Cadbury India Ltd. [JT 2006 (7) SC 147],*** which was decided on the principles of determining cost of production for captive consumption laid down by the Institute of Cost and Works Accountants of India (ICWAI). The ICWAI formulated the standards for costing: CAS-4. According to CAS-4 the definition of "cost of production" is as: "Cost of Production shall consist of Material consumed, Direct wages and salaries, Direct expenses, Works overheads, Quality Control cost, Research and Development cost, Packing cost, Administrative Overheads relating to production." The cost accounting principles laid down by ICWAI have been recognized by the Central Board of Excise and Customs *vide* Circular No. 692/8/2003, CX dated 13.2.2003.

Held

The case was remanded to the Commissioner to be decided as per principles laid down in Cadbury's judgment. The assessee was to satisfy Revenue for less than 10% notional profit and short levy of excise duty to be calculated accordingly. Credit was allowed if any. (CA. Nos. 2086-2087 of 2002 dt. 12-10-2006)

CCE Aurangabad v. Raymond Ltd. 2006 204 ELT 3/2006 taxmann.com 1251 (SC)

Editorial: Rule 30 of the CGST Rules provides for the determination of 'value of supply of goods or services or both based on cost'. This provision is substantially similar to Rule 8 of the Central Excise (Valuation) Rules, 2000, which in turn, was based on Rule 6(b)(ii) of the Valuation Rules of 1975. However, the rules would come into play only when section 15(1) does not apply. If rules were to apply, the value has to be determined in terms of Rule 27, 28 and 29, failing which; Rule 30 would come into operation. Consequently, principle laid down in the above ruling could be relied upon, though, according to me, may not be applicable, while determining cost of provision of services between branches (separately registered) or for sharing of costs.

> *"If I have the belief that I can do it, I shall surely acquire the capacity to do it even if I may not have it at the beginning."*
>
> \- Mahatma Gandhi

110 – 6. Central Excise Act, 1944

S. 4: Valuation of excisable goods for purpose of charging of duty of excise -Assessable value - Appellants selling cars on price lower than the cost of production main reason for assessees to sell their cars at a lower price than manufacturing cost was to penetrate market and this constituted extra commercial consideration - Since price charged was not sole consideration, hence, value was to be determined as per valuation rules

Facts

The assessee is a car manufacturer (Fiat Uno). The assessee was selling the cars at a price lower than the cost of production for long period of time with a view to penetrate the market. The authorities had found that the wholesale price declared by the assessees was much less than the cost of production and, therefore, the price so declared by them could not be treated as a normal price for the purpose of arriving at assessable value under Section 4(1)(a) of the Central Excise Act. The assessee was issued 11 show cause notices for the period from June 1996 to February 2000, *inter alia*, making a demand of differential duty on the assessable value calculated on the basis of manufacturing cost plus manufacturing profit minus MODVAT availed per car, and the duty which the respondents were actually paying on the assessable value. The value was determined in terms of Rule 7 of the Valuation Rules.

Issue

Whether value for sale of car which is below manufacturing cost can be rejected and notional profit can be added?

View

It was held that sale below cost was not the normal price. The Supreme Court referred to the provisions of section 4(1)(a) of the Act (prior to 01.07.2000) and held that normal price is a deemed price. The Court construed the expression “ordinarily sold” and held that sale throughout below cost of production was not ordinary sale. The court, then, construed the term “sole consideration” to mean that capturing the market would amount to additional consideration and hence, in terms of Rule 7 of the Valuation Rules, the same can be added notionally. Once price is not the ‘sole consideration’, even after 01.07.2000 (under the transaction value regime), the rules can be invoked. The rules need not be invoked sequentially. The Court distinguished the earlier judgment in the case of Guru Nanak Refrigeration and Bisleri on facts. It was observed that each case depends on its own facts and a close similarity between one case and another is not enough because either a single significant detail may alter the entire aspect.

Held

It was held that the price at which goods were sold clearly indicated that these goods cannot be termed as "ordinarily sold" as the cars were being sold at a loss for five years. The Court also observed that since the assessable value is not ascertainable, the best judgment method should be resorted to and the excise duty should be computed on the basis of manufacturing cost plus profit. (CA. Nos. 1648-1649 of 2004 dt. 29-8-2012)

CCE v. Fiat India (P) Ltd. (2012) 37 STT 147/25 taxmann.com 534 (SC)/ 2012 (283) ELT 161 (SC)/(2012) 9 SCC 332

Editorial: The above ruling was in the context of "normal price". Normal price is a deemed price. There are no words "ordinarily sold" under section 15(1) of the CGST Act. Section 2(31) of CGST Act, 2017 defines "consideration" It is modelled on the definition under section 2(d) of the Indian Contract Act. The same must be a benefit derived by the assessee.

The expression "sole consideration" would also have to be read in context with the rules. Under the CGST Rules, there is no rule which provides for notional additions (unlike erstwhile Central Excise Valuation Rules). GST is a transaction based tax. It is a contract based levy. Hence, value would be the contract value in terms of section 15(1) of the Act, subject to exceptions stated therein. Supply below cost and bulk discounts cannot be question under GST. The said judgment, in my view, would have no application under section 15(1) of the Act.

> *"Faith... must be enforced by reason...*
> *when faith becomes blind it dies."*
>
> \- Mahatma Gandhi

111 – 6. Central Excise Act, 1944

S. 4: Valuation of excisable goods for purpose of charging of duty of excise – Valuation – Dharmada collected along with the price of goods – Not a part of transaction value

Facts

The Appellant while selling goods charged the customers invoices for the price of goods plus 'Dharmada', a charitable donation. Such Dharmada which was paid voluntarily by customers was accordingly credited to charity. Show Cause Notice was issued to the appellant claiming that Dharmada so collected forms a part of transaction value. Due to conflicting views in the cases ***CIT (Central) Delhi, New Delhi v. Bijli Cotton Mills (P) Ltd. Hathras, District Aligarh (1979) 1 SCC 496*** and ***Collector v. Panchmnkhi Engineering Works 2003 (158) ELT 550 (S.C.), Tata Iron & Steel Co. Ltd. v. Collector of Central Excise, Jamshedpur 2002 (146) ELT. 3 (SC)*** the referred the matter to a Larger Bench in order to resolve the conflict on 29.07.2015.

Issue

Whether the Dharmada collected by the appellant which is clearly an optional payment made by the buyer can be regarded as part of the transaction value for the sale of goods.

View

If an amount is paid at the time of the sale transaction for a purpose other than the price of the goods, it cannot form part of the transaction value. The Dharmada so paid, is not for the transaction of sale i.e. for the transfer of possession of goods and any payment made alongside such a transaction cannot be treated as consideration for the goods. The receipts on account of Dharmada were voluntary, earmarked for charity and in fact credited as such. Furthermore, it would make no difference to the true character and nature of the receipts even if they were found to be paid compulsorily because the purchaser, purchased the goods out of their own volition, choice and will. The purchase of the goods is the occasion and not consideration for the Dharmada paid by the customer. Dharmada so paid, is meant for charity and is received and held in trust by the seller.

Held

If such amounts are meant to be credited to charity and do not form part of the income of the assessee they cannot be included in the transaction value or assessable value of the goods. Thus, Dharmada collected by the appellant which is clearly an optional payment made by the buyer can not be regarded as part of the transaction value for the sale of goods. (CA No. 5282 of 2005 and 531 of 2008 dt. 9-4-2019)

D J Malpani v. CCCE Nashik (2019) 9 SCC 120/(2019) 74 GST 407/308 CTR 73 (SC)

Editorial: Section 15 provides for value (transaction value) of supply of goods and services. Hence, according to me, the ratio of the above ruling would continue to hold good and apply even under the GST regime in as much as ‘the price actually paid or payable for the said supply of goods or services or both’ alone would form part of value. Compulsory extraction would not form a part of value.

“There is a higher court than courts of justice and that is the court of conscience. It supersedes all other courts.

- Mahatma Gandhi

112 – 6. Central Excise Act, 1944

S. 4: Valuation of excisable goods for purpose of charging of duty of excise - Valuation – Related person- Where the two companies/firms etc., belong to the same group then the test of mutuality is established and satisfied [S. 4(4)(c)]

Facts

M/s Haldyn Glass works ("Respondent") is manufacturer and supplier of glass bottles. M/s Haldyn supplies these goods to following parties 1) M/s. 'J' Foundation, (2) M/s. 'J' Traders (3) M/s. Janata Glass Works (4) M/s. Travin Trading & Investment Pvt. Ltd. M/s. Haldyn is the joint venture of two groups known as Shetty group and Mehta group who were having shareholding of 52 per cent and 48 per cent respectively in M/s. Haldyn. The aforesaid four firms/companies to which the goods were supplied by M/s. Haldin are the firms of Mehta group and Shetty group respectively. The investigation revealed that goods were supplied by M/s Haldyn to these firms at much lesser price than the price which was charged from the other buyers. On this basis, the Revenue took the position that the M/s. Haldyn and the aforesaid four purchasers of the goods are related persons with mutual interest in each other and there was price manipulations as well. Show cause notice was issued proposing to revise the declared assessable value in case of the supplies made to these concerns by M/s. Haldyn. In the second round of litigation, the CESTAT held that there was no mutuality of interest and, therefore, supplier on the one hand and the purchaser on the other hand were not related persons. Hence, appeal by Revenue before Supreme Court.

Issue

Where the two companies/firms etc., belong to the same group then the test of mutuality is established and satisfied?

View

The court followed the judgment of ***Collector of Central Excise, Ahmedabad v. ITEC (P) Ltd., Bombay [(2002) 7 SCC 473]*** and held that where the two companies/firms etc., belong to the same group then the test of mutuality is established and satisfied. In a sense, the Court has torn the corporate veil thereby pointing out that such family concerns would be beneficiaries in the affairs of each other. Insofar as the price manipulation is concerned, i.e., sale of the goods by M/s. Haldyn to the aforesaid purchasers at a depressed price, the same has been established on record on the basis of plethora of evidence tendered by the Revenue. Hence, ingredients of price manipulations also stand satisfied.

Held

CESTAT was not right in holding that there was no mutuality of interest and, therefore, supplier on the one hand and the purchaser on the other hand were not related persons. If two entities/persons belong to the same group, they have interest in the business of each other and test of mutuality is satisfied. (CA No. 659-663 and CA No of 2006 dt. 13-8-2015)

CCE v. 'J' Foundation and other (2015) 17 SCC 576/2015-TIOL-215-SC-CX/2015 (324) ELT 422 (SC)

Editorial: Section 15(5) of the CGST Act provides for the definition of 'related person'. It does not define related person as one who is so associated with the assessee that they have interest, directly or indirectly, in the business of each other as defined under section 4(4)(c) of the Central Excise Act. Hence, according to me, the ratio of said judgment would not be applicable to the supplies made under GST regime.

> *"Increase of material comforts, it may be generally laid down, does not in any way whatsoever conduce to moral growth."*
>
> \- Mahatma Gandhi

113 – 6. Central Excise Act, 1944

S. 11AB: Interest on delayed payment of duty – Interest on short levy or short payment – Escalation in price with retrospective date – Attracts interest on differential liability as per section 11AB of the Act

Facts

The Appellant Company is a manufacturer. The products were cleared on sale from 1st January, 2005 to July 2006 on the basis of prices in circular dated 24.04.2005. Subsequently, the prices were revised retrospectively, by way of price circular dated 20.07.2006. SAIL paid the duty amount on the price escalation. However, the authorities called upon SAIL to pay interest under S. 11AB of the Act. When the matter came up before a bench of two learned judges of the Hon'ble Supreme Court, the correctness of the cases ***CCE v. SKF India Ltd. 2009 (13) SCC 461*** and ***CCE v. International Auto Ltd. 2010 (2) SCC 672*** was doubted and the matter was referred to the larger bench.

Issue

Whether Interest was payable on differential excise duty with retrospective effect that become payable on basis of escalation Clause under Section 11AB of Act, 1944.

View

When an Assessee, in similar circumstances, opts for provisional assessment upon a final determination of the value consequently, the duty and interest dates back to the month "for which" the duty is determined and to the month in which final assessment is made. It may be true that the differential duty becomes crystallized only after the escalation is finalized but, it is not a case where escalation is to have only prospective operation. It is to have retrospective operation. This means the value of the goods which was only admittedly provisional at the time of clearing the goods is finally determined and it is on the said differential value on which differential duty is paid. In a case where the price is provisional and subject to variation and when it is varied retrospectively it will be the price even at the "time of removal". The fact that it is known, later cannot detract from the fact, that the later discovered price would not be value at the time of removal.

Held

Interest was payable on differential excise duty with retrospective effect that become payable on basis of escalation Clause under Section 11AB of Act, 1944. (CA No. 2150 of 2012 dt. 8-5-2019)

Steel Authority of India Ltd. v. CCE, Raipur (2019) 6 SCC 693

Editorial: Central Excise duty was payable on removal (See Rule 4). The above ruling was in the context of section 4 which provided for payment of duty at "time of removal" and "place of removal". Such concepts do not exist under GST regime. Hence, according to me, the ratio of the above ruling would not be relevant under the GST regime.

> *"A man of few words will rarely be thoughtless in his speech; he will measure every word."*
>
> \- Mahatma Gandhi

114 – 6. Central Excise Act, 1944

S. 11B: Claim for refund of duty - Excise – Refund - Excise duty paid under mistake of law – Maintainability of suit or writ petition – Unjust enrichment – Salutary principle – to be held applicable [Constitution of India, Art. 265, Indian Contract Act, S. 72]

Facts

The appellant is a textile mill manufacturing "blended yarn". Blended yarn was captively consumed. For the period prior to March 16/17, 1972, the mills paid excise duty on blended yarn manufactured for captive consumption under Tariff Item 18 or 18A of the First Schedule to the Excise Act. In a petition, Gujarat High Court held that the levy of the excise duty on blended yarn prior to March 16/17, 1972, under tariff Item 18 or 18A was *ultra vires*. The High Court directed refund of the excise duty levied for 3 years prior to institution of the petition, which was instituted on 6.5.1972. The appellant and other mill-owners stated that as a result of the declaration of the law as aforesaid by the Court, they were not liable to pay excise duty and they had paid the excise duty on the same up to that date under mistake of law. They requested for refund of the excise duty so paid till March 16/17, 1972, stating that such duty was illegally recovered from them. The Revenue did not refund the excise duty as claimed. The appellant and others filed suits. The trial court decreed the suits. In the appeals filed by the Union of India against the aforesaid decrees passed by the trial court, the High Court of Gujarat allowed the appeals and set aside the decrees passed by the trial courts, by judgment dated 6.4.1984. It was held that in order to successfully sustain the claim of restitution based on Section 72 of the Contract Act, the person claiming restitution should prove "loss or injury" to him, and in the cases before them, the excise duty paid on blended yarn was ultimately passed on to the buyer of the fabric, and so the claim for restitution will not lie. In other words, in cases where an assessee has "passed on" the duty paid by or realised from him, he has suffered no loss or injury, and the action for restitution is unsustainable. Matter was carried to Supreme Court and was ultimately referred to 9 judge Bench of the Apex Court.

Issue

Whether in an action claiming refund of excise duty (tax) paid under mistake of law, is it essential for the person claiming such refund, to establish "loss or injury" to him? In other words, in cases where the person from whom the excise duty (tax) is collected, has "passed on" the liability or deemed to have passed on the liability, is it open to him to claim refund of the duty paid by him, placing reliance on Section 72 of the Indian Contract Act?

View

The nine-Judge verdict of the Supreme has decided by a majority of 8:1 as to what rights and remedies are available to a citizen against the State in the matter of refund of unlawfully recovered taxes and imposts. The court relied on the decisions of the courts which have applied the doctrine of unjust enrichment. Reliance was based on ***State of Madhya Pradesh v. Vyankatlal & Anr. [1985 (3) S.C.R. 561]*** and ***Shiv Shanker Dal Mills etc. v. State of Haryana & Ors. Etc. [1979 (3) S.C.R. 1217]*** wherein court held that though refund of fee so collected may be legally due to the traders, the traders may be repaid amounts only to the extent that they have not passed on the burden to their customers. To the extent they have passed on, it held, they were not entitled.

Held

Nine-Member Bench Judgement: Where burden of duty is not passed on to third party, refund is admissible but no civil suit for refund is maintainable. No automatic refund to be granted under section 11B of Central Excise Act & Section 27 of Customs Act unless it is proved that duty has not been passed on to third party. (CA. No. 3255 of 1984 dt. 19-12-1996)

Mafatlal Industries Ltd. v. UOI (1997) 5 SCC 536/1997 (89) ELT 247 (SC)/(1998) 111 STC 467

Editorial: The term 'unjust enrichment' is not used anywhere in the CGST Act. However, principle is inbuilt under section 54(4) of CGST Act. Thus, a refund under section 54 would have to pass this test. However, only if it can be shown that amount paid is not tax (GST), the said conditions may not apply for seeking refund.

> *"A man's true wealth hereafter is the good he has done to his fellowmen."*
>
> \- Mahatma Gandhi

115 – 7. Central Sales Tax Act, 1956

S. 3: When is sale or purchase of goods said Movement of goods in the course of import or inter-state or commerce - Deemed sale - when can be held to be covered by Section 3(a) and Section 5(2) of the CST Act, 1956 [S. 3(a), 5(2), Constitution of India, Art. 286(2), Delhi Value Added Tax Act, 2004, S. 7, 74]

Facts

Delhi Metro Railway Corporation Ltd. (DMRC) had invited tenders for supply, installation, testing and commissioning of traction electrification, power supply, power distribution and SCADA system. The respondent was shortlisted and then executed the contract under which the respondent had to provide transformers, switchgears, high voltage cables, SCADA system and also complete electrical solution, including control room for operation of metro trains on the section concerned. The High Court found that the terms of the contract envisaged interstate movement/import of goods. Such movement of goods was within the knowledge of DMRC because there was total ban on setting up/working of heavy industries in Delhi and DMRC had approved 18 places within the country from where the equipment and goods had to be supplied. These included the premises and factories of the respondent, located in India and outside India. On these facts, the High Court allowed deemed sale in the course of import as well as interstate trade. The decision of the High Court was challenged before the Supreme Court.

Issue

Whether the movement of goods by way of imports or by way of interstate trade, in this case, was in pursuance of the conditions and/or as an incident of the contract between the assessee and DMRC and therefore the transaction was covered by section 3(a) and section 5(2) respectively of the Central Sales Tax Act, 1956.

View

The High Court had in its judgement enumerated various conditions in the contract between DM RC and the respondent which were as follows :

1. Specifications were spelt out by DMRC;
2. Suppliers of the goods were approved by DMRC;
3. Pre-inspection of goods was mandated;

4. The goods were custom made, for use by DMRC in its projects;

5. Excise duty and customs duty exemptions were given, specifically to the goods, because of a perceived public interest, and its need by DMRC.

6. The Project Authority Certificate issued by DMRC the name of the subcontractors as well as the equipment/goods to be supplied by them were expressly stipulated;

7. DMRC issued a certificate certifying its approval of foreign suppliers located in Italy, Germany, Korea, etc. from whom the goods were it to be procured;

8. Packed goods specially marked as meant for DMRC use in its project.

The Supreme Court found that there was no attempt to rebut the aforesaid findings of the High Court or any factual error therein. Therefore, after considering these salient features of the contract and the entire conspectus of the law applicable thereto the Supreme Court was of the opinion that the deemed sale under consideration was in the course of import and was also in the course of interstate trade.

Held

The sale under consideration was covered by section 3(a) and section 5(2) respectively of the Central Sales Tax Act, 1956. (CA Nos 2989-3008 of 2016 (Arising out of SLP (C) Nos 30045-30064 of 2013 dt. 5-4-2016)

Commissioner, DVAT v. ABB Ltd (2016) 6 SCC 791/AIR 2016 SC 1901/(2016) 55 GST 293 (SC)

Editorial : The statutory framework under GST has now changed and this decision is not entirely relevant under the new law however the pending cases under earlier laws can be benefited by this case.

> *"If your heart acquires strength, you will be able to remove blemishes from others without thinking evil of them."*
>
> \- Mahatma Gandhi

116 – 8. Delhi Sales Tax Act, 1975

S. 4: Rates of tax- Lottery tickets –Right to participate in lottery is actionable claim – No sale of goods with in the meaning of the sales tax Act - Whether ratio of H. Anraj is still valid so far as it splits the rights attached to a lottery ticket into right to participate and right to win-former held as goods and latter as actionable claim-whether is a composite right [Constitution of India, Art. 246(3), 366(12), 366(29A) Sale of Goods Act, 1930, S. 4(1), Transfer of Property Act, 1882, S. 3, 130]

Facts

The Delhi High Court in the case of Haryana State Lotteries vs. Govt. of NCT decided on 17-07-1998 and several other writ petitions held that lottery tickets as a whole are goods liable to sales tax. These petitioners challenged this decision before the Supreme Court. In the appeal preferred by Sunrise Associates vs. Govt. of NCT of Delhi, the Delhi High Court referred a question of law to the Constitution Bench of the Supreme Court since it had garnered doubts in respect of the views expressed in two earlier judgments of the Supreme Court namely, ***H. Anraj v. Govt. of TN (1986) 61 STC 165(SC)/(1986) 1 SCC 414*** and ***Vikas Sales Corporation v. CCT (1996) 102 STC 106(SC) (1996) 4 SCC 433***, which had affirmed the view in H. Anraj. In H. Anraj's case, the question was whether lottery tickets are goods liable to sales tax. The Court had held that there were two rights involved in a lottery ticket namely, (1) right to participate in a lottery draw (2) right to win the prize depending on chance. The second one was chose-in-action i. e. actionable claim and not liable to sales tax whereas the first one was beneficial right in movable property and liable to sales tax. The High Court had a doubt whether splitting of rights was correct in case of a lottery ticket. The Delhi High Court however, held the lottery tickets themselves as "goods" relying upon a few statements in the H. Anraj's judgment.

Issues

1) Whether ratio laid down by H. Anraj's case is correct law?

2) Whether splitting of rights as right to participate in a draw and right to win being a chance, as ruled in H. Anraj's case is correct?

3) If yes, then whether the first right is beneficial right in movable property and hence, 'goods' liable to sales tax and second right is actionable claim out of the purview of sales tax?

4) Whether is it possible to infer that the case of H. Anraj stipulated that lottery tickets themselves are "goods" due to ambiguous language used in it?

Held

The Court after thoroughly perusing H. Anraj's case, concluded that Court in that case clearly distinguished the two rights embodied in a lottery ticket. The first right of participation in the draw alone was right in *praesentio* and liable to sales tax being "goods". The second right was in *futuro* dependent on a contingency and was only actionable claim not liable to sales tax. The states who had jettisoned this reasoning and treated lottery ticket itself as "goods" had committed an error.

The Court observed that almost in all states, the definition of "goods" did not include actionable claims although they have all characteristics of "goods". A lottery ticket is a piece of paper evidencing a chance or right to a conditional benefit to receive a prize of a greater value than the consideration paid for the transfer of that chance. It is nothing more than a token or evidence of this right.

The Court referred to the definition of "actionable claims" in section 3 of the Transfer of Property Act and inferred that purchaser of lottery ticket gains a claim to a conditional interest in the prize money which is not in possession of the purchaser and hence, it is an actionable claim. But the Court observed that further distinction of rights sought by H. Anraj's case is totally unwarranted. A lottery being a chance to win a prize, in essence is only that chance. Every right can be sub-divided into lesser rights. There is no value in the mere right to participate in the draw and the purchaser does not pay for the right only to participate. The consideration is paid for the chance to win. There is therefore no distinction between the two rights. The right to participate being an inseparable part of the chance to win and is therefore, a part of the actionable claim.

The Court came to the conclusion that there is one inseparable right in a lottery ticket which is an actionable claim not liable to sales tax.

The case of Vikas Sales Corporation was also included in the reference made by Delhi High Court because it affirmed the decision in H. Anraj. The Supreme Court declined to comment on the ratio of the said decision since the question whether REP licenses are goods or not was not referred to them directly. (CA Nos. 4552, 4553-4557, 4913 and 6256-6260 of 1998 & Ors dt. 28-04-2006)

Sunrise Associates v. Govt. of NCT of Delhi (2006) 5 SCC 603(SC)/AIR 2006 SC 1908/(2006) 145 STC 576 (SC)

Editorial : Under CGST/SGST Act, the definition of "goods" under section 2(52) includes actionable claims. The difference between actionable claims and other goods is clearly brought out by this judgment. However, Schedule III makes all actionable claims other than lottery, betting and gambling, as not liable to GST.

> *"What is obtained by love is retained for all time. What is obtained by hatred proves a burden in reality for it increases hatred."*
>
> \- Mahatma Gandhi

117 – 9. Goods and Services Tax (Compensation to States) Act, 2017

S. 11: Other provisions relating to Cess - GST Compensation Cess – Valid – Traceable to Articles 246A, 248 as well as 270 [Constitution of India, Arts. 39, 245, 246(1) 246A, 248, 254, 269, 270, 271, 366(26A)]

Facts

Goods and Services Tax (Compensation to States) Act, 2017 was challenged as being unconstitutional.

Issue

(1) Whether Act is beyond legislative competence of Parliament? (2) Whether same taxing event can be basis of normal GST as well as Compensation Cess? (3) Whether clean energy cess paid before GST can be set off against Compensation Cess?

View

(1) The Act is traceable to both Articles 246A which provides for levy of GST and Article 248 which is residuary power of Parliament to levy any tax as well as Article 270 which allows levy of any cess for specific purposes by Parliament (2) Compensation Cess being traceable to Article 246A, there is no bar in Constitution for two taxes being levied on the same taxable event if the power is available to levy each of those taxes (3) Set off is legislative policy and in absence of a statutory provision allowing clean energy cess paid before 20.6.2017 as set off against the Compensation Cess, the Court cannot grant any such set off through judicial orders.

Held

The Goods and Services Tax (Compensation to States) Act, 2017 is constitutional. (CA No. 10177 of 2018 Arising out of SLP (C) No. 2017 & Ord dt. 3-10-2018)

UOI v. Mohit Mineral (P) Ltd (2019) 2 SCC 599/AIR 2018 SC 318/(2018) 69 GST 743 (SC)

Editorial : Though the decision is otherwise unexceptionable, the Court has ignored the amendment made to Article 248 by the 101st Constitution Amendment Act which makes the residuary power of legislation “subject to Article 246A”. The counsel had specifically pointed out to the Court that this amendment narrowed down the scope of Article 248 in relation to Goods and Services Tax, but the amendment has not been commented upon by the Court.

“I cannot conceive of a greater loss than the loss of one’s self-respect.”

- Mahatma Gandhi

118 – 10. Karnataka Sales Tax Act, 1957

S. 5C: Levy of tax on the transfer of the right to use any goods- Transfer of right to use – Charter Party Agreement [Andra Pradesh General Sales Tax Act, 1957, S. 5E, Constitution of India, Art. 28, 246(4), 286, 297(3), 366(29A)(d)]

Facts

The appellant owned a tug (towing vessel). It entered into a Character Party Agreement with New Mangalore Port Trust on 8.1.1998. It agreed to make available the services of tug, for the purposes provided in the agreement along with the master and other personnel of the company to the port trust for 6 months.

Issues

Whether the State of Karnataka had jurisdiction to levy sales tax under Section 5C the KST Act in respect of the Charter Party Agreement dated 8.1.1998?

I. Whether the agreement dated 8.1.1998 constitutes "transfer of the right to use"?

II. Whether the State of Karnataka has the competence to levy sales tax on the agreement, which is effective within the territorial waters?

View

The Supreme Court considered the various terms and conditions of the Charter party agreement (Annexure 1), and observed that when the terms were perused, clause 1 provided that the contractors "let" and the charterer "hire" the goods vessel for 6 months. The expression "let" had been used and the vessel, most significantly during the charter period had been placed at the "disposal" of the charterers and under their control in every respect. The charterers had been given the right to use all outfits, equipment and appliances on board the vessel at the time of the delivery, including the whole reach, burthen and deck capacity. Thus, the Court observed that in their considered opinion, effective control for the entire period of 6 months had been given to the charterers. To constitute a transaction of a transfer of right to use, essentially goods must be available for delivery. In the instant case, the vessel was available for delivery and in fact, had been delivered. There was no dispute as to the vessel and the charterer had a legal right to use the goods and the permission/license had been made available to the charterer to the exclusion of the contractor. Thus, there was complete transfer of the right to use.

The Supreme Court followed their judgement in the case of ***20th Century Finance Corp. Ltd. v. State of Maharashtra (2000) 6 SCC 12*** and held that since the agreement was signed in the State of Karnataka, the situs of the transfer of right to use was within the State of Karnataka and therefore that State was competent to tax it.

The Court did not go into the question of imposition of tax in territorial waters and have kept the question open.

Held

The Charter Party Agreement resulted in a deemed sale as there was a transfer of right to use the vessel. The transaction was liable to be taxed by the concerned authorities in the State of Karnataka. (CA No. 3383 of 2004 dt. 4-12-2019)

Great Eastern Shipping Co. Ltd. v. State of Karnataka (2020) 35 SCC 354/(2020) 78 GST 98/MANU/SC/1674/2019

Editorial: The statutory framework for under GST has now changed and this decision is not relevant from the levy point of view, but can be used for the purposes of classification.

> *"A true lawyer is one who places truth and service in the first place and the emoluments of the profession in the next place only."*
>
> \- Mahatma Gandhi

119 – 10. Karnataka Sales Tax Act, 1957

S. 8A: Power of State Government to notify exemption and reductions of tax - Maximum (or Max) Retail Price (MRP) - MRP of a packaged product-Inclusive of all taxes-Cannot establish the collection of sales tax over the product [Standard of Weights and Measures Act, 1976, Rule 6]

Facts

The assessee is manufacturer of tea. One such unit in Karnataka (Dharwad unit) was availing sales tax exemption for a period of 5 years while the other units did not have benefit of such/similar exemption. The assessee sold the tea packets being manufactured from all its units at a uniform rate of Rs. 118/-, basis MRP (inclusive of taxes). The Revenue was of the view that ultimate selling price in both the cases was Rs. 118 (Rs 12.27/- being the sales tax component in the other units) and hence, the assessee has violated the sales tax exemption as it had added and collected the sales tax component, though not under the nomenclature of tax or cess. The assessee contended that MRP was a statutory declaration and it did not imply that the assessee with respect to the sales tax-exempt unit had collected any amount by way of tax. The assessee had taken a decision of having a uniform price of its products across the country, irrespective of sales tax being payable in certain States or not.

Issue

Whether price of sale of goods "inclusive of taxes" on MRP would amount to collection of sales tax by the dealer in respect of goods sold under exemption?

View

The Court was of the view that the MRP is a statutory declaration required as per Rules framed under the Standards of Weights and Measures Act, 1976. A market retail price stating "inclusive of all taxes" would not prove and establish the collection of sales-tax on the produce of a tax exempted unit. The Court further stated that a uniform market price throughout the country is a matter of business policy and it is followed to prevent distortion of sale of the product from one State to another. The Court held that the respondent had not passed on the tax liability and assumption that the phrase "inclusive of all taxes" includes the collection of sales taxes is a fiction that cannot be applied in the instant case, as there exists no such principle in law.

Held

Affixation of MRP on the product does not lead to the inevitable conclusion that sales tax has been collected from the purchaser. (CA No. 656 of 2008 dt. 30-6-2016)

Dy. CCT v. Hindustan Lever Ltd 2016 SCC Online SC 646

Editorial: GST is an indirect tax, from an economic point of view, however, from a legal standpoint, it is a direct tax. It is a tax on supply. It is to be paid by supplier (with certain exceptions). Thus, irrespective of the fact whether GST is collected separately from the recipient or not or it is treated as inclusive of GST, the liability to pay GST vests with the supplier. Hence, GST regime does not recognise MRP based assessment. There is no such concept under the CGST Act or rules. Section 7 provides for scope of supply. Section 15(1) provides for value of supply which is transaction value. Section 15(2) of the CGST Act, 2017 provides the inclusions under transaction value. The above ruling would be of significance, according to me, even under GST regime, as sale on MRP basis would not lead to the conclusion that tax has been collected by the supplier. It would not be hit by section 32 of the CSGT Act which prohibits unauthorized collection of tax or would not amount to unjust enrichment under section 54 of the CGST Act.

> *"I do not want to foresee the future.*
> *I am concerned with taking care of the present.*
> *God has given me no control over the moment*
> *following."*
>
> \- Mahatma Gandhi

120 – 11. Karnataka Value Added Tax, 2003

S. 2(36): Turnover means - Valuation - Deduction of trade discount from total turnover – discount was not relatable to the sales effected by the relevant tax invoices - All trade discounts are allowable as permissible deductions [S. 2(34), 64(1); Karnataka Value Added Tax Rules, 2005, R. 3(2)(c)]

Facts

The appellant is a manufacturer. The appellant offers a quantity discount to its distributors depending on their performance during the previous quarter. This is part of a marketing/sales strategy. The discount is given by the appellant to its dealers in the sales invoices raised in the subsequent quarter. The amount of the discount is deducted from the gross sale price and VAT is collected and remitted on the net sale price. The Deputy Commissioner of Commercial Taxes, Bengaluru disallowed the quantity discount accorded by the appellant to its distributors on the ground that the discount was not relatable to the sales effected by the relevant tax invoices. On appeal, the Joint Commissioner of Commercial Taxes set aside the order of the assessing authority. However, above order was revised on the ground that the quarterly discount given by the appellant was in respect of the performance of the previous quarter and not in respect of the sales offered under the same invoices. The appellant filed appeal before High Court of Karnataka. By a judgment dated 19 March 2014, a Division Bench of the Karnataka High Court dismissed the appeals. Hence, appeal before the Supreme Court.

Issue

Inter alia the following issues were considered:

(a) Whether, to arrive at taxable turnover, it is necessary to deduct trade discount from total turnover, even if they were not shown on the fact of the invoice?

(b) Whether one part of the proviso to a statute can be interpreted separately, to override the other part of such provision, rather than being construed together?

View

The court followed the judgment of ***Southern Motors v. State of Karnataka (2017) 3 SCC 467*** and held that deductions on account of trade discounts are given under agreement; or under terms of sale or by established practice and should not be disallowed only because they are not payable at the time of each invoice or deducted, from the invoice price. In the first part of the proviso, Rule 3(2)(c) recognizes trade practice or, as the case may be, the contract or agreement of the dealer. The latter part which provides a methodology for ascertainment does not override the earlier part. Both must be construed together. Above all, it must be remembered that taxable turnover is turnover net of deductions. All trade discounts are allowable as permissible deductions.

Held

The assessee must establish from its accounts that the discount relates specifically to the sales with reference to which it is allowed. However, it does not mean that if it is not specifically shown on the face of the invoice, deduction will not be permitted. (CA Nos. 357-367 of 2008 (Arising SLP (C) Nos. 24249-24259 of 2014 dt. 6-2-2018)

Maya Appliances (P) Ltd v. Addl CCT (2018) (2) SCC 756/AIR 2018 SC 810 (2018) 66 GST 210 (SC)/2018-TIOL-47-SC-VAT-LB

Editorial: Section 15(3) allows deduction for discounts, if recorded in the invoice at the time of supply or after the supply has been affected, it was known at the time of supply and is specifically linked to the relevant invoices. According to me, discounts cannot, even otherwise, for part of value. Value under section 15(1) would be transaction value as agreed between parties. If the discount is known to the recipient at the time of supply, only the quantification to be undertaken later, the same would not form part of value. Hence, the above ruling, which reinforces that net taxable turnover would be the value of supply, would apply in the GST regime as well.

> *“Lawyers are also men, and there is something good in every man. Whenever instances of lawyers having done good can be brought forward, it will be found that the good is due to them as men rather than as lawyers.”*
>
> \- Mahatma Gandhi

121 – 11. Karnataka Value Added Tax, 2003

S. 4: Liability to tax and rates thereof - Works Contract - rate of tax - Karnataka VAT Act - Rate of tax applicable on the various goods involved in the execution of works contract as per specific entry in the rate schedules [S. 3(1), 4(1)(c)]

Facts

The respondents were executing civil contracts in the State of Karnataka. They purchased building materials like, sand, hardware as also declared goods like iron & steel covered by section 15 of the CST Act either from within the State from registered dealers or from outside the state or from unregistered dealers. They approached the Authority for Advance Clarification and Ruling (AAR) by way of an application dated 31-01-2006 seeking rate of tax applicable on the goods involved in the works contracts executed by them. AAR ruled that in absence of any specific entry providing rate of tax on works contract, the goods involved in a works contract would attract rate of tax as per KVAT Act. It also held that declared goods covered by section 15 of the CST Act would attract tax at 4% if used in the same form or at 12.5% in other cases. AAR also observed that KVAT Act was amended w.e.f. 01-04-2006 and clause (c) was inserted in section 4(1) to provide a specific rate of tax on the goods involved in works contract as one category. Accordingly, Schedule VI was inserted to incorporate works contracts of various descriptions with corresponding rate of tax on each of them.

The department was of the opinion that the rate of tax applicable to "other goods" under section 4(1)(b) at 12.5% was applicable to works contracts prior to 31-03-2006. According to them, the rate of tax cannot vary as per the goods involved in the execution of works contract. It is the conglomerate of goods used in such works contract which is not allotted any specific rate of tax even prior to 31-03-2006. Therefore, the residuary entry under section 4(1)(b) at 12.5% was applicable. The CCT (Bangalore) passed revision order treating the ruling of AAR as erroneous. Against the said order, appellants preferred an appeal before the Karnataka High Court which allowed it and observed that rate of tax as per the schedule entries would be applicable to individual categories of goods involved in the works contract. Against the said decision, department filed an appeal before Supreme Court.

Held

The Court held that it was possible for the Legislature to prescribe uniform rate of tax on the goods involved in the works contract as a separate category which it did w.e.f. 01-04-2006, in accordance with the mandate given by Supreme Court in the case of ***Gannon Dunkerley & Co. v. State of Rajasthan (1 SCC 364).*** This was sought to be done by inserting clause (c) in sec. 4(1). But prior to this date, there was no such uniform rate prescribed on works contracts and therefore, the rate applicable as per the schedules under the KVAT Act was to be levied on the goods. Sec. 4(1)(b) which prescribed the rate of tax at 12.5% on “other goods” only referred to those goods which were not specifically covered by any of the entries in rate schedules. It did not refer to the conglomerate of various goods involved in the works contract as one category. Therefore, prior to 31-03-2006, the goods involved in the works contract would attract the rate of tax applicable on the individual goods falling into any entry of the rate schedules appended to KVAT Act subject to the declared goods liable to tax at 4% as per sec. 15 of the CST Act, if used in the same form.

(CA No. 811 of 2018 (Arising SLP (C) No. 27048 of 2013 dt. 6-3-2018)

State of Karnataka v. Durga Project Inc. (2018)4 SCC 633/(2018) 66 GST 476 (SC)

Editorial: The ratio of this decision lays down that transfer of property in goods involved in a works contract amounts to a deemed sale and exigibility to tax is different from measure of taxation and rate of tax. Works contracts were always taxable prior to and after 01-04-2006 but rate of tax is different in two periods. Individual goods used in WORKS Contract, attract the rate of tax as per their schedule entries if there is no specific rate of tax prescribed for entire conglomerate of goods involved in the works contract. The Legislature has the power but it needs to be exercised specifically.

Under GST law, works contract is defined under section 2(119) and refers to only immovable property. It is considered as “service” liable to tax @ 18% as per entry 6 of schedule II, without having any effect of the nature of goods that may be involved therein. The problem of individual rates of goods or a composite rate does not arise.

> *“Abstract truth has no value unless it incarnates in human beings who represent it, by proving their readiness to die for it.”*
>
> \- Mahatma Gandhi

122 – 12. Madras General Sales Tax Act (Tamil Nadu General Sales Tax Act, 1959)

S. 2(i): Works contract - Lift installation- Construction - Building products - Manufacture, supply and installation of lifts - A contract for manufacture, supply and installation of lifts is a works contract [S. 4, 5, 6, 7, Constitution of India, Art. 366(29A)(b), Finance Act, 1994, S. 65(29), S. 2, Maharashtra Lifts Act, 1939, S. 3(e), Sale of Goods Act, 1930, S. 21, Tamil Nadu General Sales Tax Act 1959, S. 2(g)]

Facts

A three-judge bench of the Supreme Court in ***State of AP v. Kone Elevators (2005) 3 SCC 389*** had taken the view that a contract for manufacture, supply and installation of lifts is a “sale” and the entire value of the consideration can therefore be taxed under the sales tax law. The decisions of the Supreme Court in ***State of Rajasthan v. Man Industrial Corpn Ltd. (1969) 1 SCC 567***, ***State of Rajasthan v. Nenu Ram (1970) 26 STC 268*** and ***Vanguard Rolling Shutters and Steel Works v. CST (1977) 2 SCC 250*** were however not noticed in the Kone Elevators 2005 judgment. Therefore, a reference was made to a larger bench of five Hon’ble Judges to review the issue afresh.

Issue

Whether a contract for manufacture, supply and installation of lifts is a contract of sale or a works contract?

View

The installation obligation in a contract for manufacture, supply and installation of lift is not merely incidental, but is a profound part of the entire contract. Various components are assembled together and installed at site as a permanent fixture to the building. The goods, skill and labour elements are intimately connected with one another and the contract is not divisible. There is no chattel qua chattel transfer. ***State of AP v. Kone Elevators (2005) 3 SCC 389*** overruled.

Held

A contract for manufacture, supply and installation of lifts is a works contract. (WP(C) Nos. 232, 298, 487 and 528 of 2005 dt. 6-5-2014)

Kone Elevator India (P) Ltd. v. State of Tamil Nadu (2014) 7 SCC 1/(2014) 71VST9 (SC)/2014 (304) ELT 161 (SC)

Editorial : The distinction between "sale" and "works contract" has diminished under the new GST regime, from the levy point of view. However, this decision can still be used to understand what is a works contract for purposes of classification for rate of tax under GST law. Under the said Act the term " works contract" have been defined under S. 2(119) and is pertaining to only immovable properties. Such supply has been treated as supply of services.

> *"Just as a man not cherish living in a body other than his own, so do nations not like to live under other nations, however noble and great the latter may be."*
>
> \- Mahatma Gandhi

123 – 13. Madhya Pradesh General Sales Tax Act, 1939

S.2(n): Works Contract - Material supplied by the employer - price of the material so supplied and consumed by the contactor deducted from the prices of the material in the final bill of the contractor - Entry Tax payable on the entry of goods into the local area for sale, consumption or use - Supplies are "sales" within the meaning of the MP Gen. Sales Tax Act – Contractor liable to pay entry tax [7(1), M. P. Sthaniya Kshetra Me Mal Ke Pravesh Per Kar Adhiniyam, 1976, S. 3(1), 6(c)]

Facts

PWD had invited tenders for the construction of godown. Contractor/appellant was to procure the material and use the same in the construction. However, as per clause (10) of the contract, certain materials of special description were to be supplied by PWD (the employer). The prices of such materials were specified in the tender and were to be deducted from the final bill of the contractor. The PWD was not registered dealer, however the appellant/contractor was the registered dealer.

Issue

Whether there was sale and whether the property in the goods in question passed to the appellant or continued to remain with the PWD although the PWD had in the final bill debited the prices of the goods so supplied to the appellant under clause (10) of the contract.

View

The Supreme Court was of the view that in order to be sale taxable to duty, not only the property in the goods should pass from the contractor to the government or the appellant in the impugned case, but there should be an independent contract – separate and distinct – apart from mere passing of the property where a party purchases or procurers goods from the government. Mere passing of property from the contractor to government would not suffice. There must be sale of goods. The primary object of the bargain, judged in its entirety, must be viewed. For the purpose of performance of the contract, the contractor was bound to procure materials. In order to ensure that quality materials are procured, the PWD undertook to supply such materials and stores as from time to time required by the contractor to be used for the purpose of performing the contract only. The value of such quantity of materials and stores so supplied was specified at a rate and got set off or deducted from any sum due or to become due thereafter to the contractor. The Court was of the view that there was no inherent sale, however a sale inhered from the transaction.

Held

By use or consumption of materials in the work of construction, there was passing of the property in the goods to the contractor from the PWD. By appropriation and by the agreement, there was a sale as envisaged in terms of Clause (10) of the contract. Therefore, there was a sale which was liable to tax. The ratio Decidendi: "For purpose of sales tax there must be a contract for transfer of title to goods but also sale of goods which parties intend to sell for a money consideration". (CA No. 340 of 1998 dt. 28-10-1988)

N.M. Goel & Co v. Sales Tax Officer, Rajnandgoan (1989) 1 SCC 335/AIR 1989 SC 285/1988 (38) ELT 733 (SC)/(1989) 72 STC 368 (SC)

Editorial: This decision furnishes some first principles for application to new GST regime, though this must be done cautiously since the statutory framework has now changed. For a valid levy there have to be a supplier and a recipient which have been specifically defined under the GST Law under Sec 2(105) & (93) respectively.

> *"Lawyers will, as a rule, advance quarrels instead of repressing them. Moreover, men take up that profession, not in order to help others out of their miseries, but to enrich themselves. It is one of the avenues of becoming wealthy and their interest exists in multiplying disputes. It is within my knowledge that they are glad when men have disputes."*
>
> \- Mahatma Gandhi

124 – 14. Maharashtra Municipal Corporation Act, 1949

S. 2(31A): Local Body Tax (LBT) - Goods for levy of Octroi or Local Body Tax - Entry of Sodexo meal vouchers into the municipal limits of Mumbai-whether liable to LBT which is tax on entry of the "goods" for use, sale or consumption-meal vouchers issued to customers for definite value which are meant for distribution amongst their employees- employees visit the affiliated restaurants, departmental stores, shops etc which are affiliated-Vouchers are not "goods" and are not liable to Local Body Tax [S. 2(25), 2(42)]

Facts

Appellants were in the business of providing pre-printed paper meal vouchers to the customers with whom an agreement was entered into and who were establishments with number of employees. The customers paid the price equivalent to the face value of the vouchers and also service charges at specified percentage. The vouchers known as "sodexo meal vouchers" were given over to the employees of such establishments who redeemed them with affiliated establishments such as restaurants, shops, departmental stores etc. for purchase of food, gifts etc. with whom the appellants had made arrangements. The said affiliates presented the vouchers to the appellants and were reimbursed with the cost thereof after recovery of service charges.

The said vouchers were circulated under the authorization by RBI to operate a payment system based on "paper based vouchers" under section 7 of the "Payment and Settlement Systems Act, 2007". Appellants were also required to adhere to the Prepaid Issuance & operations of the Payment Instruments (Reserve Bank) Directives, 2009 and Consolidated Guidelines, 2014 thereunder. The payment instruments introduced by this Act merely facilitates the purchase of goods and services up to the value mentioned on such instruments. The amount paid by the customers was strictly required to be kept in escrow account and used to reimburse the affiliates for sales effected by them against such vouchers. RBI as a regulator had strict control over operation of the scheme.

The appellants resisted the levy of LBT on the vouchers since according to them, the system of vouchers was introduced only for providing service. The High Court negated the contention on the ground that vouchers were "sold" to the establishments and then distributed to their employees who in turn purchased goods against such vouchers. In the opinion of the High Court, the vouchers were capable of being sold after entering the limits of Municipal Corporation. Therefore, they were "goods" within the meaning of sec. 2(25) of the Maharashtra Municipal Corporation Act (1949 Act) and hence, liable to LBT.

View

The Supreme Court considered the provisions and objectives of the "Payment and Settlement Systems Act, 2007" under which the vouchers were issued. The Court found that the system was introduced only to facilitate the provision of meals and other essentials to the employees of the organizations and the activity was purely in the nature of service. The appellants were merely a facilitator or medium through which the service was provided to bridge the gap between customers and affiliates. The vouchers could not partake the nature of goods. High Court had erred in treating the vouchers as goods.

The Court also examined the provisions of 1949 Act and observed that LBT is a tax on the "goods" which enter the municipal limits for the purpose of sale, use or consumption. If vouchers do not bear the character of "goods", then no LBT can be levied thereon. Under Income Tax Act as well, the distribution of vouchers is considered as "perquisites" and therefore, they cannot be considered as "goods".

Held

"sodexo meal vouchers" are not "goods" and not liable to Local Body Tax. (CA No. 4385-4386 of 2015 dt. 9-12-2015)

Sodexo SVC India Pvt. Ltd. v. State of Maharashtra & Others (2015) 16 SCC 479/AIR 2016 SC 413/(2016) 53 GST 293(SC)/2016 (331) ELT 23 (SC)

Editorial: The ratio of this judgment lays down that vouchers when used merely to facilitate the payment for goods or services, are not "goods" by themselves and not liable to sales tax. However, CGST/SGST Act defines "voucher" under section 2(118) to mean *"an instrument where there is an obligation to accept it as consideration or part consideration for a supply of goods or services or both and where the goods or services or both to be supplied or the identities of their potential suppliers are either indicated on the instrument itself or in related documentation, including the terms and conditions of use of such instrument".*

Thus, the voucher itself is not 'good' but used to facilitate supply of goods or services. The said Acts also defines the time of supply in case of issue of vouchers by the supplier both under sections 12 and 13. It is the date of issue of the voucher when supply is identifiable at that point or date of redemption, in any other case.

> *“I have not a shadow of a doubt that society would be much cleaner and healthier if there was less resort to law courts than there is.”*
>
> \- Mahatma Gandhi

125 – Punjab Value Added Tax Act, 2005

Entry 60(6)(g) : Concessional rate of levy- Mobile battery charger-whether part of mobile phone or accessory thereof-Cell phones covered by HSN code 8525.20.17 - Entry 60(6)(g) of Schedule B under the Punjab & Haryana VAT Act covered said HSN and liable to VAT @ 4%-respondent sold cell phone and battery charger in a single solo pack and collected VAT @4% on the total pack-VAT @ 12.5% collected on separate sale of battery chargers –Battery charger is an accessory of cell phone and not part thereof-concessional rate of tax not applicable [S. 26, 32(1), 53]

Facts

The respondents Nokia India pvt. Ltd sold cell phones along with battery charger in a single solo pack and charged VAT at 4% on the ground that cell phones were covered under schedule B at serial entry no. 60(6)(g). According to them, when the charger is sold along with the cellphone, it was supplied free of cost and therefore, the composite pack was covered by the aforesaid entry. The HSN code applicable is 8525.20.17. They relied upon Rule 3(b) of the General Rules for interpretation of the First Schedule of the Import Tariff under the Customs Tariff Act, 1975, which reads as under:

> "3(b) mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to (a), shall be classified as if they consisted of the material of component which gives them their essential character, insofar as this criterion is applicable."

The respondents claimed that the composite pack was essentially made for sale of cell phone and no separate price was collected for the charger. As per above rule of interpretation, the composite pack should be covered by entry 60(6)(g) liable to tax @4%. The assessing officer, appellate officer and Tribunal dismissed the claim of chargers as "accessory" and sought to levy tax @ 12.5%. However, Punjab & Haryana High Court allowed the claim of the respondents and held that chargers are "accessories" of cell phone.

Issues

(a) Whether mobile phone battery charger is an "accessory" of the cell phone or part/component of the cell phone?

(b) Whether such battery charger is covered by HSN code 8525.20.17 covering "cellular telephones" read with rule 3(b) of the General Rules for interpretation of the First Schedule of the Import Tariff under the Customs Tariff Act, 1975?

View

The Court considered the dictionary meaning of the term "accessory" as *"(1) a person or thing that aids subordinately; an adjunct; appurtenance; accompaniment (2) aiding the principal design, or assisting subordinately the chief agent, as in the commission of a crime. (3) contributory; supplemental; additional: accessory nerves"*.

It also relied on the case of ***Annapurna Carbon Industries Co. v. State of Andhra Pradesh, (1976) 2 SCC 273,*** wherein the Court, while examining the question whether "Arc Carbon" is an accessory to cinema projectors or whether it comes under other cinematography equipment under Entry 4 of Schedule I to the A.P. General Sales Tax Act, 1957, observed that an "accessory" is an object or device that is not essential in itself but that adds to the beauty, convenience or effectiveness of something else.

It considered the aforesaid rule 3(b) but found it inapplicable in the given case since charger cannot be held as an integral part of the mobile phone making it a composite good. Merely, making a composite package of cell phone charger will not make it composite good for the purpose of interpretation of the provisions.

Held

Battery charger is not a part of the cell phone but is an accessory thereof. It is an independent product which can be separately sold even without selling the cell phone. (CA Nos 11486-11487 of 2914 arising SLP (C) Nos 30398-30399 of 2011 dt. 17-12-2014).

State of Punjab v. Nokia India Pvt Ltd AIR 2015 SC 1068/(2015) 49 GST 277 (SC)/2015 (315) ELT 162 (SC)/MANU/SC/1178/2014 (SC)

Editorial: Ratio is useful in drawing demarcating line between "accessory" and "part/component" as also in interpreting the scope of HSN code since classification under GST is based on HSN.

Under GST law, there is a new concept of ‘composite’ and ‘mixed’ supply. The case was decided in absence of such situation. The definition of the term ‘composite supply’ under section 2(30) make it clear that if two or more taxable supplies were naturally bundled and supplied together in the ordinary course of business, it would be a case of composite supply where mobile handset would be a principal supply.

> *“Justice should become cheap and expeditious. Today it is the luxury of the rich and the joy of the gambler.”*
>
> \- Mahatma Gandhi

126 – 16. Service Tax (Finance Act, 1994)

S. 67 : Valuation of taxable services for charging Service tax - Rule 5 - Validity of provision - Determination of value - Reimbursable expenditure or cost incurred by service provider while providing taxable service – Rule 5(1) which provides for inclusion of said expenses in value of taxable service – It is *ultra vires* to Section 66 and 67 of the Finance Act, 1994 [Service Tax (Determination of Value Rules, 2006, R. 5; Finance Act, 1994, S. 66, 67]

Facts

Appellant was, *inter alia,* engaged in providing consulting engineer service. The appellant was discharging service tax in respect of amount received from customer on provision of service. Apart from above, appellant received reimbursement of expenses incurred by them for provision of service from the customer. Show cause notice was issued alleging that under Rule 5 of the Service Tax (Determination of Value) Rules, 2006, service tax was to be charged on the gross value including reimbursable and out of pocket expenses such as travelling, boarding and lodging, transportation, office rent, office supplies and utilities, testing charges, etc. which are "essential expenses for providing the taxable service of consulting engineers". Writ petitions were filed by the assessees challenging the vires of Rule 5 of the Rules. The High Court of Delhi declared Rule 5 to be *ultra vires*. Hence, appeal before the Supreme Court.

Issues

Challenge the constitutional validity of Rule 5 of the Service Tax (Determination of Value) Rules, 2006 to the extent it includes re-imbursement of expenses in the value of taxable services for the purposes of levy of service tax as being *ultra vires* provisions of Section 66 and 67 of Chapter V of the Finance Act, 1994.

View

The Court held that Section 67(1) of Finance Act, 1994 can include in the value of taxable services only and nothing else (to be read in consonance with Section 66). It was, further observed that it is inbuilt mechanism to ensure that only taxable service shall be evaluated under Section 67, where under value of taxable service is gross amount "charged" by service provider 'for such service'. Accordingly, it was concluded that expenditure/costs such as air travel, hotel stay, etc. incurred for service provider shall not be includible in gross amount charged under taxable head of "consulting engineer" service. Further, it was also held that

Rule 5(1) which provides for inclusion of the expenditure or costs incurred by the service provider in the course of providing the taxable service in the value for the purpose of charging service tax is *ultra vires* Section 66 and 67 of the Finance Act, 1994 and travels much beyond the scope of those sections.

Held

The Hon'ble Supreme Court examined the amended to section 67 post 14th May, 2015 which amended section 67 to provide for inclusion of reimbursements in the value of the taxable service. The Court held that, prior to the said amendment, the rule would fall foul of the parent provision (section 67). (CA Nos. 2013, 295-299, 2021, TP(C) Nos. 1043-1045 of 2017 & Ors dt. 7-3-2018)

UOI v. Intercontinent Consultants & Technocrats Pvt Ltd (2018) 4 SCC 669/AIR 2018 SC 3754/(2018) 66 GST 450 (SC)

Editorial: Section 15(2) does not provide for inclusion of reimbursable expenditure. No provision similar to explanation to section 67 exists. Reimbursements are expenses incurred for supplies made to the recipient. The supplier is a payer only. Such expenses would not form a part of the value of supply. Thus, according to me, the above ruling would continue to have application under the GST regime as well.

> *"Literary education is of no value if it is not able to build up a sound character."*
>
> \- Mahatma Gandhi

127 – 17. Uttar Pradesh Trade Tax Act, 1948

S. 2(h): Sale- Section 2(h), U.P. Trade Tax Act, 1948 after amendment in consonance with Art. 366(29-A) of the Constitution – Concept of "barter" and "exchange" explained – Since in terms of the Act the manufacturer is a dealer, held, it could not be said that the supply of molasses is the present case was a mode of payment of licence fee [Constitution of India, Article 246, 366(29-A) and Schedule VII List II Entry 54]

Facts

Swaroop Vegetables Products Industries Ltd. (company) owned and possessed a sugar mill. A Deed of Licence was executed by the company in favour of the appellant on 3.9.1987; pursuant whereto, the appellant herein executed a performance guarantee to ensure performance of the said Deed of Licence dated 3.9.1987, wherein it was agreed to by and between the parties that a major part of the licence fee would be paid in the shape of molasses. For AY 1987-88, the Department held the appellant liable to pay trade tax under the U.P. Trade Tax Act, 1948 (for short "the Act") on payment made in terms of molasses. The appellate authority held that the molasses having been supplied in lieu of rent, the same did not fall within the definition "sale" and it was a barter or exchange. The appeals, after passing through different levels, reached the Apex Court.

Issue

Whether the adjustment of price of molasses from the amount of licence fee would amount to "sale" within the meaning of Uttar Pradesh Trade Tax Act, 1948 ('the Act', for short)?

View

The court was of the view that the deed of licence did not contain any provision requiring the appellant to transfer to the company, the molasses produced by it, by exercising its exclusive right to use the sugar mill, in lieu of the licence fee or otherwise. The performance guarantee deed entered into by the appellant herein was a mechanism to pay the licence fee. By reason of the said performance guarantee, only a provision has been made in terms whereof the appellant was required to hand over the entire quantity of molasses to the company and the appellant had no right to sell it to any other person. In terms of the deed of licence, the appellant was responsible to manufacture in the same capacity as that of the owner. It had to pay the licence fee in the manner laid down in the deed of licence. The performance guarantee was not a part of the deed of licence in the sense that by reason thereof the terms and conditions for grant of the licence including that of payment of the licence fee, were not controlled by it.

A licence fee cannot be the subject-matter of barter or exchange. A barter or exchange indisputably is distinct and different from a sale. A contract of sale denoted a transfer of property in goods by mutual consent. Such a transfer of ownership must be a price in the form of money. Only when the consideration for transfer consists of other goods, it may be an exchange or barter. Such is not the position here. The transaction in the present case answers the description of "sale" within the meaning of the provisions of the U.P. Trade Tax Act, 1948. It comes within the purview of the expression "any other valuable consideration", which expression would take colour from deferred payment being a monetary payment, but does not loses its character of some other monetary payment by way of mutual arrangement.

Held

There is no barter or exchange in as much as there is no transfer of property in goods for valuable consideration. However, the Court cautioned that adjustments would be subject to tax. The words "deferred payment" and "other valuable consideration" enlarge the ambit of consideration beyond cash only. However, only when there is sale of goods, the State becomes entitled to impose tax on the sale or purchase of goods. (CA No. 2635 of 2006 (Arising out of SLP (C) No. 1811 of 2005 dt. 12-5-2006)

Dhampur Sugar Mills Ltd. v. Commissioner of Trade Tax, U.P. (2006) 5 SCC 624/(2006) 147 STC 57 (SC)

Editorial: Section 7 of the CGST Act provides for scope of supply. Tax is on supply. Sale or transfer of property in goods is a form of supply. Hence, article 366(19-A) would not be of relevance under GST regime. Further, there is no definition of "sale price" or "dealer" or "turnover" under the CGST Act. Section 2(31) defines consideration. It may be in money or otherwise. Thus, barter would also be subject to GST. Adjustments are; even otherwise, well known methods of payment. Hence, the above ruling may not be of much significance under the GST regime. However, what would be the value of such barter is a question to be decided in as much as, according to me, the valuation rules do not provide for valuation of barter of goods or services or both.

> *"Public opinion alone can keep*
> *a society pure and healthy."*
>
> \- Mahatma Gandhi

128 – 18. Uttar Pradesh Tax on Luxurious Act, 1955

S. 3: Levy of Luxury tax- Entry 62 List II: “taxes on luxuries...” – Cannot include “goods” even if they are “luxury goods” which are covered by Entry 54 List II – No overlapping in taxing entries of Seventh Schedule [Central Sales Tax Act, 1956, S. 14, 15, Constitution of India, Art. 286]

Facts

Various States had enacted statutes levying tax on supply of “luxury goods”. These tax laws were justified as falling within Entry 62 List II which reads as “taxes on luxuries, including taxes on entertainments, amusements, betting and gambling” and therefore immune from the various Constitutional restrictions which are otherwise applicable to a tax enacted under Entry 54 List II (“tax on sale or purchase of goods”), namely Article 286 read with Sections 14 and 15 of Central Sales Tax Act, 1956 as well as statutory restrictions under ADE Act 1957 where the States have opted to take benefit under that Act.

Issue

Whether Entry 62 List II can cover “goods”, even if they are luxurious in nature, when the same items are also covered under Entry 54 List II?.

View

The principle of *noscitur a soiicis* was applied and it was held that “luxuries” would only mean those luxuries which are analogous to entertainments, amusements, betting and gambling and which are intangible in nature. Based on historical convention, it was held that luxury goods were always treated as falling within the power relating to levying of sales tax and not the tax on luxuries. The Court further held that there should be no overlapping in the taxable events specified in taxing entries in the Constitution, and the Court should adopt an interpretation which does not allow any kind of overlapping.

Held

The tax on luxury goods was held to be outside Entry 62 List II and other issues were left open. (WP. No. 567 and 568/094 & Ors dt. 20-1-2005)

Godfrey Phillips v. State of UP (2005) 2 SCC 515/AIR 2005 SC 103/(2005) 194 CTR 257 (SC)

Editorial : After the enactment of the Constitution 101st Amendment Act, 2016, the tax on luxuries has been deleted from Entry 62 List II. However, the principles expressed in this judgment on the rule against overlapping of taxing entries remains applicable even today.

> *"Strength does not come from physical capacity.*
> *It comes from an indomitable will."*
>
> - Mahatma Gandhi

129 – 19. West Bengal Sales Tax Act, 1994

S. 2(5): Business - Provision of food, drinks and refreshments etc. to permanent members of an incorporated club - not a "deemed sale"- Payment by members to the club not a consideration - club even if incorporated is merely an agent of the members who facilitates the supply of the goods - principle of mutuality applicable even after 46th amendment to Constitution [S. 2(10), 2(30), Constitution of India, Art. 366(29A)(e), Finance (No. 2 Act, 1994, S. 65(25a), 65(105), 66, Income-tax Act, 1961, 2(24), 44, Sale of Goods Act, 1930, S. 1(1),

Facts

Calcutta club was an incorporated company under section 26 of the Companies Act. It supplied food, drinks, refreshments etc. to its permanent members on payment. The club did not pay any sales tax thereon on the ground that there was no sale of goods since the club and its members have same identity. However, the club paid sales tax when the goods were provided to non-members or guests. The doctrine of mutuality would come into play. The club acted only as agent between the vendors from whom supplies were procured and the members. The payment by the members was not consideration for any sale. The club was not a "dealer" under the Sales Tax Act. The sales tax authorities sought to tax the said transactions as "sales".

The Tribunal accepted the contention of the club and held that receipts from the members were not exigible to sales tax based on the principle of mutuality. The revenue filed writ petition before the High Court of Calcutta which opined that members collectively were the real life and club was a superstructure only. The facts of presentation of bills, non-payment thereof and subsequent expulsion of members do not prove otherwise. The High Court referred to the Constitution Bench judgment in the case of ***CTO v. Young Men's Indian Association (1970) 1 SCC 462*** and held that there was no sale by the club to its members.

The matter was then taken before the Division Bench of the Supreme Court at the behest of the Revenue. The Division Bench then referred three questions to the larger Bench:

1. Whether doctrine of mutuality is applicable to incorporated clubs or any clubs after 46th amendment to Article 366(29A) of the Constitution?

2. Whether decision of ***CTO v. Young Men's Indian Association (1970) 1 SCC 462 (SC)*** still holds field after 46th amendment to Constitution?

And whether decisions o***f Cosmopolitan Club v. State of TN (2009) 19 VST 456 (SC)*** and ***Fateh Maidan Club v. CTO 12 VST 598 (SC)*** which applied doctrine of mutuality after 46th amendment to Constitution lay down correct law?

3. Whether 46th amendment by its deeming fiction affirms the position that provision of food, beverages etc. by an incorporated club to its permanent members constitutes 'sale' liable to sales tax?

The revenue referred to 61st Law Commission report which preceded 46th amendment and "Statement of Objects and Reasons" to the said amendment to Constitution and contended that clause (e) to Article 366(29A) was inserted to specifically do away with doctrine of agency/trust or mutuality in case of Members' Club and sought to overcome the decision of ***CTO v. Young Men's Indian Association (1970) 1 SCC 462***. They also argued that the words "unincorporated associations" and "body of persons" employed in clause (e) were to be read disjunctively which meant that "body of persons" may include incorporated companies, co-operative societies etc. Further clause (f) of the said Article covers supply of food, drinks for human consumption and employs the expression "in any other manner whatsoever" which has a very wide import to cover provision of food/drinks even by incorporated entities to its members. They heavily relied on the judgment of ***Deputy Commercial Tax Officer, Saidapet v. Enfield India Ltd, Co-operative Canteen Ltd. (1968) 2 SCR 421 (SC)*** to bring home the point that the English judgments which propounded doctrine of mutuality had no application in taxing statute since they dealt with criminal law. Further, it was stated that doctrine of mutuality had no application when the members' club was in a corporate form. For this proposition, they relied upon the decision of ***Bucha F. Guzdar v. CIT (1955) 1 SCR 876 (SC)*** wherein it was held that shareholder is not the owner of the assets of a company. The same principle would apply to member's club since member and club would be two different persons.

On the other hand, the respondent club contended that clause (e) of Article 366(29A) referred to unincorporated associations and clearly did not include incorporated entities. The club is registered under section 25 of the Companies Act, 1956 which prohibited distribution of dividends and required application of the profits only for carrying out the objects of the company. Therefore, ratio of ***Bucha F. Guzdar v. Commissioner of Income Tax, Bombay (1955) 1 SCR 876 (SC)*** would not apply to the club. The expression "unincorporated association" has to be read ***ejusdem generis*** with "body of persons" so that incorporated body of persons are not covered by the said clause. Further, there was no profit motive behind the activities of the club and therefore, club will not be covered under the definition of "dealer". Clause (f) is inserted only to nullify the effect of the judgement of ***Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi (1978) 4 SCC 36 (SC).***

View

The Supreme Court perused the 61st Law Commission report wherein clause 1D had made certain pertinent observations. The case of ***Enfield India Ltd (supra)*** which was heavily relied by the department was examined. It was observed that in case of unincorporated club, society, association etc. the property is jointly held by the members for common benefits and relinquishment of rights by other members in favour of one member who pays the price is not a transaction of sale. The Court in that case also stated that it was not called upon to consider the aforesaid situation. The court also considered the case of Young Men's Indian Association wherein it was unequivocally held that there is no sale by the incorporated club to its members. The ratio of an English case of Graff vs Evans was also considered wherein it was held that no liquor license is required for a club which provides liquor to its member out of the common stock since it is not a sale. The crux lies in the fact that when the goods are provided to a member from the common property of all members, there is no transfer of property in those goods and hence, no sale. In view of this legal position, the Commission opined that there was no need to amend the Constitution to tax the supply of goods by an unincorporated club/association to its members. It gave mainly three reasons 1) Number of such clubs/associations is not very large 2) the taxation would scuttle the cooperative movement 3) there is no serious evasion of tax since members takes their own goods.

The Court thereafter considered the Statement of Objects and Reasons which led to amendments in Constitution. It referred to various Supreme Court judgments wherein transactions which resembled sale were held as not amounting to sale. In respect of clause (e) of Article 366(29A), it was mentioned that while registered clubs/associations having corporate status are liable to sales tax on their supply of goods to their members, unincorporated clubs/associations are not so liable since, in law, they have no separate existence from that of the members. This statement in respect of incorporated clubs however, was found by the Court as contrary to the law declared by it in the case of Young Men's Indian Association (supra).

The Court also referred to the case of ***BSNL v. UOI (2006) 3 SCC 1(SC)*** where it is observed, while commenting upon the necessity of 46th amendment, that incorporated clubs/associations were not liable to tax on the supplies to their own members and therefore, amendment in Constitution to make it a deemed sale was necessary. Although this statement cannot be called as ratio of this judgment, it took note of the legal position prevalent at that time.

The Court also acknowledged the principles of law laid down by ***Graff v. Evans and Trebanog working Men's Club*** and ***Institute Ltd. v. Macdonald (1940) 1 K. B. 576.*** Both the cases held that legal property in the goods held by the club necessarily belongs to the members jointly and hence, there cannot be any sale. Various legal entities may be entrusted with the property of the members but the arrangement remains the same. The legal status of such entities does not change the transaction into sale.

The court also noted that various High Courts too dragged the same line and held that clubs held the property belonging to the members, whether as a separate legal entity or otherwise, and supply of goods to the members did not amount to sale. E.g. ***Bengal Nagpur Cotton Mills Club v. Sales Tax officer, Raipur (8 STC 781)(MP) (HC)*** and ***Century Club v. State of Mysore (16 STC 38)(Mysore) (HC).***

The Court distinguished the case of ***Bucha v. Guzdar (supra)*** where it was held that shareholders of a company are not owners of the assets of the company. The said judgment dealt with two tea companies and not section 25 companies which are formed to promote certain charitable objects and do not distribute the profits as dividends to the shareholders. Therefore, the observations in above case were not relevant.

In this context, the case of ***Cricket Club of India v. Bombay Labour Union (1969) 1 SCR 600 (SC)*** was also considered by the court to bring home the point that the fact of being incorporated as a limited company is not important. Under the Contract law and for the purposes of filing suit or being sued, the separate legal status is required. These legal technicalities cannot be used to change the fact that club is merely holding the property of the members as a trustee. There is no sale transaction between the members and the club.

The Court thereafter examined the proposition whether 46th amendment changed the legal position laid down by Young Men's Indian Association as narrated above.

The Court observed that terms "unincorporated association" and "body of persons" used in clause (e) of Article 366(29A) cannot be read disjunctively. For the purpose, the definition of "person" under General Clauses Act was referred. It was inferred that the said clause does not use the expression "person" which includes corporate person but employs the expression "body of persons" which definitely does not cover corporate person. The definitions of "person" in various other Acts is succeeded by an expression "whether incorporated or not" which suggests that "body of persons" does not cover corporate person.

The last part of Article 366(29A) specifies that supply of such goods shall be deemed to be sale of those goods by person making such supply and purchase of those goods by the person to whom such supply is made. This explanation presupposes two persons and they are absent in case of member's club. Therefore, it suggests that the ratio of Young Men's Indian Association is not been done away with.

The revenue also proposed that the transactions can fall under clause (f) of Article 366(29A) which reads as under:

"(f) A tax on the supply by way of or as part of any service or in any other manner whatsoever of goods being food or any other article for human consumption or any drink (whether or not intoxicating) where such supply or service is for cash, deferred payment or other valuable consideration and such transfer, delivery and supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made."

The Court based on "Statement of Objects and Reasons" inferred that the said clause was inserted to annul the ratio of judgments in the cases o***f State of Punjab v. Association of Hotels of India Ltd. 1972 1 SCC 472*** and two judgments of ***Northern India Caterers Ltd. [(1979) 1 SCR 557 (SC) & (1980) 2 SCC 167 (SC)].*** The said decisions had held that supply of food in hotels or restaurant is a composite contract of sale and service and they could not be segregated for the purpose of levy of tax. In order to remove this lacuna, clause (f) was inserted. It therefore, did not apply to clubs which are not hotels or restaurants. Further, clause (f) dealt with only food, drinks for human consumption whereas the club can supply many other goods like soaps, paste, medicines etc. Therefore, Court came to the conclusion that clause (f) was not applicable to clubs.

In view of the entire analysis, the Court came to the following conclusions:

1. The doctrine of mutuality continues to be applicable to incorporated or unincorporated members' club after the 46th Amendment adding Article 366(29A) to the Constitution.

2. Young Men's Indian Association (supra) and other judgments which applied this doctrine continue to hold the field even after the 46th Amendment.

3. Sub-clause (f) of Article 366(29A) has no application to Members' Club.

Service Tax

Facts

The High Court of Jharkhand and Gujarat delivered judgments in the cases of Ranchi Club and Calcutta Club respectively and held that service tax is not leviable on the services like mandap keeper service rendered by the Member's Club to its members. The Division Bench of Supreme Court heard the matters in civil appeal proceedings and referred them to the Larger Bench of the Supreme Court. Thus, the appeals are heard by this Court.

The Court observed that both High Courts have held that Young Men's Indian Association ratio is applicable so far as members' club liability for service tax is concerned and they are not liable to service tax. It was pleaded before them by the revenue that Young Men's Indian Association decision was in respect of sales tax and not service tax and hence, not applicable. But the High Courts observed that both in sales tax and service tax, two persons are required namely, seller and buyer to effect a sale and service provider and service recipient in case of service. The members' club and its members are one and the same and there cannot be sale or provision of service by one to oneself. The ratio of Young Men's Indian Association decision is squarely applicable even under Finance Act, 1994 levying service tax.

The service tax was levied on the clubs and associations w.e.f. 16-06-2005 which were defined under section 65(25a) to mean "any person or body of persons providing services, facilities or advantages, for a subscription or any other amount, to its members but does not include—

"(a) any body established or constituted by or under any law for the time being in force

…….."

The various provisions under the Finance Act 1994 seeking to levy service tax on the clubs/associations were in force for the period from 16-06-2005 till 30-06-2012. Up to 30-06-2012, the service tax was being levied on selective services only.

From 01-07-2012, the service tax law underwent paradigm shift and all services became taxable except those in the negative list specified in section 66D. The definition of "service" was inserted for the first time under section 65B(44) which read as follows:

Service means any activity carried out by a person for another for consideration and includes a declared service but shall not include---

………

……….

Explanation 3- For the purposes of this chapter;

(a) An unincorporated association or body of persons, as the case may be, and the member thereof shall be treated as distinct persons

(b) ……..

The Court was required to take a view whether the ratio of Young Men's Indian Association still held the field under aforesaid provisions in two periods.

View

For the period prior to 30-06-2012, the Court considered the exclusion from the definition of club/association as under section 65(25a) namely, "any body established or constituted by or under any law for the time being in force". The majority of the clubs were either registered under section 25 of the Companies Act or under the Co-operative Societies Registration Act. The contention of the revenue that such clubs are not "established" under those Acts was not accepted by the Court. The judgments cited by the revenue namely, ***Dalco Engineering Pvt. Ltd. v. Satish Prabhakar Padhye (2010) 4 SCC 378 (SC)*** and were distinguished by referring to the case of ***R. C. Mitter & Sons, Calcutta v. CIT, West Bengal, Calcutta (1959) 2 SCR 641 (SC).*** It is held therein that the word "constituted" does not necessarily mean "created" or "set up" though it may mean so. It also includes the idea of clothing the agreement in a legal form. The decision of ***Dwarkadas Khetan & Co. v. CIT (1956) 29 ITR 903 (Bom) (HC)*** was also referred in this context. In view of this legal position, the Court came to the conclusion that companies and cooperative societies which are registered under the respective Acts, can certainly be said to be 'constituted' under those Acts and hence, excluded from the definition of "club".

For the period after 01-07-2012, the Court compared the explanation 3 clause (a) below the definition of "service" under section 65B (44) and exclusion under section 65(25a) as regards "any body established or constituted under any Act" prior to 30-06-2012 and came to the conclusion that both in substance were same. A Member's club in a corporate form is identical with its members and one cannot provide service to oneself. The Court held that Member's club as opposed to proprietary club is not liable to service tax in both the periods. (CA No. 4184 of 2009, 7497 of 2012 CA No. 7773 of 2019 (Arising out of SLP (C) No. 26883 of 2013, dt. 3-10-2019)

State of West Bengal and v. Calcutta Club Ltd. AIR 2019 SC 310/(2019) 311 CTR 121 (SC)/(2019) 76 GST 614 (SC)

Editorial : Member's Club other than proprietary club is not liable to sales tax or service tax even if clothed in a corporate form. Under CGST/SGST Act, definition of "business" includes "provision by a club, association, society, or any such body (for a subscription or any other consideration) of the facilities or benefits to its members. There is no distinction between incorporated and unincorporated clubs/associations. The definition of "person" under section 2(84) includes "an association of persons or a body of individuals, whether incorporated or not, in India or outside India". Entry 7 of schedule II stipulates that supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration shall be treated as supply of goods. Although the activities of a club are treated as business, in order to constitute a supply, there has to be a supplier and a recipient. If two parties are missing, there cannot be a supply as laid down by this judgment. However, the matter needs to be contested in Court keeping in view the GST provisions.

> *"There is a higher court than court of justice and that is the court of consciousness. It supercedes all other courts."*
>
> \- Mahatma Gandhi

130 – 20. Advocates Act, 1961

S. 33: - Bar Council of India - Counsel needs express authority to enter settlement/compromise - Admission by counsel – Client is not bound by the statement or admission. [Bar Council of India Rules, 1975, Code of Civil Procedure, 1908, S. 151, Order III Rule 1, Constitution of India 1949, Art. 226, 227]

Facts

Appellant was a co-operative society registered under the Delhi Cooperative Societies Act, 1972. It comprised of 150 members who had enrolled themselves with the society for allotment of residential quarters/apartments. Despite repeated demand notices, the Respondents failed to make the necessary payments and were expelled from the society following a resolution that was approved by the Registrar. The appeal before the Revisional Authority failed and the matter reached the High Court. The High Court also noted that the actions of the society were legal. However, the Respondents sought the issuance of directions to the Appellant for consideration of their request to construct and allot additional residential quarters/apartments. Noting the acceptance of this request by the Appellant's counsel, the High Court passed the necessary directions in its judgement. A review was preferred by the Appellants stating that they had not authorised their counsel to make any concessions in favour of the Respondent, which was dismissed. Hence the appeal before the Supreme Court.

Issues

Inter alia the following issues were considered:

(a) Whether the counsel appearing for an Appellant could make concession(s) for or on behalf of the Appellant without any express instructions/authorisation in that regard?

(b) Whether such a concession would bind the Appellant?

(c) Since the subject matter of the concession made by the counsel was not the issue before the High Court, whether the same would bind the Appellant?

View

The Court was of the view that the High Court should not have issued the impugned directions merely because a request was made by the Respondents, notwithstanding a concession made by the Appellant's counsel. Since the request made was not the subject matter of the petition, the High Court should have enquired into whether the Appellant had authorised its counsel in this regard and whether a resolution was passed allowing for such concessions. The client is not bound by a statement or admission which he or his lawyer was not authorised to make. The lawyer generally has no implied or apparent authority to make an admission or statement which would directly surrender or conclude the substantial legal rights of the client unless such an admission or statement is clearly a proper step in accomplishing the purpose for which the lawyer was employed. A lawyer has to be specifically authorised to enter in to a settlement or compromise. He has no implied authority to bind his client to such a compromise/settlement. It is always better to seek appropriate instructions from the client.

Held

The impugned directions were set aside as the counsel for the Appellants was held to not have the requisite authority to enter into a settlement/compromise. (CA Nos 4363-4364 of 2015 Arising out of SLP (Nos. 9305-9306 of 2013 & Ors dt. 4-9-2015)

Himalayan Cooperative Group Housing Society v. Balwan Singh (2015) 7 SCC 373/AIR 2015 SC 2867

Editorial : Ratio is relevant in determining the scope of authority delegated to an advocate by the client in reaching a compromise/settlement on his/her behalf. Ratio also highlights the code of professional conduct to be followed by advocates in making such concessions.

> *"Anger is the enemy of Ahimsa and pride is a monster that swallows it up."*
>
> \- Mahatma Gandhi

131 – 21. Arbitration and Conciliation Act, 1996

S. 36: Execution of awards – Anywhere in the country – No requirement for obtaining a transfer of the decree from the Court which would have jurisdiction over the arbitral proceedings [Arbitration and Conciliation Act, 1996, S. 36, 40; Civil Procedure Code, 1908, S. 46]

Facts

Respondent had defaulted on a loan and the Appellant had sought repossession of his truck as a result. The arbitration clause was invoked and an *ex-parte* award was issued in the Appellant's favour. During execution proceedings, the trial court in Morena, Madhya Pradesh returned the execution application on account of lack of jurisdiction. The appellant was asked to first file execution proceedings before the competent Court in Tamil Nadu having jurisdiction over the proceeding, obtain a transfer of the decree and then seek execution before the Court in Morena.

Issue

Whether an award under the Arbitration and Conciliation Act, 1996 is required to be first filed in the Court having jurisdiction over the proceedings for execution and then to obtain transfer of the decree or whether the award can be directly filed and executed in the Court where the assets are located.

View

In the case of an arbitral award, there is no decree passed but the award itself is executed as a decree by fiction, unlike the position under the 1940 Act. An award is equated to a decree only for the purpose of execution, nothing else. Section 43 of the 1996 Act has no relevance in determining jurisdiction after the final award has been passed and the mandate of the arbitral tribunal has terminated.

Held

Execution proceedings can be filed anywhere in the country where such decree can be executed and there is no requirement for the transfer of decree from the Court which would have jurisdiction over the arbitral proceedings. (CA No 1650 of 2018 dt. 15-2-2018)

Sundaram Finance Limited v. Abdul Samad 2018 (2) SCALE 467/MANU/SC

Editorial: Ratio is relevant when dealing with execution proceedings of arbitral awards. It significantly eases the mechanism for seeking enforcement of an arbitral award in jurisdictions where the opposite party may have its assets.

> *"Each one has to find his peace from within, and peace to be real must be unaffected by outside circumstances."*
>
> \- Mahatma Gandhi

132 – 22. Banking Regulation Act, 1949

S. 45ZA(2): Nomination for payment of depositor's money - Nominee rights - Bank Account – Rule of Succession - Death of Depositor - Nominee will have all the rights of the depositor, so far as the depositor's account is concerned, however, does not make him owner of the money lying in said account - Distribution of money will depend on rules of succession governing the deceased [Government Saving Certificates Act, 1961, S. 6(1)]

Facts

Appellant, who was the nominee in the bank account held by his deceased mother, was claiming full rights over the money in that account, to the exclusion of the Respondent, his full brother.

Issue

Whether the nominee in a bank account held by a deceased depositor is the owner of the money in the said account.

View

Section 45ZA(2) of the Banking Regulation Act 1949 puts the nominee in the shoes of the deceased depositor and gives him the exclusive right to receive the money in the account. It gives him all the rights of the depositor so far as the account is concerned. It does not make the nominee the owner of the money in the account. The money receivable by the nominee would form a part of the deceased's estate and devolve according to the rule of succession that governs the depositor.

Held

High Courts order dismissing the Appellants claim was upheld and the appeal was accordingly dismissed. (CA No. 1684 of 2004 dt. 6-10-2010)

Ram Chander Talwar v. Devender Kumar Talwar (2010) 10 SCC 671/159 Comp. Cas. 646/MANU/SC/0833/2010

Editorial: Ratio helps clarify the rights of the nominee in relation to the bank account and the money lying in it. The principle however may not have universal application and has to be applied w.r.t the statutory provision under which the nomination is made. In the case before the Supreme court decided under the WB CS Act, the court held that the nominee was the successor to the estate in question. (Also refer nomination by policy holder under Insurance Act, 1938, ***Shreya Vidyarthi v. Ashok Vidyarthi AIR 2016 SC 139/MANU/SC/1465/2015.***

> *"Prayer is not asking. It is a longing of the soul. It is daily admission of one's weakness. It is better in prayer to have a heart without words than words without a heart."*
>
> \- Mahatma Gandhi

133 – 23. Benami Transactions (Prohibition of Right to Recover Property) Ordinance, 1988

S. 2: A mere financial assistance to purchase immovable property cannot be treated as Benami Transaction

Facts

The Appellant had filed a suit seeking partition and recovery of her 1/4th right in the suit properties, which was allegedly purchased by her late father in the name of her brothers, the Respondents. It was her case that the properties was joint family property whereas her brothers claimed the properties in question were owned exclusively by them. The Trial Court held that the immovable properties were self-acquired by the brothers and that she had no right in them, but was entitled to 1/4th share in the movable property. Being aggrieved by the said order, she approached the High Court. The High Court held that the suit property was not self-acquired as the transaction related to the suit property was benami in nature. The said order of the high court was challenged in the Supreme Court by her brothers which remanded the matter back to the High Court for reconsideration. Thereupon, the High Court upheld the verdict of the Trial Court, holding that the suit property was self acquired and that the transaction was not benami in nature. Hence the appeal by her before the Supreme Court.

Issue

Whether financial assistance rendered by the father for purchase of suit property by the brothers made the transaction benami in nature or not.

View

In determining whether the transaction was benami, the intention of the person who contributed the purchase money was determinative. The intention could be ascertained on the basis of the surrounding circumstances: relationship of the parties, motives governing their action in bringing about the transaction, their subsequent conduct etc. The source of money is not the sole consideration, but merely one of them. The burden of proving that a particular transaction was benami or not always rests on the person asserting it to be so. The Court relied on ***Thakur Bhim Singh v. Thakur Kan Singh (1980) 3 SCC 72*** and ***Binapani Paul v. Pratima Ghosh (2007) 6 SCC 100.***

Held

The judgement of the High Court confirming the decision of the trial court was upheld as the source of the money is not the only relevant circumstance in determining the nature of the transaction. As the father had otherwise financially helped his daughter (the Appellant), the Court concluded that the financial assistance given to her brothers (the Respondents) was to aid in their welfare and not to effectuate benami transactions. (CA No. of 2008 dt. 9-4-2019)

P. Leelavathi (D) (Smt.) by LR v. V. Shankarnarayana Rao (D) by LRs MANU/SC/0497/2019/2019 SCC OnLine SC 489

Editorial: Ratio is relevant in determining circumstances in which the financial assistance given by family members may amount to a benami transaction. It confirms that not all cases of transactions aided by the money received form others can be held to be benami which decision rests on several factors and the onus of proving the same to be so rests with the the person alleging the same to be so.

> *"Man becomes great exactly in the degree in which he works for the welfare of his fellow-men."*
>
> \- Mahatma Gandhi

134 – 24. Chartered Accountants Act, 1949

S. 22: Professional misconduct – A Chartered Accountant can be held guilty of professional misconduct even when he is acting as an individual in commercial dealings and is not acting as a Chartered Accountant nor discharging any function in relation to his practice as a Chartered Accountant. Under the Chartered Accountants Act, any action which brings disrepute to the profession or the Institute is misconduct whether or not related to professional work [Chartered Accountants Act, 1949, S. 21(3)]

Facts

Appeal arose in relation to a criminal complaint against the Respondent, a Chartered Accountant, in relation to a sale of 100 shares in 1999 transferred to his own name. He was found guilty of the crime and the ICAI had recommended for the suitable punishment against him. The High Court had rejected the ICAI's recommendation that the Respondent should be removed from the rolls for a period of six months, on the grounds that the Respondent was acting in an individual capacity nor was he discharging any function in relation to his practice as a Chartered Accountant.

Issue

Whether a Chartered Accountant can be guilty of professional misconduct even when he/she is not acting as a Chartered Accountant or discharging functions in relation to his/her practice as a Chartered Accountant.

View

A Chartered Accountant can be held guilty of professional misconduct even when he is acting as an individual in his dealings and is not acting as a Chartered Accountant nor discharging any function in relation to his practice as a Chartered Accountant. Any action which brings disrepute to the profession or the Institute is misconduct, whether or not related to professional work.

Held

Impugned order of the High Court was set aside. (CA No. 11034 of 2018 (Arising out of SLP (C) No. 19564/2017, dt. 16-11-2018) by the Supreme court by upholding the recommendation of the ICAI to suitable punish him for his misconduct.

Council of ICAI v. Gurvinder Singh (2018) 259 Taxman 311 (SC)/(2019) SC 11 785; www.itatonline.org

Editorial: The ruling mandates a strict code of professional conduct on the part of a Chartered Accountant, even when he/she is not acting as a Chartered Accountant nor discharging any function in relation to his/her practice as a Chartered Accountant. It should apply with equal force to all other professionals who are governed by self regulatory codes of the respective bodies monitoring their conduct in the interest of the profession.

> *"The main purpose of life is to live rightly, think rightly, act rightly. The soul must languish when we give all our thought to the body."*
>
> \- Mahatma Gandhi

135 – 25. Code of Criminal Procedure, 1973

S. 41: Arrest - Procedure to be followed by Police Officer if situation/circumstance is covered u/s 41 and 41A of the Cr.P.C., i.e., where the maximum sentence for such a crime would not exceed 7 years and where proper reasoning for the arrest is required [Code of Criminal Procedure, 1973, S. 41A Constitution of India, Art. 32]

Facts

Pursuant to an FIR filed under section 420 read with s. 34 of the Indian Penal Code, 1860 and Section 66D of the Information Technology Act, 2000 alleging fraud, the Petitioners were arrested. The petitioners claimed that the manner in which they were arrested was in violation of the norms set by the Supreme Court and that their dignity had been sullied. The Petitioners claimed compensation.

Issue

The Court was concerned with the guidelines that need to be followed during arrest of persons in relation to certain types of offences that meet the criteria prescribed by Section 41 and 41A of the Code of Criminal Procedure, 1973.

View

No arrest should be made without being satisfied of the genuineness and *bona fides* of a complaint and a reasonable belief as to the accused person’s complicity and the imminent need to effect his arrest. Denying a person his liberty is a serious matter.

Held

Before the police proceed to arrest, certain guidelines prescribed by the Supreme Court in ***DK Basu v. State of West Bengal (1997) 1 SCC 416*** must be adhered to by Police. As per Section 41A of the Code of Criminal Procedure, 1973 a person accused of an offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine, can be arrested by the police officer only on his satisfaction that such person had committed the offence. In such cases, a police office has to be further satisfied that such arrest is necessary:

a) to prevent such person from committing any further offence or for proper investigation of the case; or

b) to prevent the accused from causing the evidence of the offence to disappear tampering with such evidence in any manner; or

c) to prevent such person from making any inducement, threat or promise to a witness so as to dissuade him from disclosing such facts to the court or the police officer; or

d) as his presence in the court whenever required cannot be ensured.

The accused is obliged to appear before the police officer and if he/she complies with the terms of notice, he shall not be arrested, unless the officer deems such arrest necessary. In such a case, the reasons for the same have to be recorded by the officer in terms of the guidelines. (WP (Cri) No. 30 of 2015 dt. 3-6-2016)

Dr. Rini Johar & Another v. State of M.P. & Ors. AIR 2016 SC 2679/(2016) 11 SCC 703/MANU/SC/0667/2016

Editorial: The guidelines set out by the Supreme court and highlighted in this case are important in ensuring that the law enforcement agencies do not act overzealously and curtail the liberty of the citizens without reasonable justification for the same, by arresting the accused, especially when the alleged crime in question is not a serious one i.e where involving the imprisonment not exceeding seven years. In ***Youth Bar Association of India v. UOI AIR 2016 SC 4136/(2016) 9 SCC 473/MANU/SC/1339/2016*** The Supreme Court in this case set out important guidelines to be followed in uploading FIRs on the official website of the State police. Guidelines also contained the procedure to be followed in order to obtain a copy of the same in certain special circumstances.

> *"The essence of all religions is one.*
> *Only their approaches are different."*
>
> \- Mahatma Gandhi

136 – 26. Companies Act, 1956

S. 46: Binding effect of deed executed by directors on behalf of company - Company is held liable and not the Director - Plea of limitation which was raised for the first time was not allowed to be raised on the facts of the case [Companies Act, 1956, S. 48, Limitation Act, 1963, Art. 54, Indian Contract Act, 1872, S. 29]

Facts

Respondents 2, a company registered under the provisions of the Companies Act, 1956 entered into an agreement to sell executed through the hands of its three directors its suit property to Respondent No. 1. However, the company later refused to execute a sale deed in favour of Respondent No. 1 on the plea that the same became barred by limitation. A suit was filed by the Respondent No. 1 or through him for specific performance of the agreement. During the pendency of the suit, the suit property was purchased by the Appellant, a third party, with full knowledge about the pending suit from Respondent No.2. The trial Court decreed the suit in Respondent No. 1’s favour. The appeal against same was also dismissed. Even the appeal to the High Court was dismissed. Hence the appeal before the Supreme Court against the order of the High Court.

Issue

Inter alia, the Court had to consider whether the agreement entered into by Respondent No. 2 with Respondent No. 1 was valid, keeping in mind the provisions of Section 46 and 48 of the Companies Act, 1956.

View

Once a deed is executed on behalf of the company, it is the company and not the persons signing who can sue or be sued. Even in absence of the company seal, the company may still be held liable, having regard to the nature of transaction and the authority of those who had executed it.

Held

The agreement of sale with Respondent No. 1 was entered into by 3 directors of the Respondent No.2 company. The company never disputed the terms of the agreement nor raised the plea that the agreement was not binding on it. The contract was held to be executed in the name of the company and the appeal by the company was dismissed. (CA No. 5187 of 2001 dt. 12-5-2006)

Panchanan Dhara & Ors. v. Monmatha Nath Maity (Dead) through LRs. & Anr. 2006 (5) SCC 340/AIR 2006 SC 2281/MANU/SC/2287/2006

Editorial: The ratio of this decision clarifies the rights and liabilities of a company when deeds are executed in its name by its directors, thus helping in bringing about certainty in commercial transactions. It explains that the agreements executed by the directors for and on behalf of the company are valid and enforceable against and by the company and can not be backed out of by stating that they are not binding on the company.

"Glory lies in the attempt to reach one's goal and not in reaching it."

- Mahatma Gandhi

137 – 27. Consumer Protection Act, 1986

S. 2(1)(g): Deficiency in Service – Delay in obtaining occupation certificate – Reasonable cause for termination of agreement by filing Consumer Complaint – Eligible for refund with interest [S. 2(o), 2(r), Haryana Real Estate (Regulation and Development) Rules, 2017)]

Facts

Pioneer Urban Land and Infrastructure Ltd (builder & Appellant) entered into a contract with a purchaser to deliver the possession of the flat in Arya Complex, Gurugram along with the occupation certificate within 39 months from the date of excavation, with a grace period of 180 days. The Builder however failed to apply for the Occupancy Certificate as per the stipulations in the Agreement. The Purchaser filed a Consumer Complaint before the National Commission (NCRDC) alleging deficiency in service on the part of the Builder for failure to obtain the Occupancy Certificate, and hand over possession of the flat. On account of the inordinate delay, the Respondent-Flat Purchaser had no option but to arrange for alternate accommodation in Gurugram.

The NCRDC allowed the Consumer Complaint filed by the Respondent-Flat Purchaser, and held that since the last date stipulated for construction had expired about 3 years before the Occupancy Certificate was obtained, the Respondent-Flat Purchaser could not be compelled to take possession at such a belated stage. The clauses in the Agreement were held to be wholly one-sided, unfair, and not binding on the Respondent-Flat Purchaser. The Appellant-Builder was directed to refund Rs. 4,48,43,026/- i.e. the amount deposited by the Respondent-Flat Purchaser, along with Interest @10.7% S.I. p.a. towards compensation. The rate of Interest @10.7% S.I. p.a. was fixed in accordance with Rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017. Against the order of NCDRC, the Appellant builder filed the Statutory Appeal to the Supreme Court.

Issue

Whether Purchaser can claim compensation where he has not terminated the Agreement as per the terms and conditions of the Contract? Whether the purchaser can claim compensation for delayed possession over and above which is agreed to in the Agreement?

View

The flat purchasers invest their hard earned money. When the Developer delays the possession, the flat purchasers have to service their loans. The Agreements are one–sided favouring the Developers. Hence, the interpretations of these Agreements have to favour the Purchasers in consonance with the spirit of the Consumer Protection Laws.

Held

It was observed that admittedly the Builder obtained the Occupancy Certificate almost 2 years after the date stipulated in the Apartment Buyer's Agreement. The Purchaser has made out a clear case of deficiency of service on the part of the Appellant-Builder. The Purchaser was justified in terminating the Apartment Buyer's Agreement by filing the Consumer Complaint, and cannot be compelled to accept the possession whenever it is offered by the Builder. The Purchaser was legally entitled to seek refund of the money deposited by him along with appropriate compensation.

It was held that Builder failed to fulfill his contractual obligation of obtaining the Occupancy Certificate and offering possession of the flat to the Respondent-Purchaser within the time stipulated in the Agreement, or within a reasonable time thereafter. The Purchaser could not be compelled to take possession of the flat, even though it was offered almost 2 years after the grace period under the Agreement expired. During this period, the Purchaser had to service a loan that he had obtained for purchasing the flat, by paying Interest @10% to the Bank. In the meanwhile, the Purchaser also located an alternate property in Gurugram.

In these circumstances, the Respondent-Flat Purchaser was entitled to be granted the relief prayed for i.e. refund of the entire amount deposited by him with Interest. (CA Nos. 12238 and 1677 of 2019 dt. 2-4-2019)

Pioneer Urban Land and Infrastructure Ltd. v. Govindan Raghavan AIR 2019 SC 1779/MANU/SC/0463/2019

Editorial: In ***Arifur Rahman Khan and Ors. v. DLF Southern Homes Pvt. Ltd. and Ors. Civil Appeal Nos. 6239 and 6303 of 2019 Decided On: 24.08.2020 (SC)*** it is held that Consumer court can grant compensation over and above which is agreed in the Agreement. A claim for compensation for delayed handing over of possession can be pursued even if the purchaser has obtained Deed of Conveyance. If purchasers enter into specific settlement deeds with the developers then they cannot claim compensation. If flats are transferred by the purchasers before possession then the transferee cannot claim compensation. The court noted that the agreements by the builders are one sided and its interpretation should favour the cause of the consumer keeping the spirit of the consumer protection in mind. It also held that the failure to terminate the agreement by the purchaser was not detrimental to the claim of the purchaser for compensation.

“Hatred ever kills, love never dies such is the vast difference between the two. What is obtained by love is retained for all time. What is obtained by hatred proves a burden in reality, for it increases hatred.”

- Mahatma Gandhi

138 – 28. Contempt of Courts Act, 1971

S. 2(c) : Criminal contempt- Filing of false affidavit with intent to mislead the court – To be proved beyond reasonable doubt – Consent of Advocate General before initiating Contempt proceedings [S. 12, 15, Madras High Court Contempt of Court Rules, 1975]

Facts

Mr Parithi Ilamvazhuthi (Respondent No 1 & Accused) was elected as Member of Legislative Assembly (in short 'MLA') of the Egmore Constituency, Chennai in the Elections held on 10.05.2001 to the Tamil Nadu State Legislative Assembly. In respect of violence on the day of election, Respondent No. 1 was arrested and remanded to judicial custody on 17.05.2001. On the same day, that is, on 17.05.2001, Mr Mutthu Karuppan (Appellant & Alleged contemnor) was appointed as Commissioner of Police, Greater Chennai City and assumed charge. On 21.05.2001, Respondent No. 1 moved an application for bail in Crl. M.P. No. 1379 of 2001 before the XIV Metropolitan Magistrate which was dismissed on the same day. On 22.05.2001, Respondent No. 1 moved an application for bail before the Sessions Judge in Crl. M.P. No. 6277 of 2001 mainly on the ground that as the new Assembly Session commences on 22.05.2001, he has to take oath and further the victim, namely, one Mr David has also been discharged from the hospital. On 23.05.2001, Respondent No. 1 was granted conditional bail by the Sessions Judge mainly on the ground that he has to take oath as MLA. Against grant of bail to Respondent No. 1, Inspector of Police-(Respondent No. 2) filed an application being Crl. O.P. No. 9352 of 2001 on 24.05.2001 for cancellation of bail with application for stay before the High Court. On the same day, vacation Judge of the High Court stayed the order of grant of bail to Respondent No. 1 till 29.05.2001 on the ground that victim, namely, David is in serious condition and the accused Respondent No. 1 is in police custody.

By pointing out that the information furnished by Respondent No. 2 in his affidavit filed in support of the application for stay of the order of grant of bail regarding his police custody is false, Respondent No. 1 filed a counter affidavit praying for vacation of the stay granted by the High Court. On 29.05.2001, Respondent No. 2 filed his reply affidavit submitting that on 23.05.2001 application seeking police custody of other 8 accused were made and in the affidavit filed in support of the petition to cancel the bail, by oversight, it was mentioned that police custody was also obtained in respect of the Respondent No. 1. He also conveyed to the court that it is a mistake by oversight and the same is neither willful nor wanton. On going through the material placed, the learned Single Judge, by order dated 30.05.2001, dismissed Crl. O.P. No. 9352 of 2001 filed by Respondent No. 2 to cancel the bail granted to the first Respondent by the Sessions Judge.

After the order dated 30.05.2001, Respondent No. 1 filed Contempt Application No. 397 of 2001 before the High Court stating that on the direction, supervision and knowledge of the Appellant herein, Respondent No. 2 moved an application to cancel the bail granted to him on the basis of false statement thereby prevented him from attending the Assembly. On 29.10.2004, the Division Bench of the High Court proceeded on the fact that the Commissioner of Police-Appellant herein was aware of the arrest of Respondent No. 1 and also of the fact that as an elected MLA because of the wrong information by Respondent No. 2, the High Court stayed the order of bail and he was prevented from assuming office as MLA and dealt with the matter and finally convicted him under Section 2(c) of the Act and sentenced them to undergo simple imprisonment for 7 days under Section 12 of the Act. Aggrieved by the judgment and order of the High Court, Appellant herein filed Criminal Appeal No. 1376 of 2004 before this Court.

Issue

Question arises whether the Appellant was guilty of criminal Contempt? Whether the consent of the Advocate General required ? Whether a false statement in an affidavit by the junior office could be considered as the false statement made by the senior with the intention of misleading the court? Whether the court could be compelled to initiate the contempt proceedings.

View

Giving false evidence by filing false affidavit is an evil which must be effectively curbed with a strong hand. Prosecution should be ordered when it is considered expedient in the interest of justice to punish the delinquent, but there must be a *prima facie* case of “deliberate falsehood” on a matter of substance and the court should be satisfied that there is a reasonable foundation for the charge.

The contempt proceedings being quasi criminal in nature, burden and standard of proof is the same as required in criminal cases. The charges have to be framed as per the statutory rules framed for the purpose and proved beyond reasonable doubt keeping in mind that the alleged contemnor is entitled to the benefit of doubt. Law does not permit imposing any punishment in contempt proceedings on mere probabilities, equally, the court cannot punish the alleged contemnor without any foundation merely on conjectures and surmises.

If the issue involved in the proceedings have greater impact on the administration of justice and on the justice delivery system, the court is competent to go into the contempt proceedings even without the consent of the Advocate General as the case may be.

Held

The analysis of affidavits of the Inspector of Police, Assistant Commissioner and Deputy Commissioner of Police show that there is no acceptable material that the affidavit containing wrong information filed by Respondent No. 2 for cancellation of bail and stay of bail order was made at the instance of the Commissioner of Police. It is also clear that when the information about mentioning wrong statement in the affidavit filed by Respondent No. 2 against the grant of bail order was brought to the notice of the Appellant on 28.05.2001 by Deputy Commissioner of Police, namely, one Mr Christopher Nelson, the Appellant immediately asked him to direct Respondent No. 2 to file proper affidavit before the High Court and clarify the matter by placing proper facts. It is also clear from the affidavit of the government counsel E. Raja that he himself drafted the affidavit purely on the instructions of Respondent No. 2 and that the Appellant herein had no personal knowledge nor did he instruct the counsel to prepare affidavit or petition to move for cancellation of the bail. As a matter of fact, Respondent No. 2 has specifically denied the allegation that the application for cancellation of bail was moved under the direction, supervision and knowledge of the Appellant. When a city like Chennai is managed by several police officers from the level of police constable to the Commissioner of Police, in the absence of specific reference about consultation with the Commissioner of Police it cannot be presumed and concluded that the Appellant was responsible for giving incorrect information by Respondent No. 2 before the High Court.

The jurisdiction to initiate proceedings for contempt as also the jurisdiction to punish for contempt are discretionary with the court. Contempt generally and criminal contempt certainly is a matter between the court and the alleged contemnor. No one can compel or demand as of right initiation of proceedings for contempt. The person filing an application or petition before the court does not become a complainant or Petitioner in the proceedings. He is just an informer or relator. His duty ends with the facts being brought to the notice of the court. It is thereafter for the court to act on such information or not. Further Section 15 of the Act as well as the Madras High Court Contempt of Court Rules insist that, particularly, for initiation of criminal contempt, consent of the Advocate General is required. Any deviation from the prescribed Rules should not be accepted or condoned lightly and must be deemed to be fatal to the proceedings taken to initiate action for contempt.

In the present case, the above provisions have not been strictly adhered. The order of the High Court convicting the Appellant under Section 2(c) of the Act and sentencing him under Section 12 to undergo simple imprisonment for seven days is set aside. [CA No. 1376 of 2004 dt. 15.04.2011]

Muthu Karuppan v. Parithi Ilamvazhuthi AIR 2011 SC 1645

Editorial : ***In Re: Prashant Bhushan and Ors. Suo Motu Contempt Petition (Crl.) No. 1 of 2020 Decided On: 31.08.2020 (SC) (MANU/SC/0653/2020***), it has been held, that in so far as *suo motu* petitions are concerned, the Supreme Court can very well initiate the proceedings *suo motu* on the basis of information received by it without consent of Attorney General. The Honourable Court sentenced the contemnor with a fine of Rs 1 (Rupees one) to be deposited with the Registry by 15-9-2020 failing which he shall undergo a simple imprisonment for a period of three months and further be debarred from practicing in this court for a period of three years. This relaxation was held to be applicable only in cases where the court *suo moto* proceeded against the contemnor and in all other cases the consent where provided by the statute of the AG was held to be essential for the valid proceedings.

> *"The test of friendship is assistance in adversity,*
> *and that too, unconditional assistance.*
> *Co-operation which needs consideration is*
> *a commercial contract and not friendship.*
> *Conditional co-operation is like adulterated*
> *cement which does not bind."*
>
> \- Mahatma Gandhi

139 – 29. Commissions of Inquiry Act, 1952

S. 3: Commission of Enquiry – Statements made before commission cannot be used as evidence before civil or criminal court – Conclusions based on such statements cannot be used as Evidence [S. 4, 5, 6 Indian Evidence Act, 1872, Special Courts Act, 1979, S. 3, 9, 10]

Facts

The National Housing Bank drew a cheque on January 3, 1992, for an amount of Rs.95.39 crores approximately on the Reserve Bank of India in favour of the State Bank of Saurashtra, a subsidiary of the appellant, which later merged in the appellant. Towards the end of April, 1992, the National Housing Bank found that it did not possess any bank receipts or supporting documents or any securities in respect of such transaction and addressed letters to the State Bank of Saurashtra requesting it to make delivery of bank receipts/securities or for return of the amount. The State Bank of Saurashtra denied the existence of any "outstanding transaction". The National Housing Bank filed a suit before the Special Court established under the Special Court (Trial of Offences Relating to Transactions in securities) Act, 1992 against (i) the State Bank of Saurashtra, (ii) Harshad S Mehta (HM), (iii) two employees of Plaintiff Bank and (iv) the Custodian appointed under section 3(1) of the 1992 Act for recovery of an amount of Rs.95.39 crores with interest alleging conspiracy, collusion and fraud between the defendants in the suit thereby causing loss to the National Housing Bank. The Special Court passed a decree in favour of the National Housing Bank and against the State Bank of Saurashtra only and not against other Defendants. The State Bank of Saurashtra challenged that part of the decree which was against it and the National Housing Bank challenged that part of the decree of the Special Court directing it to deliver certain amounts to the Custodian. According to the Special Court, the Plaintiff had not led any oral evidence to prove it's case but it decreed the suit in it's favour on the basis of findings in the report of the Jankiraman Committee.

Issue

Whether the Suit was rightly decreed on the basis of credible evidence on record?

View

The entire scandal and the present litigation revolves around the second Defendant (since deceased)-one Harshad S. Mehta. The scandal exposes the shortcomings and loopholes in the administration of banking sector of this country, more particularly, the State-owned/controlled banks.

The Supreme Court in this case came down heavily upon the Plaintiff Bank and the Defendant No 1 Bank which are instrumentalities of State for not leading proper evidence before the Special court. The Court held that *"The entire effort of the Plaintiff in the suit, according to us, is to suppress all the relevant information, we are convinced that such a process is resorted to in order to shield the delinquent officers of the bank (whoever they are) who are responsible for such dealings by taking shelter under the legal principles such as unjust enrichment and moneys had (??) and received etc. to recover the money paid by the Plaintiff to the 1st Defendant through the cheque in question. Whether the payment in question was made in discharge of any existing legal obligation such as the one set up by the Defendants 1 and 2 or not could be known only when the full facts are disclosed. But disclosure of full facts might (though we are almost certain) lead to trouble to somebody or the other in the management of the Plaintiff-Bank or perhaps both the Banks and God knows who else."*

The Court also came down heavily on the Government for not settling these matters. The Court held *"The professed purpose of the Special Courts Act-the back drop of the scandal that shook the nation-and the manner in which the litigation was conducted coupled with the absolute indifference of the Government to get at the truth only demonstrates the duplicity with which Governments can act."*

Held

Though the 1992 Act declares that the Special Court is not bound by the Code of Civil procedure, 1908, it does not relieve the Special Court from the obligation to follow the Indian Evidence Act, 1872. The findings of even a statutory commission appointed under the Commissions of Inquiry Act, 1952, are not enforceable *proprio vigore* and the statements made before such commission are expressly made inadmissible in any subsequent proceedings civil or criminal. Therefore, courts are not bound by the conclusions and findings rendered by such commissions. The statements made before such commission cannot be used as evidence before any civil or criminal court. It should logically follow that even the conclusions based on such statements can also not be used as evidence in any court. The Special Court had based its conclusions on Janakiraman Committee Report and the correspondence between the various parties (whose details are not even specified in the judgment). The course adopted by the learned Judge of the Special Court of looking into the correspondence between the parties, which even according to the learned Judge had not been proved is not permissible in law. Further, the learned Judge extensively relied upon the second interim report of the Jankiraman Committee on the ground that the same was tendered by the 1st Defendant. It is well settled by a long line of judicial authority that the findings of even a statutory Commission appointed under the Commissions of Inquiry Act, 1952 are not enforceable *proprio vigore* as held in ***Ram Krishna Dalmia v. Justice S. R. Tendolkar AIR 1958 SC 538*** and the statements made before such

Commission are expressly made inadmissible in any subsequent proceedings civil or criminal. In our view, the courts, civil or criminal, are not bound by the report or findings of the Commission of Inquiry as they have to arrive at their own decision on the evidence placed before them in accordance with law. Accordingly the Suit was dismissed as the Plaintiff had not led any evidence. (CA Nos. 2155, 2294 and 3647 of 1999 dt. 31-7-2013)

SBI through General Manager v. National Housing Bank & Ors (2013) 180 CompCas 15 (SC)/AIR 2013 SC 3478/(2013) 16 SCC 538/MANU/SC/0759/2013

Editorial: The ratio of the decision settles the cloud over the issue whether the statement made before the inquiry commission can be used in the proceedings before the court as an admission of guilt or as an evidence to establish the fact; the court held that such statements made before the inquiry commission could not be used against the persons making such statements in the court proceedings.

> *"The moment there is suspicion about a person's motives, everything he does becomes tainted."*
>
> \- Mahatma Gandhi

140 – 30. Constitution of India, 1950

Art. 21: Protection of life and personal liberty - Natural Justice – Opportunity to be heard is universally recognized as an essential ingredient of principle of natural justice – *Audi alteram partem* – Even if not specifically provided for may be applicable by implication – Rules of natural Justice applicable to administrative action [Art. 14, 19, Pass Port Act, 1976, 10(3)(c)]

Facts

The petitioner held a passport issued to her under the Passports Act, 1967. The petitioner received a letter dated July 2, 1977 from the Regional Passport Officer, Delhi intimating to her that it had been decided by the Government of India to impound her passport under Section 10(3)(c) of the Act in public interest and requiring her to surrender the passport within seven days from the date of receipt of the letter.

The petitioner immediately addressed a letter to the Regional Passport Officer requesting him to furnish a copy of the statement of reasons for making the order as provided in Section 10(5) to which a reply was sent by the Government of India, Ministry of External Affairs on July 6, 1977 stating *inter alia* that the Government has decided “in the interest of the general public” not to furnish her a copy of the statement of reasons for the making of the order.

The petitioner thereupon filed a petition in the Supreme Court challenging the action of the Government in impounding her passport and declining to give reasons for doing so.

Issue

Whether Section 10(3)(c), insofar as it empowers the Passport Authority to impound a passport “in the interests of the general public” was violative of the equality clause contained in Article 14 of the Constitution.

Whether an order impounding a passport could not be made by the Passport Authority without giving an opportunity to the holder of the passport to be heard in defence and, in the alternative, if the Section were read in such a manner as to exclude the right of hearing, the section would be infected with the vice of arbitrariness and it would be void as offending Article 14.

Views

The doctrine of natural justice consists principally of two rules, namely, *nemo debet esse judex in propria causa* : no one shall be a judge in his own cause, and *audi alteram partem* : no decision shall be given against a party without affording him a reasonable hearing. The *audi alteram partem* rule is intended to inject justice into the law and it cannot be applied to defeat the ends of justice, or to make the law "lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation". Since the life of the law is not logic but experience and every legal proposition must, in the ultimate analysis, be tested on the touchstone of pragmatic realism, the *audi alteram partem* rule would, by the experiential test, be excluded, if importing the right to be heard has the effect of paralysing the administrative process or the need for promptitude or the urgency of the situation so demands. This is a rule of vital importance in the field of administrative law and it must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. The *audi alteram partem* rule is sufficiently flexible to permit modifications and variations to suit the exigencies of myriad kinds of situations which may arise.

Held

(In the Lead Judgement Authored by Bhagwati J.) It would not be right to conclude that the *audi alteram partem* rule is excluded merely because the power to impound a passport might be frustrated, if prior notice and hearing were to be given to the person concerned before impounding his passport The Passport Authority may proceed to impound the passport without giving any prior opportunity to the person concerned to be heard, but as soon as the order impounding the passport is made, an opportunity of hearing, remedial in aim, should be given to him so that he may present his case and controvert that of the Passport Authority and point out why his passport should not be impounded and the order impounding it recalled. This should not only be possible but also quite appropriate, because the reasons for impounding the passport are required to be supplied by the Passport Authority after the making of the order and the person affected would, therefore, be in a position to make a representation setting forth his case and plead for setting aside the action impounding his passport. A fair opportunity of being heard following immediately upon the order impounding the passport would satisfy the mandate of natural justice and a provision requiring giving of such opportunity to the person concerned can and should be read by implication in the Passports Act, 1967. If such a provision were held to be incorporated in the Passports Act, 1967 by necessary implication the procedure prescribed by the Act for impounding a passport would be right, fair and just and it would not suffer from the vice of arbitrariness or unreasonableness. (dt. 25-1-1978)

Maneka Gandhi v. UOI (1978) 1 SCC 248/1978 AIR 597 (SC)/1978 SCR (2) 621 (SC)

Editorial: Different orders were passed, the lead judgement is of Bhagwati J.. Individual Judgements were passed by Chandrachud J., Krishna Iyer J. and Beg CJ. and Kailasam J. with a common theme upholding audi alteram partem but with slightly different views about the end result. A statement was made by the Ld. Attorney General that Petitioner would be allowed to make a representation which would be dealt with expeditiously which was considered by all the Judgements and influenced the outcomes. Followed in ***Sahara India (Firm) v. CIT [2008] 300 ITR 403 (SC)*** with reference to Section 142 of the Income-tax Act, 1961. The court that in certain cases the rule of *audi alteram partem* could be observed by the authorities after the action of impounding as long as the action of impounding was succeeded by providing the opportunity of hearing immediately thereafter for challenging the impounding action.

> *"Even as wisdom often comes from the mouth of babes, so does it often come from the mouths of old people. The golden rule is to test everything in the light of reason and experience, no matter from where it comes."*
>
> - Mahatma Gandhi

141 – 30. Constitution of India, 1950

Art. 141: Law declared by the Hon'ble Supreme Court shall be binding on all courts with in territory of India - Covid-19 - Extension of limitation period due to Covid-19 Lock down - Service of all notices, summons and exchange of pleadings may be effected by e-mail, FAX, WhatsApp, Telegram, Signal etc in addition to service of the same document by e-mail simultaneously on the same date - The Reserve Bank of India may consider whether the validity period of a cheque under the Negotiable Instruments Act should be extended or not [Arbitration and Conciliation Act, 1996, S. 23(4), 29A, Banking Regulation Act, 1949, S. 35A, Commercial Courts Act, 2015, S. 12A Constitution of India, 1949, Art. 141, Negotiable Instruments Act, 1881, S. 46, Limitation Act 1908, S. 5]

Facts

In *Suo Moto* Writ Petition (C) No. 3/2020, by order dated 23.03.2020 and 06.05.2020, the Hon'ble Supreme Court ordered that period of limitation prescribed under all the provisions of Arbitration and Conciliation Act, 1996, shall be extended w.e.f. 15.03.2020 till further orders. The Ld. Attorney General had sought a minor modification in the aforesaid orders. Section 29A of the Arbitration and Conciliation Act, 1996 does not prescribe a period of limitation but fixes a time to do certain acts, i.e. making an arbitral award within a prescribed time. Similarly, Section 23(4) of the Arbitration and Conciliation Act, 1996 provides for a time period of 6 months for the completion of the statement of claim and defence. Under Section 12A of the Commercial Courts Act, 2015, time is prescribed for completing the process of compulsory pre-litigation, mediation and settlement. Service of notices, summons and exchange of pleadings/documents, is a requirement of virtually every legal proceeding. Service of notices, summons and pleadings etc. have not been possible during the period of lockdown because this involves visits to post offices, courier companies or physical delivery of notices, summons and pleadings. There was also a prayer to extend the period of validity of cheques.

Issue

Parties had approached the Hon'ble Supreme Court for extending the time where limitation was to expire during the period when there was a lockdown in view of COVID-19 or the time to perform a particular act was to expire during the lockdown.

Held

Orders in *Suo Moto* Writ Petition (C) No. 3/2020, by order dated 23.03.2020 and 06.05.2020 would also apply for extension of the time limit prescribed under Section 23(4) of the said Act. Time limit under Section 12A of the Commercial Courts Act, 2015, was liable to be extended. Therefore, the Hon'ble Court directed that the said time shall stand extended from the time when the lockdown is lifted plus 45 days thereafter. It was also directed that Service of notices, summons and pleadings etc. may be effected by e-mail, FAX, commonly used instant messaging services, such as WhatsApp, Telegram, Signal etc. However, if a party intends to effect service by means of said instant messaging services, it was directed that in addition thereto, the party must also effect service of the same document/ documents by e-mail, simultaneously on the same date.

Regarding extension of period of validity of cheques, the Hon'ble Court found that the said period has not been prescribed by any Statute but it is a period prescribed by the Reserve Bank of India under Section 35-A of the Banking Regulation Act, 1949. The Hon'ble Court did not consider it appropriate to interfere with the period prescribed by the Reserve Bank of India, particularly, since the entire banking system functions on the basis of the period so prescribed. It therefore held that the Reserve Bank of India may in its discretion, alter such period as it thinks fit. (C) No. 3/2020, dated 10-07-2020).

In re: Cognizance for Extension of Limitation (Suo Moto Writ Petition MANU/ SC/0654/2020 (SC) www.ittonline.org)

Editorial: This order is modification of the order passed by the Hon'ble Supreme Court ***In re: Cognizance for Extension of Limitation 2020 SCC OnLine SC 434.***

The order of the honourable Court would alleviate hardships faced by people in completing such formalities during the pandemic as courier/postal services have been severely affected. The decision is one of its kind and shall be available in cases limited to the period of pandemic and such other cases where it is established that the physical service is not possible. It also has the potential, on being legalized, of becoming the standard practice in normal times with the increasing uptake of information technology.

> *"Measures must always in a progressive society be held superior to men, who are after all imperfect instruments, working for their fulfilment."*
>
> \- Mahatma Gandhi

142 – 30. Constitution of India, 1950

Art. 226 : Power of High Courts to issue certain writs - Alternative remedy – Not an absolute bar on writ jurisdiction [Trade and Merchandise Marks Act, 1958, 56(4)]

Facts

Whirlpool, based in the United States of America, applied for registration of their trade mark "whirlpool" to the Registrar of Trade Marks under the Trade Marks Act, 1940, which has since been replaced by the Trade and Merchandise Marks Act, 1958. The trade mark was duly registered and a Certificate of Registration was issued, which was further renewed twice. Since renewal was not obtained after 1977, it was removed from the Register but the appellant continued to publicise their trade mark "whirlpool" as also the company name through publications which had a wide circulation in this country and thus managed to maintain their reputation among the business circle including prospective customers and buyers. The trustees of Chinar Trust, applied for registration of the trade mark "whirlpool", which was duly advertised by the Registrar in Trade Marks Journal pursuant to which the appellant filed their opposition. Their objections were dismissed by the Assistant Registrar and an appeal against this order was filed in the Hon'ble Delhi High Court.

In the meantime, "whirlpool" was registered as the trade mark of the Chinar Trust and a Certificate of Registration was granted to them. A petition for rectification and for removal of this entry from the Register had been filed by the appellant before the Registrar under Sections 45 and 46 of the Act and was still pending. The trust had also started using the trade mark "whirlpool" in relation to certain washing machines allegedly manufactured by them. The appellant, as owner of the trade mark "whirlpool", filed a suit for passing off in the Hon'ble Delhi High Court with an application for temporary injunction which was granted and SLP against the same was dismissed. The appellant filed an application for renewal of the trade mark "whirlpool" and the Registrar allowed the renewal for three successive periods.

In the meantime, Chinar Trust through its attorneys, wrote to the Registrar to take *suo moto* action under Section 56(4) for cancellation of the Certificate of Renewal granted to the appellant. The Registrar, acting on that request, issued a notice to the appellant requiring it to show cause why the Certificate of Registration be not cancelled. Against this notice, the appellant filed a writ petition in the Hon'ble Bombay High Court which was dismissed due to presence of an effective and efficacious remedy. It is against this judgment that the appeal was filed in the Hon'ble Supreme Court.

Issue

Can the High Court exercise its Writ Jurisdiction in the presence of an effective and efficacious remedy available to the Petitioner?

Views

Under Article 226 of the Constitution, the High Court, having regard to the facts of a case, has a discretion to entertain or not to entertain a writ petition. But the High Court had imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

Held

The jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, especially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation. The High Court was not justified in dismissing the writ petition at the initial stage without examining the contention that the show-cause notice issued to the appellant was wholly without jurisdiction.

Whirlpool Corporation v. Registrar of Trade Marks Mumbai (1998) 8 SCC 1

Editorial: One may also refer to judgments in ***Calcutta Discount Co. Ltd. v. ITO (1961) 41 ITR 191 (SC), A. V. Venkateswaran, Collector of Customs Bombay v. Ramcahnd Sobharaj Wadhwani & Anr. AIR 1961 SC 1506, K.S. Rashid & Son v. Income tax Investigation Commission (1954) 25 ITR 167 (SC)*** relied upon, upheld by larger bench (Three Judges) in ***Godrej Sara Lee Ltd. v. Assistant Commissioner (AA) & Or. (2009) 14 SCC 338.***

> *"Intolerance is itself a form of violence and*
> *an obstacle to the growth of a true*
> *democratic spirit."*
>
> \- Mahatma Gandhi

143 – 30. Constitution of India, 1950

Art. 368 : Power of Parliament to amend the Constitution and procedure therefor - Basic Structure of Constitution - Article 368, does not enable Parliament to alter the basic structure or framework of the Constitution [Art. 13(1), 14, 19(1)(f), 25, 26, 31, 32, Kerala Land Reforms (Amendment) Act, 1971 (Kerala Act 25 of 1971)]

Facts

Six writ petitions involve common questions as to the validity of the Twenty-fourth, Twenty-fifth and Twenty-ninth Amendments of the Constitution. Writ Petition No. 135 of 1970 was filed by the petitioner on March 21, 1970, under Article 32 of the Constitution for enforcement of his fundamental rights under Articles 25, 26, 14, 19(1)(f) and 31 of the Constitution. He prayed that the provisions of the Kerala Land Reforms Act, 1963 (Act 1 of 1964) as amended by the Kerala Land Reforms (Amendment) Act, 1969 (Act 35 of 1969) be declared unconstitutional, *ultra vires* and void. He further prayed for an appropriate writ or order be issued during the pendency of the petition. During the pendency of the writ petition, the Kerala Land Reforms (Amendment) Act, 1971 (Kerala Act 25 of 1971) was passed which received the assent of the President on August 7, 1971. The petitioner filed an application for permission to urge additional grounds and to impugn the constitutional validity of the Kerala Land Reforms (Amendment) Act, 1971 (Kerala Act 25 of 1971). The Constitution (Twenty-ninth Amendment) Act came into force on June 9, 1972 which placed both the Amendment Acts in the Ninth Schedule to the Constitution. The petitioner then moved an application for urging additional grounds and for amendment of the writ petition in order to challenge the above constitutional amendments which was allowed and a larger bench constituted to decide whether ***I. C. Golak Nath v. State of Punjab [(1967) 2 SCR 762 : AIR 1967 SC 1643 : (1967) 2 SCJ 486]*** was rightly decided or not.

View

It was the claim of the Respondents that the Parliament can abrogate fundamental rights such as freedom of speech and expression, freedom to form associations or unions, and freedom of religion. They claimed that democracy can even be replaced and one party rule established. Indeed, short of repeal of the Constitution, any form of Government with no freedom to the citizens can be set up by Parliament by exercising its powers under Article 368. It was claimed by the Petitioners that the power of Parliament is much more limited and that the Constitution gave the Indian citizens freedoms which were to subsist for ever and the Constitution was drafted to free the nation from any future tyranny of the representatives of the people.

Held

Judgment in ***Golak Nath case AIR 1967 SC 1643/(1967) 2 SCR 762/(1967) 2 SCJ 486]*** was overruled. Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution. The Constitution (Twenty-fourth Amendment) Act, 1971, is valid. Section 2(a) and 2(b) of the Constitution (Twenty-fifth Amendment) Act, 1971 is valid. The first part of Section 3 of the Constitution (Twenty-fifth Amendment) Act, 1971, is valid. The second part, namely, "and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy" is invalid. The Constitution (Twenty-ninth Amendment) Act, 1971 is valid.

Keshavanada Bharati Sripadalvaru v. State of Kerala AIR 1973 SC 1461

Editorial: Judgement passed by 13 Judge bench of the Hon'ble Supreme Court (Full Bench). The Hon'ble Bench constituted to review the Judgement was dissolved without passing of a written order. Also known as the 'fundamental rights case', the Judgement is widely recognised as a watershed moment in the development of constitutional jurisprudence of India. Eleven separate Judgements were passed by the Hon'ble Judges and case was decided with a narrow majority of one; Views of seven Hon'ble Judges to prevailed over views of six Hon'ble Judges.

> *"The human voice can never reach*
> *the distance that is covered by*
> *the still small voice of conscience."*
>
> \- Mahatma Gandhi

144 – 31. Hindu Succession Act, 1956

S. 6: Devolution of interest in coparcenary property - Interest in coparcenary property - Daughters have to be given equal share of co parcenary rights in share of property like the son even if born prior to Amendment to Hindu Succession Act [Hindu Succession Act, 1956 as amended by Hindu Succession (Amendment) Act, 2005]

Facts

Under the Hindu law, before amendment by Hindu Succession (Amendment) Act, 2005, daughters were not coparceners of the undivided family and therefore did not have same rights as sons in respect of property of the family. The law was amended in the year 2005 to provide that daughters are also co-parceners. The question concerning the interpretation of Section 6 of the Hindu Succession Act, 1956 ('the Act of 1956') as amended by Hindu Succession (Amendment) Act, 2005 ('the Act of 2005') was referred to a larger Bench in view of the conflicting verdicts rendered in two Division Bench judgments of Supreme Court in ***Prakash and Ors. v. Phulavati and Ors. (2016) 2 SCC 36*** and ***Danamma @ Suman Surpur and Anr. v. Amar and Ors (2018) 3 SCC 343.*** Other connected matters, the question involved was similar; as such, they were also heard along.

Issue

After the amendment, issue arose as to whether the right under the amendment is available to daughters only if their father was alive on the date of amendment being 09.09.2005?

Views

One school of thought was that as right of co-parcener is given to a daughter for the first time by amendment on 09.09.2005, a daughter would get right as co-parcener only if her father is alive on the date of amendment. In ***Prakash v. Phulavati (Supra)*** it was held that the rights under the substituted Section 6 accrue to living daughters of living coparceners as on 9.9.2005 irrespective of when such daughters are born. Whereas in ***Danamma v. Amar (Supra)*** daughter was given equal share though Father had died earlier in the year 2001.

Held

(i) The provisions contained in substituted Section 6 of the Hindu Succession Act, 1956 confer status of coparcener on the daughter born before or after amendment in the same manner as son with same rights and liabilities.

(ii) The rights can be claimed by the daughter born earlier with effect from 9.9.2005 with savings as provided in Section 6(1) as to the disposition or alienation, partition or testamentary disposition which had taken place before 20th day of December, 2004.

(iii) Since the right in coparcenary is by birth, it is not necessary that father coparcener should be living as on 9.9.2005.

(iv) The statutory fiction of partition created by proviso to Section 6 of the Hindu Succession Act, 1956 as originally enacted did not bring about the actual partition or disruption of coparcenary. The fiction was only for the purpose of ascertaining share of deceased coparcener when he was survived by a female heir, of Class-I as specified in the Schedule to the Act of 1956 or male relative of such female. The provisions of the substituted Section 6 are required to be given full effect. Notwithstanding that a preliminary decree has been passed, the daughters are to be given share in coparcenary equal to that of a son in pending proceedings for final decree or in an appeal.

(v) In view of the rigor of provisions of Explanation to Section 6(5) of the Act of 1956, a plea of oral partition cannot be accepted as the statutory recognised mode of partition effected by a deed of partition duly registered under the provisions of the Registration Act, 1908 or effected by a decree of a court. However, in exceptional cases where plea of oral partition is supported by public documents and partition is finally evinced in the same manner as if it had been affected by a decree of a court, it may be accepted. A plea of partition based on oral evidence alone cannot be accepted and to be rejected out rightly. [Diary No. 32601 of 2018, SLP (C) Nos. 684 of 2016, 35994 of 2015, 38542 of 2016, 6403, 14353, 24901 of 2019 and 1766-1767 of 2020 dt. 11-08-2020)]

Reference was made to following observation in ***Savita Samvedi (Ms.) v. UOI (1996) (2) SCC 380***:

"6. A common saying is worth pressing into service....

A son is a son until he gets a wife. A daughter is a daughter throughout her life.

7 ....The eligibility of a married daughter must be placed on a par with an unmarried daughter (for she must have been once in that state),..... to claim the benefit........(Otherwise, it would be) unfair, gender-biased and unreasonable, liable to be struck down Under Article 14 of the

> Constitution.... It suffers from twin vices of gender discrimination *inter se* among women on account of marriage.”

(Diary No. 32601 of 2018 SLP (C) Nos. 684 of 2016 & Ors dt. 11-8-2020)

Vineeta Sharma v. Rakesh Sharma MANU/SC/0582/2020 (SC). www.itatonline.org

Editorial: ***Prakash and Ors. v. Phulavati and Ors. (2016) 2 SCC 36*** is overruled and ***Danamma @ Suman Surpur and Anr. v. Amar and Ors. (2018) 3 SCC 343*** is partly overruled.

“It is any day better to stand erect with a broken and bandaged head than to crawl on one’s belly , in order to be able to save one’s head.”

- Mahatma Gandhi

145 – 32. Indian Evidence Act, 1872

S. 65B : Admissibility of electronic records - Data - Electronic Records – Document - furnishing certificate [S. 2(t), 65A, 65B(4), 69, Information Technology Act, 2000, 67C, Representation of the People Act, 1951, S. 80, 81]

Facts

Two election petitions were filed by the Respondents before the Bombay High Court under Sections 80 and 81 of the Representation of the People Act, 1951, challenging election of the Appellant on the ground that the nomination papers were filed after the stipulated time of 03.00 p.m. on 27.09.2014. Petitioners had relied upon electronic record of video-camera arrangements (CDs/VCDs), both inside and outside the office of the Returning Officer of the Election Commission, to prove that the nomination papers were offered only at 3.53 p.m. (i.e. beyond 3.00 p.m.). Though there was no written certificate as required by Section 65B(4) of the Evidence Act, the statement given by the Returning Officer in her cross examination, was taken as a certificate u/s 65B(4). Based on this, it was held that the CDs/VCDs were admissible in evidence, and based upon this evidence it was found that, as a matter of fact, the nomination forms by the Appellant had been improperly accepted. The election of the Appellant was therefore declared void in the impugned judgment of the High Court.

Issue

Section 65B of the Indian Evidence Act, 1872 provides for furnishing of a certificate by the person who relies upon electronic records as evidence; which should be issued by the official who is responsible for operating the relevant devise in order to admit the said electronic record as documentary evidence. The issue before the Apex Court was whether the requirement of certificate under Section 65B(4) of Indian Evidence Act is mandatory for production of electronic evidence?

Views

In ***Anvar P. V . v. P. K. Basheer (2014) 10 SCC 473,*** Hon'ble Supreme Court held that an electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements of furnishing certificate under section 65B are satisfied.

However, in ***Shafhi Mohammad v. The State of Himachal Pradesh (2018) 2 SCC 801*** it was held that requirement of a certificate under section 65B was merely procedural and could be relaxed by the court in cases where party wanting to produce secondary electronic record is unable to obtain the necessary certificate because of non-possession of relevant device.

Held

On account of the above mentioned conflicting pronouncements; matter in the present case was referred to the larger bench by the two judge bench.

The Hon'ble Court observed that the three Judge Bench decision in ***Tomaso Bruno v. State of U.P. [(2015) 7 SCC 178,*** which was relied upon heavily in case of ***Shafhi Mohammad v. The State of Himachal Pradesh (supra)***, was per incuriam. The major premise of Shafhi Mohammad (supra) that such certificate cannot be secured by persons who are not in possession of an electronic device was wholly incorrect. All the efforts should be made to obtain the requisite certificate by the party u/s. 65B and if still the concerned authority refuses to provide such certificate or does not reply, then in such case the party can approach the court seeking production of such certificate from the concerned authority. Once such application is made to the court or when defective certificate is issued; the court will order/direct the concerned authority through summon to issue the requisite certificate. An application can always be made to a Judge for production of such a certificate from the requisite person under Section 65B(4) in cases in which such person refuses to give it. Recourse can be had to section 165 of the Indian Evidence Act, 1872 or Order XVI of the Civil Procedure Code, 1908 or section 91 of the Code of Criminal Procedure, 1973.

It was held that the certificate required under Section 65B(4) of the Indian Evidence Act, 1872 is a condition precedent to the admissibility of evidence by way of electronic record.

The law laid down in ***Anvar P. V. v. P. K. Basheer (Supra)*** was held as the correct legal position and decision in case of ***Shafhi Mohammad v. The State of Himachal Pradesh (supra)*** was overruled.

It was clarified that requirement of certificate under section 65B is not necessary when the original document (primary evidence) itself is produced.

Section 67C of the Information Technology Act, 2000 provides for Preservation and retention of information and the Hon'ble Court directed that appropriate rules and directions should be framed relating to retention of data involved in trial of offences, their segregation, rules of chain of custody, stamping and record maintenance for the entire duration of trials and appeals and also in case of preservation of meta-data to avoid any corruption of data.

In a separate but concurring judgement, Justice V. Ramasubramanian also observed that with ever-changing developments in technology and considering amendments made by various legislations of the world, there is need to relook at Section 65B of the Indian Evidence Act.

Arjun Panditrao Khotkar v. Kailash Kusahanrao Goryantal (MANU/SC/0521/2020 (SC)

Editorial: Use of digital means of record is common and the judgment is a good guide for retention and production of evidence in digital format before the Hon’ble Courts.

“Self-respect knows no considerations.”

- Mahatma Gandhi

146 – 33. Indian Partnership Act, 1932

S. 5: Partnership not created by status - Property of the firm - Interest of a partner in partnership assets, whether a moveable or immoveable property – Partner's rights during the existence of the partnership – Partner's rights after the dissolution of the partnership or with his retirement from the partnership firm - Unregistered deed of release in a partnership firm whether admissible as evidence even though the partnership owned immoveable property [S. 12, 14, 15, 29, 31, 48, Indian Registration Act, 1908, S. 7(1), 37, 48]

Facts

The members of two Joint Hindu families entered into a partnership for carrying on business. Each family had half share in that business. The capital of the partnership consisted, among other things, of some lands belonging to the families as well as lands later acquired by the firm. The members of one family filed suit in 1949 for dissolution of the partnership and the taking of accounts. The members of the second family raised the defense that the partnership was already dissolved in 1936 and that accounts were then settled between the two families. In support of that plea, they relied upon an unregistered document, which showed that the partnership had come to an end. It was contended by the appellants, that since the partnership assets included immovable property and the document recorded the relinquishment by the members of the plaintiff family of their interest in those assets, the document was compulsorily registerable under Section 17(1)(c) of the Registration Act, 1908 and that since it was unregistered, it was inadmissible as evidence to prove the dissolution as well as the settlement of accounts.

Issue

The question which arose for consideration was whether the interest of a partner in partnership assets, comprising of movable as well as immovable property, should be treated as movable or immovable property for the purposes of Section 17(1) of the Registration Act, 1908?

Held

The concept of partnership is to embark upon a joint venture and for that purpose to bring in as capital, money and/or property including immovable property. Once that is done, whatever is brought in would cease to be the asset of the person who brought it in. It would be the asset of the partnership in which all the partners would have interest in proportion to their share in the business of partnership. The person who brought it in would, therefore, not be able to claim or exercise any exclusive right over any property which he had brought in, much less over any other partnership property. He would not be able to exercise his right even to the extent of his share in the business of the partnership. His right during the subsistence of the partnership was to get his share of profits from time to time as may be agreed upon among the partners and after the dissolution of the partnership or with his retirement from partnership of the value of his share in the net partnership assets as on the date of dissolution or retirement after a deduction of liabilities and prior charges. It is true that even during the subsistence of the partnership a partner may assign his share to another. In that case what the assignee would get would be only that which is permitted by s. 29(1), that is to say, the right to receive the share of profits of the assignor and accept the account of profits agreed to by the partners.

The karar executed in favour of one of the families, only recorded the fact that the partnership had come to an end. It could not be said to convey any immovable property by a partner to another, expressly or by necessary implication, nor was there any express reference to any immovable property, except a recital of an event which had taken place earlier. Therefore, the unregistered deed of release by one family of its share in the partnership was admissible as evidence, even though the partnership owned immovable property.

The interest of a partner in partnership assets, comprising of movable as well as immovable property, should be treated as movable property. Right of a partner during the subsistence of the partnership, was to get his share of the profits from time to time, as was agreed upon among the partners, and on the dissolution of the partnership, or retirement from the partnership, right of the partner is to receive the money value of his share in the net partnership assets. During the subsistence of the partnership, no partner could deal with any portion of the firm's property as his own. Nor could he assign his interests in a specific item of the partnership property to anyone though the same may be in his/her name. During subsistence of partnership, a partner does not have right on any specific asset and his right is only a movable property even if the partnership owns immovable property too.

Reference was made to judgment of the Hon'ble Madras High Court in ***Chitturi Venkataratnam v. Siram Subba Rao (1926) Appeal No. 42 & 43 of 1925 (Mad)***, in which judgment, after discussing certain English decisions and the decisions in ***Sudarsanam Maistri v. Narasimhulu Maistri (1902) ILR 25 Mad 149*** and ***Gopala Chetty v. Vijayaraghavachariar I.L.R. 45 Mad. 378 (P.C.) [1922] A.C.1*** and the opinion of Jardine J in Joharmal's case I.L.R. 17 Bom. 235, it was held that an unregistered deed of release by a partner of his share in the partnership business is admissible as evidence, even where the partnership owns immovable property.

Addanki Narayanappa v. Bhaskar Krishnappa AIR 1966 SC 1300/1966 SCR (3) 400

Editorial: This is one of the oft referred to judgments for understanding the concept of partnership, assets of partnership and rights of partners in property of the partnership.

Reference can also be made to the decision of Hon'ble Supreme Court in ***S. V. Chandra Pandian v. S. V. Sivalinga Nadar (1995) 212 ITR 592 (SC)*** where considering the above decision, the Supreme Court held that share of a partner in property of the firm, whether immovable or movable, should be treated as movable property. Partners cannot deal with the firm's property in their personal capacity, even though for sake of convenience it is standing in their individual name.

> *"What is true of the individual will be tomorrow true of the whole nation, if individuals will but refuse to lose heart and hope."*
>
> \- Mahatma Gandhi

147 – 34. Indian Succession Act, 1925

S. 63: Execution of wills- Requirements of a valid will – The attesting witness should speak not only about the testator's signature or affixing his mark to the will but also that each of the witnesses had signed the will in the presence of the testator – execution must be proved by at least one attesting witness, if an attesting witness is alive [Indian Evidence Act, 1872, S. 68]

Facts

Appellant filed an application alleging that her late father in-law had duly executed his last will on 13-8-86 in accordance with law, in presence of two attesting witnesses, bequeathing a plot of land in Imphal in her favour. The Respondents questioned the genuineness of execution of the will and contended that the court fee was not properly paid. The District court opined in favour of the Appellant and directed that a letter of administration be issued in her favour on her deposit of the requisite stamp. The High Court held that evidence of attesting witness was vague and it cannot be said that there was due execution of the will in question. The High Court opined that no issue was framed regarding the genuineness of the Will, and the requirements of Section 63 and Section 68.

Issue

Whether the Will under question and the execution thereof was in accordance with law?

Held

The Court relied on ***H. Venkatachala Iyengar v. B. N. Thimmajamma & Others 1959 AIR 443*** to hold that there may be cases in which the execution of the will may be surrounded by suspicious circumstances. Such suspicious circumstances may be a shaky signature, a feeble mind and unfair and unjust disposal of property or the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit or the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.

For this purpose, Section 68 of the Evidence Act postulates the mode and manner of proof of execution of document which is required by law to be attested stating that the execution must be proved by at least one attesting witness, if an attesting witness is alive and subject to the process of the court and capable of giving evidence.

As per provisions of Sec. 63 of the Succession Act, for the due execution of a will:

(i) the testator should sign or affix his mark to the will;

(ii) the signature or the mark of the testator should be so placed that it should appear that it was intended thereby to give effect to the writing as a will;

(iii) the will should be attested by two or more witnesses, and

(iv) each of the said witnesses must have seen the testator signing or affixing his mark to the will and each of them should sign the will in the presence of the testator.

The attestation of the Will in the manner stated above was not an empty formality. It means signing a document for the purpose of testifying of the signatures of the executants. The attested witness should put his signature on the Will *animo attestandi*. It is not necessary that more than one witness be present at the same time and no particular form of attestation is necessary.

Yet again, Section 68 of the Evidence Act postulates the mode and manner of proof of execution of document which is required by law to be attested stating that the execution must be proved by at least one attesting witness, if an attesting witness is alive, and subject to the process of the court and capable of giving evidence.

Having regard to the fact that the will was a registered one and the propounder had discharged the onus, it was held that in such circumstances, the onus shifts to the contestant opposing the will to bring material on record meeting such *prima facie* case in which event the onus shifts back on the propounder to satisfy the court affirmatively that the testator did not know well the contents of the will and in sound disposing capacity executed the same. (CA No. 1600 of 2009 dt. 6-3-2009)

Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh (2009) 4 SCC 780

Editorial: The decision was relied upon in ***Gopal Swaroop v. Krishna Murari Mangal & Ors [CA No. 6801 of 2003]*** to hold that in the matter of proof of documents as in the case of the proof of Wills, it is ideal to expect proof with mathematical certainty and the test to be always applied is the test of satisfaction of a prudent mind in such matters.

"The law of sacrifice is uniform throughout the world. To be effective it demands the sacrifice of the bravest and the most spotless."

- Mahatma Gandhi

148 – 35. Limitation Act, 1963

S. 5: Extension of prescribed period in certain cases - Sufficient cause – Condonation of delay – Delay of 3671 days - No reason to decline benefit merely due to delay in filing of appeal when in similar cases benefit was derived by similar concerns [S. 18, S. 54, Land Acquisition Act, 1894]

Facts

There was a delay of 3671 days, in filing of appeal, on the ground that the villagers entrusted relevant papers to one co-villager, well conversant with the court proceedings and the said person had taken steps to engage an advocate at Hyderabad and the said person informed that the appeal was filed and left for Kuwait to eke out his livelihood. Thus, the appellants/claimants were under the impression that the appeal has been filed. The claimants have further stated that when they inquired the said person, he informed them that he went to the house of the Advocate and he learnt that the said Advocate is no more and expired in 2012 itself and on enquiry with the clerk of the said advocate, he learnt that no appeal has been filed and this has caused a delay of 3671 days in filing the appeal. The High Court rejected the explanation given by the appellants on the ground that there are contradictions between the affidavit filed by the said person and the stand of the claimants and being not satisfied with the reason for the delay of 3671 days in preferring the appeal.

Issue

The issue was whether the lower authority could decline the benefit available to the appellant only due to the reason of delay of 3671 days in filing an appeal?

View

It was observed by the Court that when the concerned court has exercised its discretion either condoning or declining to condone the delay, normally the superior court will not interfere in exercise of such discretion. The true guide is whether the litigant has acted with due diligence.

Held

Since the Appellants/claimants are the agriculturists whose lands were acquired and when similar situated agriculturists were given a higher rate of compensation, there is no reason to decline the same to the Appellants. Merely on the ground of delay such benefit cannot be denied to the Appellants. Accordingly, the delay was condoned. (CA No. 9287 of 2017 (SLP (C) No. 14839 of 2015 19.07.2017)

K. Subbarayudu and Ors. v. The Special Deputy Collector (Land Acquisition) (2017) 12 SCC 840/MANU/SC/0885/2017

Editorial: Hon'ble Supreme Court and High Courts have been, consistently taking, a pragmatic stand with respect to the condonation of delay is concerned. Especially, when non-condonation is going to adversely affect the inherent or vested rights of the citizen.

> *"I look only to the good qualities of men. Not being faultless myself, I won't presume to probe in to the faults of others."*
>
> \- Mahatma Gandhi

149 – 36. Motor Vehicles Act, 1988

S. 2(30): Owner – As appearing on records – Liable to pay compensation [Motor Vehicles Act, 1988, S. 2(30)]

Facts

In the present case, an accident had taken place where the Tribunal had granted an award holding the first respondent (original owner/first owner) responsible together with the driver. It was contended that there were a series of transfers which took place, however, the name in the records were not changed/altered.

Issue

Who was the owner of the vehicle & liable to pay compensation

View

It was observed by the apex court that the expression ‘Owner’ in S.2(30), it is the person in whose name the motor vehicle stands registered who, for the purposes of the Act, would be treated as the ‘owner’. However, where a person is a minor, the guardian of the minor would be treated as the owner.

In a situation such as the present where the registered owner has purported to transfer the vehicle but continues to be reflected in the records of the registering authority as the owner of the vehicle, he would not stand absolved of liability.

The principle underlying the provisions of Section 2(30) is that the victim of a motor accident or, in the case of a death, the legal heirs of the deceased victim should not be left in a state of uncertainty. A claimant for compensation ought not to be burdened with following a trail of successive transfers, which are not registered with the registering authority. To hold otherwise would be to defeat the salutary object and purpose of the Act. Hence, the interpretation to be placed must facilitate the fulfilment of the object of the law.

Held

That since in the present case, the First respondent was the ‘owner’ of the vehicle involved in the accident within the meaning of Section 2(30). The liability to pay compensation stands fastened upon him. (CA No 1427 of 2018 (Arising out of SLP (C) No. 18943 of 2016 dt. 6-2-2018)

Naveen Kumar v. Vijay Kumar AIR 2018 SC 983/MANU/SC/0077/2018

Editorial: The ratio laid down in this decision is very important not only with respect to the claims under the Motor Vehicle Act, 1988. But, it has ramifications where the vehicles are used in illegal activity after the same are sold but the transfer of the same has not been effected in the records maintained by the authorities under the Motor Vehicle Act, 1988.

> *"I believe in the fundamental truth of all great religions of the world."*
>
> \- Mahatma Gandhi

150 – 37. Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, (SARFAESI Act)

S. 13 : Enforcement of security interest - Protected tenant - Tenants covered by the Rent Control act cannot be dispossessed in an action initiated by the bank against the landlord under the SARFAESI Act [S. 14, Maharashtra Rent Control Act 1999, S. 55(2), Transfer of Property Act, 1882, S. 106]

Facts

The Landlords had approached the Bank of India for a financial loan, which was granted against equitable mortgage of several properties belonging to them, including the property in which the Appellant before the Apex Court was a tenant. As the landlord failed to pay the dues within the stipulated time in terms of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Int. Act, 2002 (SARFAESI Act), their account became a non-performing asset. Consequently the Bank filed an application before the Chief Metropolitan Magistrate, Mumbai under section 14 of the SARFAESI Act for seeking possession of the mortgaged properties which are in actual possession of the Appellant. The Appellant then filed an application as an intervenor to stay the execution of the order passed by the Chief Metropolitan Magistrate. The learned Chief Metropolitan Magistrate dismissed the application filed by the Appellant. The matter ultimately reached the Apex court.

Issue

Whether a ‘protected tenant’ under The Maharashtra Rent Control Act, 1999 (‘Rent Control Act’) can be treated as a lessee, and whether the provisions of the ‘SARFAESI Act’ override the provisions of the Rent Control Act?

Views

It is a settled position of law that once tenancy is created, a tenant can be evicted only after following the provisions of the Rent Control Act. Section 15 of the Rent Control Act mentions that no ejectment of a tenant can take place as long as the standard rent is being paid to the landlord, apart from the other conditions mentioned therein. Therefore a landlord cannot be permitted to do indirectly what he has been barred from doing under the Rent Control Act, more so when the two legislations operate in completely different fields. The provisions of the SARFAESI Act cannot be used to override the provisions of the Rent Control Act. Doing so would render the entire scheme of all Rent Control Acts operating in the country as useless and nugatory. Tenants would be left wholly to the mercy of their landlords and in the fear that the landlord may use the tenanted premises as a security interest while taking a loan from a bank and subsequently default on it. Conversely, a landlord would simply have to give up the tenanted premises as a security interest to the creditor banks while he is still getting rent for the same. In case of default of the loan, the maximum brunt will be borne by the unsuspecting tenant, who would be evicted from the possession of the tenanted property by the Bank under the provisions of the SARFAESI Act. Under no circumstances can this be permitted.

Held

In view of the foregoing, the provisions of the SARFAESI Act cannot be used to override the provisions of the Rent Control Act and accordingly the impugned judgments and orders passed by the High Court/Chief Metropolitan Magistrate are set aside and the appeals are allowed. (CrA No. 52 of 2106 (Arising out of SLP (Cri) No 8060 of 2015 & Ors dt. 20-1-2016)

Vishal N. Kalsaria v. Bank of India and Others. AIR 2016 SC 530/MANU/SC/0061/2016

Part 2:

S. 13 : Enforcement of security interest - Protected tenant - Written Lease agreements - Tenants covered by the Rent Control act cannot be dispossessed in an action initiated by the bank against the landlord under the SARFAESI Act on the premise that no written lease agreement is on record. [S. 14, Maharashtra Rent Control Act 1999, S. 55(2), Transfer of Property Act, 1882, S. 106]

Facts

The Landlords had approached the Bank of India for a financial loan, which was granted against equitable mortgage of several properties belonging to them, including the property in which the Appellant before the Apex Court was a tenant. As the landlord failed to pay the dues within the stipulated time in terms of the SARFAESI Act, 2002, their account became a non-performing asset. Consequently the Bank filed an application before the Chief Metropolitan Magistrate, Mumbai under section 14 of the SARFAESI Act for seeking possession of the mortgaged properties which are in actual possession of the Appellant. The Appellant then filed an application as an intervenor to stay the execution of the order passed by the Chief Metropolitan Magistrate. The learned Chief Metropolitan Magistrate dismissed the application filed by the Appellant. The matter ultimately reached the Apex court. One of the contentions raised was that the Appellant had not provided any registered document proving the lease to be in existence.

Issue

Whether, in the absence of a written lease agreement, the tenancy of the Appellant can be questioned?

Views

Section 106 of the Transfer of Property Act, 1882 does provide for registration of leases which are created on a year to year basis. However, the Act remains silent on the position of law in cases where the agreement is not reduced into writing or in cases of oral agreement. It can be said that if the two parties are executing their rights and liabilities in the nature of a landlord-tenant relationship and if regular rent is being paid and accepted, then the *mere factum* of non-registration of deed will not make the lease itself nugatory. If no written lease deed exists, then such tenants are required to prove that they have been in occupation of the premises as tenants by producing such evidence in the proceedings under Section 14 of the SARFAESI Act before the learned Magistrate. Further, in terms of Section 55(2) of the Rent Control Act, the onus to get such a deed registered is on the landlord.

Held

In light of the above, neither the landlord nor the banks can be permitted to exploit the fact of non-registration of the tenancy deed against the tenant. (CrA No. 52 of 2106 (Arising out of SLP (Cri) No 8060 of 2015 & Ors dt. 20-1-2016)

Editorial: Provisions of the SARFAESI Act, cannot be used to override the provisions of the Rent Control Act. In ***Delhi Punjab Goods Carrier P. Ltd. v. Bank of Baroda AIR 2008 P & H 107*** the Court held that, tenancy created after creation of charge by borrower on property, no protection in law available to such tenant

Vishal N. Kalsaria v. Bank of India and Others AIR 2016 SC 530//MANU/SC/0061/2016

> *"There is no one without faults, not even men of God. They are men of God not because they are faultless, but because they know their own faults, they strive against them, they do not hide them, and are ever ready to correct themselves."*
>
> - Mahatma Gandhi

151 – 38. Right to Information Act, 2005

S. 8(1)(j) : Exemption from disclosure of information – Right to Privacy – Information sought for details such as income tax return, assets and liabilities, gifts accepted, etc which come under the purview of 'Personal Information' – Information required needs to have some relationship to any public activity or public interest and should justify larger public interest for disclosure – Held, such information constituted personal information and is exempted from disclosure under S. 8(1)(j) of the Act

Facts

The petitioner approached the Regional Provident Fund Commissioner and made an application under the Right to Information Act, 2005 requiring details relating to an employee employed as an Enforcement Officer in Sub-Regional Office. Copies of appointment order, salary details, copies of memo, show cause notice, censure issued, return of assets and liabilities, details of investment and other related details, item wise and value wise details of gifts accepted, details of movable, immovable properties, complete enquiry proceedings, etc. Aggrieved by the said order, the petitioner appealed to the Central Information Commissioner (CIC). Such information was declared to be personal information and hence exempted from disclosure. An appeal before the high Court and thereafter a Letters Patent Appeal (LPA) was filed before the High Court but the result was the same. Thereafter, the petitioner filed a Special leave Petition (SLP) before the Apex Court.

Issue

Whether information regarding the respondent's personal matters pertaining to his service career, details of his assets and liabilities, movable and immovable properties, etc was qualified to be personal information as defined in clause (j) of Section 8(1) of the RTI Act?

Views

The performance of an employee/officer in an organization is primarily a matter between the employee and the employer and normally those aspects are governed by the service rules. The information mostly sought for finds a place in the income tax return of the respondent. The aforementioned requirements fall under the expression "personal information", the disclosure of which has no relationship to any public activity or public interest.

Held

The petitioner in the instant case has not made out a bona fide public interest in seeking information; the disclosure of such information would cause unwarranted invasion of privacy of the individual under section 8(1)(j) of the RTI Act. The petitioner did not succeed in establishing and convincing the authorities that the information required is for the larger public interest. That being the fact, the petition was dismissed. (SLP (C) No. 27734 of 2012 (Arising out of CC 14781/2012 dt. 3-10-2012)

Girish Ramchandra Deshpande v. Central Information Commissioner & Ors. (2013) 1 SCC 212/MANU/SC/0816/2012

Editorial : In ***Secretary General Supreme Court of India v. Subhash Chandra Agarwal AIR 2010 Del 159 (FB)*** the Court held that the notes or jotting by Judges or their draft Judgements, they are meant only for the use of judges and cannot be held to be a part of a record 'held' by the public authority.

> *"A nation's culture resides in the hearts and in the soul of its people."*
>
> \- Mahatma Gandhi

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About All India Federation of Tax Practitioners (AIFTP)

Inspired by the ideology to have a common platform for all those who practice taxation laws, irrespective of their individual affiliations and to enable them to share the benefits of their learning and sharing of knowledge, eminent professionals from the fields of Direct and Indirect Taxes conceived the idea of establishing an All India body for the tax practitioners. It was at the opening ceremony of the National Conference held on 11-11-1976 organised by The Chamber of Income Tax Consultants Mumbai under Presidentship of Shri B. C. Joshi, that the doyens of the Professionals christened the Association in the presence of former Chief Justice of India, Hon'ble Justice J. C. Shah, distinguished Jurist Padma Vibhushan Dr. N. A. Palkhivala Senior Advocate and Shri Ram Rao Adik, Senior Advocate, Advocate General of Maharashtra. Shri N. C. Mehta, Chartered Accountant, Mumbai, was elected as Founder President of the All India Federation of Tax Practitioners (AIFTP) of and Shri P. C. Joshi was elected as Secretary General. The AIFTP has completed 44 glorious years of its existence.

The main object of AIFTP is to spread education in the matters relating to tax laws, other laws and Accountancy.

The AIFTP has a well-equipped registered Head Office at 215, Rewa Chambers, 31, New Marine Lines, Mumbai- 400 020. The total strength of National Executive Committee Members is 75 headed by a National President, with a Deputy President, five Vice-Presidents and five Joint Secretaries. Present the National President Mrs Nikita Badheka, Advocate from Mumbai and Mr M. Srinivasa Rao, Tax Practitioner from Eluru (AP) is the Deputy President. Our eminent Past National Presidents are Late Shri N. C. Mehta, Chartered Accountant, Mumbai (1978-83), Late Shri B. C. Joshi, Advocate, Mumbai (1984-90), Late Shri L. M. Mahurkar, Tax Practitioner, Nagpur (1991-93), Shri P. C. Joshi, Advocate, Mumbai (1994-96), Late Shri Sukumar Bhattacharya, Advocate, Kolkata (1997-99), Late Dr. N. M. Ranka, Senior Advocate, Jaipur (2000-02), Dr. K. Shivaram, Senior Advocate, Mumbai (2003-05), Late Shri V. Ramachandran, Senior Advocate, Chennai (2006-07), Shri Bharat Ji Agrawal, Sr. Advocate, Allahabad (2008-09), Shri M. L. Patodi, Advocate, Kota (2010-11), Late Shri S. K. Poddar, Advocate, Ranchi (2012-13) Shri J. D. Nankani, Advocate, Mumbai (2014-15), Dr. M. V. K. Moorthy, Advocate, Hyderabad (2016), Mrs Prem Lata Bansal, Senior Advocate, Delhi (2017) Shri Ganesh Purohit, Senior Advocate, Jabalpur (2018), Dr. Ashok Saraf, Senior Advocate, Guwahati (2019) and Mrs. Nikita Badheka, Advocate, Mumbai has been elected as National President for the year 2020.

The membership of the AIFTP includes Senior Advocates, Advocates, Solicitors, Chartered Accountants and Tax Practitioners, Practicing Direct or Indirect Taxes, from all States in the Country. Its members enjoy a strong bond of fellowship leading to fraternal brotherhood amongst professionals. The AIFTP is the symbol and spirit of National Integration. As of today, the AIFTP is the only voluntary professional organisation of our country which has 138 Professional Associations as its affiliated members and more than 8701 individuals as life members from 27 States and 4 Union Territories.

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The AIFTP publishes a monthly Journal covering the latest reported & unreported decisions of the Supreme Court, High Courts and Income Tax Appellate Tribunals including the articles, opinions and latest developments on direct and indirect taxes by experts in the field. The unique feature is that every quarter, it publishes the gist of Important Case Laws published in 33 Tax Magazines, www.itatonline.org from across the country. Yearly digest of case laws from 2012 onwards are also available in the website www.aiftponline.org and www.itatonline.org which can be down loaded by the members and tax professionals.

AIFTP publishes a monthly newsletter called AIFTP TIMES which is sent to all the members free of charge. Newsletter contains important notifications, circulars and other topical information apart from various activities of the AIFTP.

AIFTP website i.e. www.aiftponline.org, is an informative source for the members. The website is regularly updated by a team of dedicated professionals. The Journal and Times are available on the website.

AIFTP has been making representations for better tax law and tax administration. AIFTP and Associate members have filed more than 35 Public interest petitions before various Courts for better administration of tax laws and to up hold the independency of judicial forums. AIFTP regularly sends Pre- and Post-Budget Memorandums. Many of the suggestions and the recommendations are accepted. It regularly publishes books in simple language and question-answer format at a low cost. It has published more than 43 publications till date. Its first e-publication on the subject of Direct Tax Vivad se Vishwas Scheme 2020 and the same was released on 22-04-2020.

AIFTP in association with Income Tax Appellate Tribunal Bar Association, Mumbai has published a publication named "Digest of Case Laws — Direct Taxes (including allied laws) (2003-2011)", to Commemorate the 150th Year anniversary of the Bombay High Court. In the year 2015, "Interpretation of Taxing Statutes – Frequently asked questions", which was dedicated to Honourable Mr. Justice S. H. Kapadia, former Chief Justice of India, (2017) Income tax Appellate Tribunal – A Fine Balance, Law Practice, procedure and conventions – Frequently asked questions – Dedicated to Padma Vibhushan Late Dr. N. A. Palkhivala, Senior Advocate AIFTP has published a publication titled (2018) "311 - Frequently asked questions on Survey – Direct taxes – Dedicated to Honourable Justice late Dr. B. P. Saraf, Former Chief Justice of Jammu and Kashmir High Court. (2020) "151 Land mark judgements of the Hon'ble Supreme Court of India - 151 years of Mahatma Gandhi" on the auspicious occasion of 151st birth anniversary of Father of the Nation Mahatma Gandhi. This publication dedicated to Honourable Justice late Dr. B. P. Saraf, former Chief Justice of Jammu and Kashmir High Court.

AIFTP jointly with the Association Members, organise National Seminars, Conferences and Conventions in various parts of the Country to update its members on Direct and Indirect Taxation. A unique feature of the AIFTP is that its faculties, chairmen, trustees, office bearers and members of the National Executive and Zonal Committees pay a registration fee and bear their own travel and stay expenses. From April 2020 to September 2020 during the period of Covid-19 Pandemic, the AIFTP has conducted more than 100 Webinars on various subjects and all webinars were without any charges. AIFTP as an association with the help of their members have contributed an amount of Rs. 11 lakhs to the Prime Minister Cares Fund. In the year, 1999 the AIFTP had published a publication titled "NRI - A Legal companion" which was dedicated to the War Heroes of Kargil and the entire surplus of the said publication was handed over to the Defence fund.

For the development of the Tax Bar, the "Nani Palkhivala Memorial National Tax Moot Court Competition" and "Research in Tax Laws" was started under the banner of "Palkhivala Foundation" at Mumbai, wherein every year students from more than 25 leading law colleges of India participate in the competition and more than 100 Law Colleges are participating in the Research Competition.

AIFTP has adopted the Code of Ethics to its members which is part of the constitution of the AIFTP.

As per an appeal made by the AIFTP, the Government of India has released Commemorative Postage Stamp in Memory of Padma Vibhushan Late Dr. N. A. Palkhivala, Senior Advocate on 16th January, 2004. The then Hon'ble Prime Minister of India, Shri Atal Bihari Vajpayee released the Commemorative Postage Stamp at Mumbai.

Since 2004 AIFTP conducts regular International Study tours, in the first study tour a seminar was held at Law Society of England and Wales on 24-04-2004, wherein a publication titled "India-A Global Business Destination" was released at England. In the first International Tax Conference which was held on 19th to 21st November 2009 at Mumbai wherein heads of Professional Organisations from 16 Countries attended the International Tax Conference.

AIFTP is considered a National Integration of Tax Professionals of India. AIFTP have many eminent professionals as members, some have been elevated as Judges of the Supreme Court, High Courts, and Tribunals. Most of the leading Senior Advocates, Advocates who practice on Direct or Indirect Taxes, many past Presidents of Institute of Chartered Accountants of India, Chairman and member of Bar Councils of various States, leading Lawyers, Chartered Accountants and Tax Practitioners of our country are esteemed members. AIFTP is recognised globally as one of the vibrant Associations of Tax Practitioners of India.

On 11-11-2016, on the occasion of completion of 40 years of the AIFTP a publication and a short film titled "40 Years of Milestones and Beyond" was released by the AIFTP which contains the history of the AIFTP. The same is available in our website.

With active support of the members of the AIFTP the flag of the AIFTP will fly high for the times to come.

About the Publication

151 land Mark judgements of the Hon'ble Supreme Court of India – 151 st years of Mahatma Gandhi

This publication is an acknowledgment of gratitude to the Hon'ble Supreme Court of India, on the auspicious occasion of 151st birth anniversary of father of the Nation Mahatma Gandhi.

This publication is divided in to two parts. First part of the publication deals with 101 landmark judgements of the Hon'ble Supreme Court of India on direct taxes which are digested section wise. Some of the judgments which are dealing with Indian Income-tax, 1922, still holds good while interpreting the Income-tax Act, 1961. For ready reference corresponding reference of, Income-tax, 1961 are referred On the second part 50 land mark judgements of the Honourable Supreme Court are digested on Indirect taxes and Allied laws. The digested cases on indirect taxes will be relevant for the interpretation of Goods and Services taxes.

In this publication Land mark of Judgements from 38 Acts are digested. Speech of Honourable Prime Minster of India Shri Narendra Modi, to mark 150 Birth Anniversary of Mahatma Gandhi at UN. on 25-9-2019, Messages from Honourable Judges and 151 Quotations of Gandhiji Bapuji which are cited in this publication will serve as an inspiration to the readers.

Editorial note by the editorial team on each case are immense value addition to this publication.

Cases laws digested on Allied laws are selected on the basis of important Acts which are very much relevant to the tax practitioners and tax payers across the country.

The index to case laws s prepared in alphabetical order. For instance the revenue is the petitioner/applicant the index is shown as under:

Case: Presented in index case laws as:

*CIT v. Raja Benoy Kumar Sahas Roy - Raja Benoy Kumar Sahas Roy; CIT v.**

*UOI v. U.A.E. Exchange Center - U.A.E. Exchange Center; UOI v.**

Kale Khan Mohammad Hanif v. CIT - Kale Khan Mohammad Hanif v. CIT

The subject wise and section wise index will aid in swift search of case laws on the issue. This publication will serve as a useful reference to tax professionals, tax payers and also tax administration.

ETHICS
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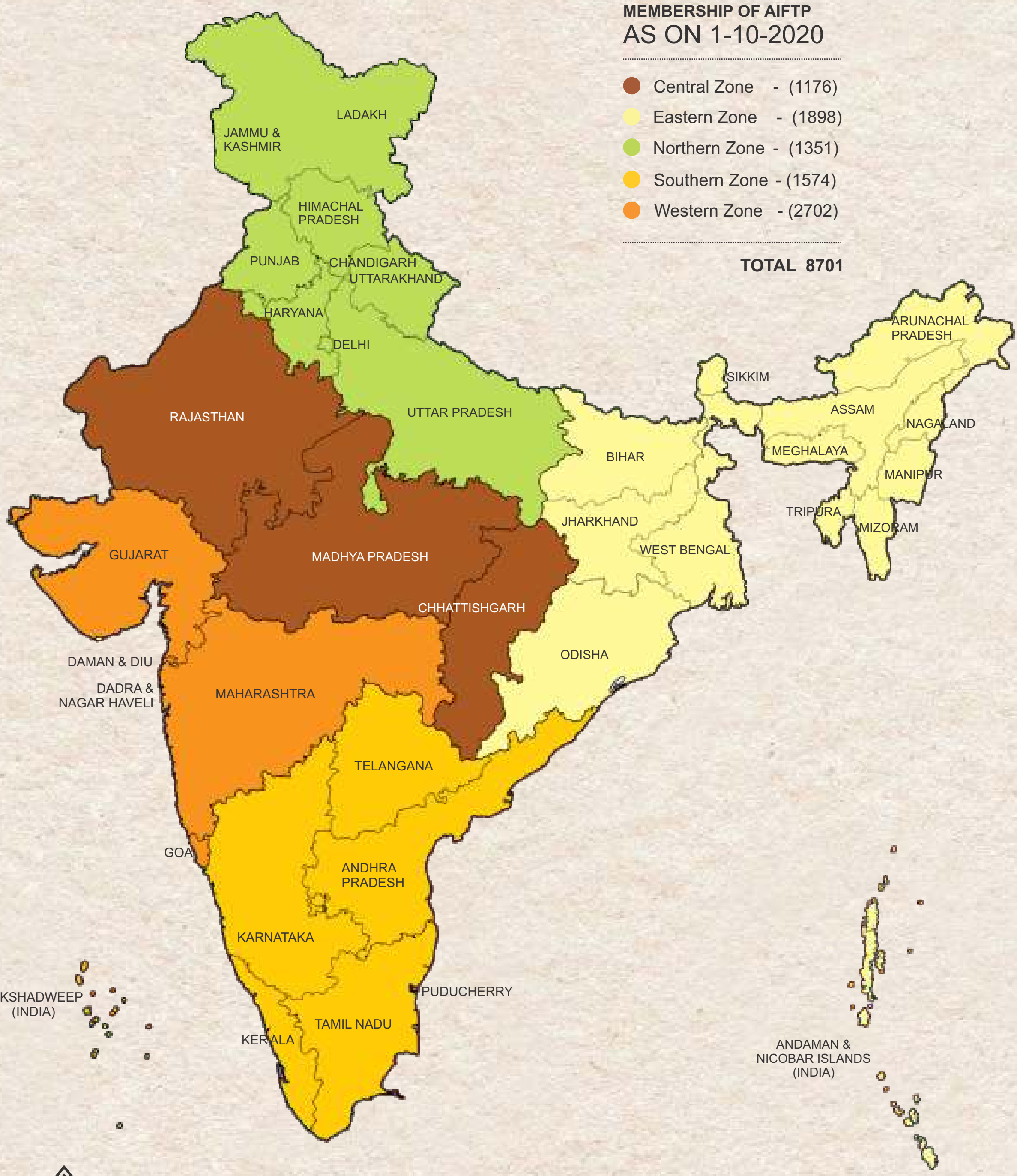

MEMBERSHIP OF AIFTP
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●	Central Zone	- (1176)
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●	Northern Zone	- (1351)
●	Southern Zone	- (1574)
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TOTAL 8701

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ESTD. 11th NOVEMBER 1976

All India Federation of Tax Practitioners

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