Important Judgments of Honourable Supreme Court

PCIT vs. Tejua Rohitkumar Kapadia (Supreme Court)

Facts

The Assessing Officer had disallowed purchase expenditure of Rs. 5.19 crores making the additions treating the purchases as bogus. The assessee carried the matter in appeal. CIT(Appeals) allowed the appeal interalia on the ground that all payments were made by the assessee by Account Payee cheque. The assessee was in fact, a trader.

All purchases made from M/s. Raj Impex were found to have been sold and sales were also accepted by the Assessing Officer. The Revenue carried the matter in appeal before the Tribunal.

Issue

"**Whether on the facts and circumstances of case and in laws the Appellate Tribunal was justified in treating the bogus purchase of Rs.5,19,86,285/legitimate only on the basis that purchases are duly supported by bills and all the payments were made by account payee cheques by overlooking findings of the Investigation Wing in the case of Shri Kulwant Singh Yadav, who was running shroff business and he in his statement on oath stated that he issue acknowledgment to the beneficiary on receipt of cheque and delivered cash and the assessee was one of the beneficiaries?"**

Held

Purchases cannot be treated as Bogus if (a) they are duly supported by bills, (b) all payments are made by account payee cheques, (c) the supplier has confirmed the transactions, (d) there is no evidence to show that the purchase consideration has come back to the assessee in cash, (e) the sales out of purchases have been accepted & (f) the supplier has accounted for the purchases made by the assessee and paid taxes thereon.

PCIT vs. LG Electronics India Pvt Ltd (Supreme Court)

Facts

The challenge in this petition is to the order dated 2nd August, 2017 passed by the Principal Commissioner of Income Tax ('PCIT') by which the Petitioner was directed to pay 20% of the tax demand of Rs. 32 crores amounting to Rs. 6.4 crores by 11th August, 2017 in order to get a stay of the demand up to 15th December, 2017 pending consideration of the Petitioner's appeal before the Commissioner of Income Tax (Appeals) ['CIT(A)'] against the order dated 30th June, 2017 passed by the Assistant Commissioner of Income Tax-Circle 15(1) (hereafter Assessing Officer – AO), levying a penalty under Section 271 (1) (c) of the Income Tax Act, 1961 ('Act'). By the said order the AO raised a demand of Rs. 32,00,07,958 for the Assessment Year ('AY') 2007-08 and directed the Petitioner to deposit the said amount on or before 31st July, 2017.

The Petitioner-Assessee filed an appeal against the order before the CIT (A). The Petitioner also filed an application under Section 220(6) of the Act seeking stay of the recovery proceedings. In the said application for stay, the Assessing Officer ('AO') directed the Petitioner, by order dated 20th July 2017, to deposit 15% of the total tax demand in terms of the Office Memorandum ('OM') dated 29th February, 2016.

Issue

Does CBDT's OMs dated 29.02.2016 & 31.07.2017 by which AO's have been directed to grant stay of disputed demand on payment of 20%/ 15% fetter the power of the AO & CIT to grant stay on payment of amounts lesser than 15%/ 20%. ?

Held

Having heard Shri Vikramjit Banerjee, learned ASG appearing on behalf of the appellant, and giving credence to the fact that he has argued before us that the administrative Circular will not operate as a fetter on the Commissioner since it is a quasi judicial authority, we only need to clarify that in all cases like the present, it will be open to the authorities, on the facts of individual cases, to grant deposit orders of a lesser amount than 20%, pending appeal.

Vinodbhai Shamjibhai Ravani [2017] 79 taxmann.com 237 (Gujarat)

(SLP Filed against the Said Case was Dismissed)

Assessment Year :2011-12

Facts

The assessee was partner in various firms and derived his income from business and other sources. A re-opening notice was issued against the assessee on the grounds that a document was seized from the residence of RV, one of the partners of the firm SRV in which assessee was also a partner. This was a copy of 'SaudaChitthi' entered between the assessee and one VSR on one hand as seller and PK and RV on other side of the deal as buyers for purchase of land. According to the Assessing Officer, the total sale consideration for above land, according to saudachittihi, came to Rs. 18.80 crores and subsequently a sale deed was executed for a consideration of Rs. 56.39 lakhs and balance amount of Rs. 18.23 crores was received by assessee in cash as on money. He held that the differential amount must be added to income of assessee.

Issue

Where there was no tangible material available on record to form a reasonable belief that amount of sale consideration on sale of land owned by third party was received by assessee in cash, merely on basis of saudachitthi signed by assessee for sale of such land, could it could be said that sale consideration was received by assessee ?

Held

It appears that on the basis of the statement of RV recorded during the course of search proceeding and on the basis of one saudachitthi signed by the respective petitioners. The Assessing Officer held that the sale consideration for the land in question comes of Rs. 18.80 crore and subsequently when the sale deed has been executed, the same is for sale consideration of Rs. 56.39 lakhs and therefore, the balance amount of Rs. 18.23 crore can be said to have been received by the petitioners-assessee in cash as on money and therefore, the same is required to be

added into their income. Therefore, Assessing Officer has formed a belief that the income of the assessee has escaped assessment to the extent of Rs. 18.11 crore during the assessment year 2009-10. [Para 7.1]

However, it is required to be noted that the respective petitioner were never owners of the land in question. It is also required to be noted that in fact the subsequently sale deeds are executed by the original land owners in favour of PK. It is an admitted position that the respective petitioners-assesseehave never executed any sale deeds. Therefore, nothing is on record that any sale consideration was received by the respective petitioners-assessee. Therefore, merely on the basis of the saudachitthi signed by the respective petitioners assessee (signed and executed though admittedly they were not owners of land for which the saudachitthi was executed/signed), it cannot be said that any amount is received by the petitioners-assessee. [Para 7.2]

Even considering the statement of RV, upon which much reliance has been placed by the revenue/Assessing Officer, he has categorically stated that the saudachitthi dated 12-03-2008 was subsequently immediately cancelled. From the statement of the said RV, it does not appear that he has stated that he paid any amount to the respective petitioners. Under the circumstances, as such there is no tangible material available with the Assessing Officer to form a reasonable belief that the amount of Rs. 18.23 crores has been received by the respective petitioners-assessee in cash. As observed herein above, as such there is no material whatsoever with the Assessing Officer that any amount of sale consideration has been received by the respective petitioners - assessee. The formation of opinion by the Assessing Officer, thus, seems to be on surmise and conjecture, which cannot be the basis for reopening the assessment of concluded assessment, in exercise of powers under section 147. [Para 7.3]

Even otherwise, it is required to be noted that according to the Assessing Officer, the valuation as per the saudachitthi signed by the respective petitioners assessee would come to Rs. 18.80 crores and the sale deeds have been executed for total consideration of Rs. 56.39 lakhs and therefore, the balance amount of Rs. 18.23 crores is considered to be on money received by them in cash. As observed hereinabove, according to the Assessing Officer the said saudaChitthi was signed by both the petitioners. In case of both the petitioners-assessee, the Assessing Officer has reopened assessment for assessment year 2009-10 on the ground that the income chargeable to tax has escaped assessment to the extent of Rs. 18.23 crores during the year 2009-10. If the

saudachitthi was signed by both the petitioners-assessee, in that case, in case of both the petitioners-assessee, it cannot be said that the income to the extent of Rs. 18.23 crores has escaped assessment during assessment year 2009-10. In case of both the assessee the resultant effect would be that according to the Assessing Officer Rs. 36.46 crores is received in cash. If the difference is found to be Rs. 18.23 crores (in case of each petitioners), it can be said to be non-application of mind. No reasonable and prudent person would form such a belief. Under the circumstances also, on the aforesaid ground alone, the impugned reassessment proceedings cannot be sustained. On the aforesaid ground, the present petitions are required to be allowed by quashing and setting aside the impugned notices under section 148. [Para 7.4]

MSK Real Estates (P.) Ltd. [2018] 95 taxmann.com 241 (Gujarat)

Assessment Year :2010-11

Facts

For the relevant year, the assessee-company did not file its return. Subsequently, a search was carried out in case of 'M' group of companies. In course of search, certain documents were seized showing that assessee had received share application money and share premium from various companies.

The Investigation wing of department provided information that those companies were paper/shell companies involved in providing accommodation entries in form of share capital, share premium, unsecured loans etc.

On basis of aforesaid information, the Assessing Officer initiated reassessment proceedings in case of assessee. The main objection raised by assessee was that entire share application and share premium money was received by the assessee on or before 31-3-2009. No amount having been received after 1-4-2009, no taxing event fell within the period relevant to the assessment year 2010-11. The Assessing Officer rejected assessee's objection.

Issue

Whether AO was justified in reopening assessment as assessee allegedly received accommodation entries from shell Co.?

Held

From the record, it emerges that the assessee had not filed return for the relevant assessment year. Further, the reasons cited by the Assessing Officer for issuing the notice of reopening are quite serious. In such reasons, he had pointed out that the material collected by the department during search operation in case of 'M' Group of cases which led to further information that the

assessee had alloted 1 lac shares to different investor companies by charging Rs. 90/- by way of premium over and above the nominal value of Rs. 10/- per share. The Investigating Wing of the department had collected material to suggest that these were shell companies engaged in providing accommodation entries having dummy directors. Statement of the director of the assessee-company was also recorded. He could not provide genuineness of these transactions. He would also confront with the report of the Investigation Wing of the department. [Para 5]

As the reason stand therefore, reopening of the assessment would be ordinarily permissible. The assessee, however, strongly urged that whatever be the facts, no taxing event having been occurred during the period relevant to the assessment year 2010-11, impugned notice should be quashed. Elaborating this ground, he contended that the entire share application and share premium money was received by the assessee on or before 31-03-2009. No amount having been received after 01-04-2009, no taxing event fell within the period relevant to the assessment year 2010-11. This ground, the Assessing Officer repealed citing two fold reasons. According to him, mere receipt of the share application money was not enough. Unless shares are alloted, such amount would remain with the company and cannot be appropriated. In case of over subscription of shares, it may happen that the amount may have to be returned. In short, the transaction would be completed only upon allotment of shares. The second ground was that, in any case, part of the amount of Rs. 1 crore was actually received by the assessee-company on 02-04-2009. He pointed out that two cheques of Rs. 10 lacs and 15 lacs respectively were deposited with the bank on 31-03-2009 and encashed on 02-04-2009. According to him, therefore, the company received the money actually on 02-04-2009 and not earlier. [Para 6]

As recorded, two facts are undisputable (1) that the assessee had not filed any return for the said assessment year and; (2) as per the reasons recorded by the Assessing Officer, there is every case for permitting assessment of the assessee for the said year. As per the reasons recorded, the assessee had received bogus share premium money from shell companies who were indulging in providing bogus accommodation of the entries. There were series of transactions of this nature. The question that, when precisely the taxing event occurred would have to be kept open to be decided at the first instance by the Assessing Officer during the course of assessment. In the present case, at the very threshold, it is neither necessary nor are we inclined to decide this issue finally. We are conscious that the reasons recorded by the Assessing Officer can be challenged

on the ground of their validity. If therefore there is a clear conclusion possible that such reasons lacked validity, it would always be open for the Court to strike down the notice based on such reasons. However, at the stage when the notice for reopening is under challenge, if it is not possible without further detailed inquiry to arrive at a final conclusion, the Court would be well advised in keeping such a question open and permitting further proceedings in connection with the notice of reopening.

Under the circumstances, subject to above observations, the petition is dismissed. Notice is discharged. Needless to add, we have not expressed any final opinion on the petitioner's principal contention for challenging the notice of reopening. Since the other issues cited by the Assessing Officer in the reasons recorded had not even come up for discussion before us, we had no occasion to comment on any of them. The assessment would be carried out independently of the observations made in this order.

Khatu Shyam Processors (P.) Ltd. [2018] 94 taxmann.com 429 (Gujarat)

Assessment year 2010-11

Facts

The assessee-company was engaged in the business of dying of cloth on job-work basis. It filed return declaring certain taxable income. The Assessing Officer passed an order of assessment under section 143(3).

Subsequently, the Investigation wing of the Department supplied a list of paper companies which had provided accommodation entries in form of share Capital and share Premium.

The Assessing Officer found that some of the companies out of the said list had provided accommodation entries to the assessee during the year under consideration.

The Assessing Officer, thus, issued notice under section 148 seeking to reopen the assessment. The assessee objections to initiation of reassessment proceedings were rejected.

Issue

The petitioner raised objections to the notice of reopening under a letter dated 18th December 2017. Such objections were however rejected by the Assessing Officer by an Order dated 19th December 2017 whereby the present petition has been filed..

Held

A perusal of the reasons recorded show that the same come into two parts. First portion refers to information provided to the Assessing Officer by the Investigation Wing and the processing of such information by the Assessing Officer. This portion shows that the Investigating Wing had, under a letter dated 27-3-2017, provided list of as many as 396 companies which were mere paper companies indulging in providing accommodation entries. The Assessing Officer found that some of the companies out of the said list had provided accommodation entries to the assessee during the year under consideration. He recorded that on perusal of the assessment record and the list of the companies supplied by the Investigation Wing, it was found that the assessee-company had received accommodation entries in the form of share capital and share premium from five different companies. He recorded that these Kolkata based companies were paper companies and were not having any business activities. The sole purpose of creating those companies was to provide accommodation entries to the beneficiary parties. It was on the basis of such material, he concluded that the source of investment in the assessee-company were unexplained, as investing companies have no creditworthiness to make such investment.

Three things immediately emerge from the reasons recorded by the Assessing Officer *viz.*, [*i*] that the issue whether these investments were genuine or not, and whether investing companies had wherewithal to make investment or not is the central question presently, which was not an issue during the original assessment proceeding. [*ii*] the question of true and full disclosure and the scrutinized issue in fact in the present case closely overlap and [*iii*] the present is not a case where the Assessing Officer has acted mechanically without any mental input on his part or acted on borrowed satisfaction. What was provided to him was a list of 396 companies by the Investigating Wing pointing out that these were mere shell companies, their creation was for the purpose of providing accommodation entries. The Assessing Officer on perusal of the assessment record and list supplied by the Investigating Wing corelated the different material on record and *prima facie* came to the conclusion that the investment of Rs. 51.15 lakhs made by

five of those companies in the form of share-capital or share premium of the assessee-company was not genuine. [Para 7]

This discussion still leave open, the assessee's last contention regarding the attempt made by Assessing Officer to verify these facts through discreet inquiries. In the last portion of the reasons recorded by the Assessing Officer, he has stated that after verifying the facts, as recorded above, the Inspector was directed to make discreet inquiries in respect of the assessee-company to inquire whether the company was indulged in receiving accommodation entries from the paper companies or not. He further recorded that Inspector having made local inquiries in the nearby area where the company is working, recorded that the company used to take accommodation entries from various Kolkata based paper companies. [Para 9]

This appears to be usual attempt on the part of the Assessing Officer to make 'discreet inquiries' in order to ascertain whether the company was indulging in such illegal activities. The manner or method of such discreet inquiry is not revealed and therefore, it is not clear as to how exactly inquiry was made. However, the Assessing Officer seems to be suggesting that the Inspector deputed by him on the basis of unrecorded statements appears to have made such a report. Whether on the basis of unrecorded or even on the basis of statements of unrelated persons which may have been recorded, there is doubt about the efficacy thereof. Proper information at the command of the Assessing Officer can come only through reliable sources. Statements of those who ought to know may be one such source.

At any rate, the Assessing Officer cannot bank on unrecorded statements or statements from the sources which can at best be described as relying on rumours or gossips. Had this been the foundational reason one would have been prompted to quash the notice. However, this clearly is separate and severable part of the reasons and at the best can be seen as an over enthusiastic approach on the part of the Assessing officer to buttress an already arrived at conclusion that income chargeable to tax has escaped assessment on the basis of information on record. [Para 10]

In the result, petition is dismissed.

Comments of the Compiler

This matter is decided against the assessee because by the Honourable Gujarat High Court following the decision of **Pr. CIT v. Gokul Ceramics [2016] 241 Taxman 1/71 taxmann.com 341 [Guj.] .** However at the same time the Honourable court has held that *the* Assessing Officer cannot bank on unrecorded statements or statements from the sources which can at best be described as relying on rumours or gossips. Had this been the foundational reason one would have been prompted to quash the notice.

Haryana Paper Distributors (P.) Ltd [2018] 95 taxmann.com 152 (Gujarat)

Assessment Year :2011-12

Facts

The assessee-company was engaged in the business of dealing in paper and board. It had shown purchases worth Rs. 4.33 crores from one 'T' Ltd.

In course of assessment, the Assessing Officer examined the Director of the 'T' Ltd. who appeared before him and confirmed the sales. The Assessing Officer did not dispute said transaction any further while accepting the factum of the genuineness of the purchases made by the assessee. He noticed that the goods were delivered directly to the assessee's purchaser and the assessee was not billed for such transportation. In his opinion therefore, the assessee should have disclosed higher profit since he was rid of the transportation charges. He put the assessee to notice and made addition at the rate of 4 per cent GP on the gross turnover. In the process, he gave benefit of the profit already disclosed by the assessee.

In appellate proceedings, the Commissioner (Appeals) deleted addition made by the Assessing Officer.

Subsequently, the Commissioner issued a show-cause notice under-section 263 taking a view that when the Assessing Officer had found the purchases to be bogus, there was no question of limiting the addition on the basis of GP ratio.

Issue

Whether in view of fact that Assessing Officer did not hold that assessee's purchases from 'T' were bogus, very foundation for issuance of notice was incorrect ?

Whether even otherwise, since assessment order had been merged with order passed by Commissioner (Appeals), impugned notice issued under section 263 was to be set aside ?

Held

Two things immediately become clear. First that the Assessing Officer did not hold that assessee purchases from 'T' were bogus. In fact, he held to the contrary accepting the evidence produced by the assessee mainly in the form of the statement of the Director of 'T' Ltd. that the purchases were made. It was only after Assessing Officer had believed that the purchases were made that the question of transportation of the goods by the assessee of someone else would arise. Secondly, he made limited addition on the ground that when the assessee was not required to bear the transportation cost, his profit from such dealings would be higher than normal.

The Commissioner in the impugned show-cause notice thus committed an error in recording that the Assessing Officer had held that the purchases were bogus. This very foundation for issuance of the notice was incorrect. His further observations were merely consequential in nature. In his opinion, when the Assessing Officer had found the purchases to be bogus, there was no question of limiting the addition on the basis of GP ratio. When the Commissioner was wrong in its very foundational fact, the consequential observations, which are more in the nature of corollary, cannot survive. [Para 11]

Equally importantly, the issue itself had travelled before the Appellate Commissioner at the hands of the assessee. To the extent, the Assessing Officer rejected the assessee's request for making no additions, the assessee carried the matter in appeal. Appellate Commissioner deleted even the limited additions made by the Assessing Officer. The limited additions made by the Assessing Officer and the larger additions proposed by the Commissioner in the impugned notice are inextricably interlinked. The Commissioner argues that the entire purchases were bogus. The

Assessing Officer accepted the purchases as genuine but added certain amount on the premise that the assessee's profit from such dealings would have been higher than disclosed.

The entire issue was at large before the Appellate Commissioner. It is well known that the Commissioner (Appeals) while hearing the assessee's appeal has powers to even enhance the assessment. If he was of the opinion that not only limited additions made by the Assessing Officer but much larger additions were justified, he could have certainly exercised such powers, of course after putting the assessee to notice. In this context, one may refer to clause (c) of Explanation 1 to sub-section (1) of section 263 of the Act. As is well known sub-section (1) of section 263 of the Act empowers the Principal Commissioner or the Commissioner to call for and examine the record of any proceeding and revise the same if he considers that the order passed therein by the Assessing Officer was erroneous insofar as it is prejudicial to the interest of the revenue. [Para 12]

Clause (c) of Explanation 1 may be worded in a manner as suggesting the extent of the powers of the Commissioner for taking an order in revision, its effect is of circumscribing such powers in cases where the order passed by the Assessing Officer has been subject matter of any appeal and such subject matter has been considered and decided in such appeal. This provisions thus statutorily recognizes the principle of merger and avoids any conflict of opinion between two quasi-judicial authorities of the same rank. [Para 13]

When the Commissioner had no jurisdiction to exercise revisional powers, asking the assessee to submit to said impugned notice does not arise. Impugned notice is therefore set aside. [Para 14]

The petition is disposed of accordingly. [Para 15*]*

AlameluVeerappan [2018] 95 taxmann.com 155 (Madras)

Assessment Year 2010-11

Facts

The assessee was the wife of the 'S', who died on 26-1-2010. She received a notice dated 30-3-2017 addressed to her late husband. In the said notice, it was stated that certain income of 'S' escaped assessment.

The assessee sent a reply pointing out that her husband had already died and enclosed a copy of the death certificate to establish the said fact.

The assessee was, however, informed that she should submit all the documents pertaining to her husband's assessment including the details of bank account statements etc.

The assessee filed instant petition contending that the impugned notice was void and unenforceable in law, as it had been issued to a dead person.

Issue

Whether there is statutory obligation on part of legal representative of deceased to immediately intimate death of assessee or take steps to cancel PAN registration ?

Held

The issue, which falls for consideration, is as to whether the impugned notice under section 148 in the name of the dead person is enforceable in law and the subsidiary issue being as to whether the assessee, being the wife of the said 'S', can be compelled to participate in the proceedings and respond to the impugned notice. The fact that the 'S' died on 26-1-2010 is not in dispute. If this fact is not disputed, then the notice issued in the name of the dead person is unenforceable in the eye of law. [Para 14]

The department seeks to justify their stand by contending that they were not intimated about the death of the assessee, that the legal heirs did not take any steps to cancel the PAN registration in the name of the assessee and that therefore, the department was justified in directing the assessee to cooperate in the proceedings pursuant to the impugned notice. [Para 15]

The settled legal principle being that a notice issued in the name of the dead person is unenforceable in law. If such is the legal position, would the revenue be justified in contending that they, having no knowledge about the death of the assessee, are entitled to plead that the

notice is not defective. The answer to the question should be definitely against the revenue. [Para 16]

Admittedly, the limitation period for issuance of notice for reopening expired on 31-3-2017. The impugned notice was issued on 30-3-2017 in the name of the dead person. On being intimated about the death, the department sent the notice to the assessee - his spouse to participate in the proceedings. This notice was well beyond the period of limitation, as it has been issued after 31-3-2017. The problem sans complicated facts, a notice issued beyond the period of limitation, i.e., 31-3-2017 is a nullity, unenforceable in law and without jurisdiction. Thus, merely because the department was not intimated about the death of the assessee, that cannot, by itself, extend the period of limitation prescribed under the Statute. Nothing has been placed on record by the revenue to show that there is a statutory obligation on the part of the legal representative of the deceased to immediately intimate the death of the assessee or take steps to cancel the PAN registration. [Para 17]

In such circumstances, the question would be as to whether section 159 would get attracted. The answer to this question would be in the negative, as the proceedings under section 159 can be invoked only if the proceedings have already been initiated when the assessee was alive and was permitted for the proceedings to be continued as against the legal heirs. The factual position in the instant case being otherwise, the provisions of section 159 have no application. [Para 18]

The revenue seeks to bring their case under section 292B to state that the defect is a curable defect and on that ground, the impugned notice cannot be declared as invalid. [Para 19]

The language employed in section 292B is categorical and clear. The notice has to be, in substance and effect, in conformity with or according to the intent and purpose of the Act. Undoubtedly, the issue relating to limitation is not a curable defect for the revenue to invoke section 292B. [Para 20]

For all the above reasons, the impugned notice is wholly without jurisdiction and cannot be enforced against the assessee. [Para 26]

Accordingly, the writ petition is allowed. [Para 27]

Please also Refer Dharmnath Shares & Services (P.) Ltd[2018] 94 taxmann.com 458 (Gujarat)

Dulraj U. Jain vs. ACIT (Bombay High Court)

Assessment year : 2010-11

Facts

This petition challenges notice dated 31st March, 2017 issued under Section 148 of the Income-Tax Act, 1961 seeking to re-open the assessment for the Assessment Year 2010-11. The assessment was earlier completed by way of intimation under Section 143(1) of the Act.

The reasons to believe that income chargeable to tax has escaped assessment proceeds on information received from Deputy Director of Investigation. The information received from the Assistant Director of Income-Tax dated 24th March, 2017 referred to certain transactions as suspicious transactions and called upon the Assessing Officer to verify the transactions as there is a likelihood that income chargeable to tax has escaped assessment.

Issue

Is it mandatory to prima facie specify the quantum of income that has escaped assessment?

Held

The reasons in support of the impugned notice do not indicate any application of mind and/or further processing of the information to come to a reasonable belief that income chargeable to tax has escaped assessment. In fact, it proceeds on the basis that transactions are suspicious.

Further, the reasons also do not specify, prima-facie, the quantum of tax which has escaped assessment but merely states that it would be atleast be Rs.1,00,000/-. Prima-facie, we are of the view that the reasons recorded do not indicate reasonable belief of the Assessing Officer himself to issue the impugned notice. Thus, prima-facie, the impugned notice is without jurisdiction.

Adani Retail Ltd [2018] 95 taxmann.com 153 (Gujarat

Assessment year : 2008-09

Facts

In case of assessee, a demerged company, the scheme of demerger was approved by the High Court, and thereupon all assessed properties and liabilities of the demerged company were to be transferred to the resulting company. In said context, for the relevant assessment year the question of carry forward losses or unabsorbed depreciation of the demerged company to be available to the resultant company in view of section 72A came up for consideration.

The Assessing Officer rejected the claim on the ground that the assessee had not maintained separate accounts, a view which the Commissioner (Appeals) upheld.

The Tribunal however, was of the opinion that no such requirement arose out of sub-section (4) of section 72A. The Tribunal thus remitted the issue to the file of Assessing Officer for adjudication de novo.

Issue

Whether the Appellate Tribunal has erred in law and on facts in remitting the issue to the file of Assessing Officer without appreciating the fact that brought forward losses & unabsorbed depreciation cannot be said to be related to transferred undertaking in absence of separate accounts as per Section 72A(4)(b) of the Act ?

Held

Section 72A pertains to provisions relating to carry forward and set off of accumulated loss and unabsorbed depreciation allowance in amalgamation or demerger. Sub-section (4) of section 72A starts with *non-obstanti* clause. As per clause (a) of sub-section (4), in case of a demerger, the accumulating loss and allowance for unabsorbed depreciation of the demerged company shall, where such loss or unabsorbed depreciation is directly relatable to the undertakings transferred to the resulting company, be allowed to be carried forward and set off in the hands of the resulting

company. As per clause (b) of sub-section (4) where such loss or unabsorbed depreciation is not directly relatable, the same would be apportioned between the demerged company and the resulting company in the same proportion in which assets of the undertakings have been retained by the demerged company and transferred to the resulting company which would be allowed to be carried forward and set off in the hands of the demerged company or the resulting company, as the case may be. [Para 3]

The Tribunal is thus correct in commenting that if the brought forward losses and unabsorbed depreciation are directly relatable to the transferred company, the same has to be carried forward in the hands of the resultant company. This is a purport of clause (a) of sub-section (4) of section 72A. The only question in the present case is how would the assessee establish the same. The Tribunal noted and correctly, that the statutory provision do not command that in order to avail the benefit of clause (a), separate books of account must be maintained. The Tribunal therefore required the Assessing Officer to examine the explanation of the assessee on merits. It was for this purpose, the Tribunal has remanded the issue back to the Assessing Officer. [Para 4]

There is no error in the view of the Tribunal.

Texraj Realty (P.) Ltd [2018] 95 taxmann.com 102 (Gujarat)

Assessment Year 2011-12

Facts

Respondent-assessee is a private limited company. The business premises of the company was subjected to survey operation under section 133 of the Income Tax Act, 1961 ('the Act' for short). During the survey operation, the Revenue claimed to have seized and impounded a diary which allegedly reveal certain cash transactions with respect to sell of Vatva land. Statement of the directors of the company were also recorded. Based on such materials, the Assessing Officer carried out the assessments making additions of undisclosed income under section 68 of the Act. Commissioner of Income Tax (Appeals) confirmed the additions, upon which, the assessee approached the Tribunal.

Issue

Whether the Appellate Tribunal has erred in law and on facts in deleting the addition made u/s 68 of the Income Tax Act, 1961?

Held

The Tribunal in its detailed order noted that the directors during the course of survey, had retracted the statements by filing affidavits. They also claimed that the diaries were created under the pressure of the survey party. The Tribunal noted decision of the Supreme Court in case of Paul Mathews & Sons v. CIT [2003] 129 Taxman 416/263 ITR 101 (Ker) and of Supreme Court in case of CIT v. S. Khader Khan Son [2012] 25 taxmann.com 413/210 Taxman 248/[2013] 352 ITR 480, in which, it was highlighted that the statement under section 133A of the Act was not on oath and would have at best a coroborative value. The Tribunal also noticed that on the date of survey, the property itself was under several litigations. Though the assessee had purchased the land from one S.M.L. Maneklal Industries, the said seller was facing litigation with the Bombay High Court in Company Petitions. There were several disputes before the City Civil Court, Ahmedabad, concerning the same subject matter land. The Tribunal was therefore of the opinion that on the date of the survey i.e. 23-11-2010, the title to the property of the assessee was itself under serious doubt. Notably, the Bombay High Court's decision in Company Petition was rendered on 21-10-2011. It was also noticed that the City Civil Court, Ahmedabad, had granted status quo with respect to the same land on an application filed by GIDC. The Tribunal therefore noticed that the assessee itself do not have absolute right to alienate the property. It was noticed that in the diary, the name of the purchaser was not mentioned. There was no agreement to sell executed. The Tribunal found it unlikely that an unknown person would give sizable cash to the extent of Rs. 14.85 crores even before the agreement to sell is executed. Inter alia, on such grounds, the Tribunal deleted the additions.

From the above discussion, it can be clear that the entire issue is based on appreciation of evidence. The Tribunal having considered relevant aspects and having come to the conclusion that the Revenue has failed to bring on record sufficient evidence of cash amounts have been received by the assessee, no question of law arises. Tax Appeal is dismissed.

Banco Products (India) Ltd. [2018] 95 taxmann.com 132 (Gujarat)

Assessment Year 2008-09

Facts

The assessee-company was engaged in business of manufacturing of automotive gaskets, radiators and similar other automobile parts. The assessee had set up Research and Development facilities by incurring expenditure. An application for recognition of such facility was filed before the Ministry on 22-12-2006. Such recognition was granted on 2-9-2007. In the meantime, the assessee had applied for approval of the facility on 26-6-2007 which was approved by the concerned authority on 22-10-2008. The assessee contended that the expenditure incurred even before the grant of approval would be recognized for deduction under section 35(2AB). Accordingly, the assessee claimed deduction under section 35(2AB).

The Assessing Officer did not grant such deduction for the period prior to 1-4-2008 on the ground that approval was granted specifically for a period of two years from 1-4-2008 to 31-3-2010. The assessee had incurred capital expenditure (other than land and building) and revenue expenditure and claimed weighted deduction of 150 per cent of such expenditures under section 35(2AB). In the Form No. 3CM giving approval under section 35(2AB) in which it was specifically mentioned that the above Research and Development facility was approved for the purpose of section 35(2AB) with effect from 1-4-2008 to 31-3-2010. In view of such specific mentioned of the date it was very clear that the approval was granted for a specific period and, therefore, the deduction under section 35(2AB) was restricted for the period 1-4-2008 to 31-3-2010.

On appeal, the Commissioner (Appeals) also upheld the order of the Assessing Officer.

On further appeal, the Tribunal held that the facts were somewhat contradictory. It was not clear when the application for approval was made and when actually approval was granted. The Tribunal therefore, remanded the proceedings for fresh consideration by the Assessing Officer.

Issue

Whether for availing benefit under section 35(2AB) what is relevant is not date of recognition or date of approval but existence of recognition and approval; therefore, once research and development facility is approved, entire expenditure incurred on development of research and development facility, including expenditure incurred even before grant of approval, has to be allowed for weighted deduction under section 35(2AB) ?

Held

Section 35 pertains to expenditure on scientific research. Sub-section (2AB) thereof grants weighted deduction to a company engaged in the business of biotechnology or manufacture or production of any article or thing, except those specified in the Eleventh Schedule, where it incurs any expenditure on scientific research (excluding the expenditure in the nature of cost of any land or building) on in house research and development facility as approved by the prescribed authority. At the relevant time, such deduction was one and one half times of the expenditure incurred. Said section contains various conditions subject to which such deduction will be granted. However, the main requirements are that the expenditure should be on scientific research on in house research and development facility as approved by the prescribed authority. This provision is aimed at encouraging in house research and development facilities for specified purposes. The legislature recognized the weighted deduction on such expenditure. The approval of such facility by the prescribed authority is a prime condition. [Para 9]

In case of Claris Lifesciences Ltd., this Court examined a situation where the Tribunal had allowed the assessee's claim of deduction under section 35(2AB) when such expenditure was incurred during the period prior to the date of approval by the prescribed authority. The Court noted with approval the conclusion of the Tribunal that the provision is made for giving a boost to research and development facilities in India and once the facility is approved, entire expenditure so incurred in developing the same has to be allowed by way of deduction. It may be that as pointed out by the revenue, all events i.e. incurring of expenditure, applying for approval and grant of approval happened in the same financial year. However, this was not the basis on which the Court has confirmed the decision of the Tribunal. There is nothing in the said

judgment to suggest that had these events fallen indifferent years, the view of the Court would have been any different. [Para 10]

In case of Maruti Suzuki India Ltd. in order to grant the assessee's claim of deduction under section 35(2AB), the Court held that for availing deduction under section 35(2AB), what is relevant is not the date of recognition or the cut-off date mentioned in the certificate of the prescribed authority or even the date of approval, but the existence of recognition. The Court observed that section 35(2AB) clearly provides that any expenditure incurred by a party on its R&D facility, except, insofar as it relates to land and building is liable to be allowed to be claimed as deduction (twice the amount of expenditure). A perusal of the scheme especially sections 35(2AB), 35A and 35AB reveals in no uncertain terms, that the purpose behind these provisions is to provide impetus for research, development of new technologies, obtaining patent rights, copyrights and know-how. [Para 11]

In view of above referred two decisions and by applying the same to the facts on hand, one has no hesitation in allowing the assessee's claim for deduction under section 35(2AB). Shorn of any controversy, documents on record would suggest that at any rate, the assessee had applied for approval of research and development facility to the prescribed authority on 22-12-2006 and such approval was granted on 22-10-2008. The Assessing Officer and Commissioner (Appeals) restricted the assessee's claim for deduction in relation to such expenditure which was incurred prior to 1-4-2008 on the ground that the approval was granted for two years between 1-4-2008 to 31-3-2010. Combined reading of the judgment of this Court in case of Claris Life sciences Ltd. (supra) and judgment of Delhi High Court in case of Maruti Suzuki India Ltd. (supra), would show that period during which the approval is granted is not relevant as long as such approval has been granted and expenditure has been incurred for the specified purpose. As noted, the provision is aimed at promoting development of in house research and development facility which necessarily would require substantial expenditure which immediately may not yield desired results or could be correlated to generation of additional revenue. By the very nature of things, research and development is a hit and miss exercise. Much of the efforts, capital as well as human investment may go waste if the research is not successful. The legislature therefore, having granted special deduction for such expenditure, the same should be seen in light of the purpose for which it has been recognised. Research and development facility can be set up only

after incurring substantial expenditure. The application for approval of such facility can be made only after setting up of the facility. Once an application is filed by the assessee to the prescribed authority, the assessee would have no control over when such application is processed and decided. Even if therefore, the application is complete in all respects and the assessee is otherwise eligible for grant of such approval, approval may take sometime to come by. The claim for deduction cannot be defeated on the ground that such approval was granted in the year subsequent to the financial year in which the expenditure was incurred. No such indication was given by this Court in case of Claris Life sciences Ltd. (supra), none appears from the judgment of the Delhi High Court in case of Maruti Suzuki India Ltd. (supra). [Para 12]

n the result, appeal is allowed. Question is answered in favour of the assessee. Decision of Assessing Officer to restrict the assessee's claim for deduction on the expenditure which was incurred prior to 1-4-2008 is set aside. The Assessing Officer shall recompute such deduction and give its effect to the assessee for the relevant assessment year. [Para 13]

PCIT vs. Quest Investment Advisors Pvt. Ltd (Bombay High Court)

Assessment year 2008-09

Facts

The respondent is engaged in the business of equity research, investment advisory services and running portfolio management services. During the subject assessment year, the respondent assessee in its return of income showed professional income of Rs.1.31 crores and short term capital gain of Rs.6 crores.

As was the practice for the earlier assessment years and accepted by the Revenue, all the expenses was set off against the professional business income. However, the Assessing Officer sought to allocate the expenditure between earning of capital gains and professional income. Thus, an expenditure of Rs.88.05 lakhs claimed against professional income was disallowed by the assessment order dated 15th November, 2010 under Section 143(3) of the Act.

Being aggrieved, the respondent carried the issue in appeal to the Commissioner of Income Tax (Appeals) [CIT(A)]. By an order dated 21st November, 2011, the respondent's appeal was dismissed.

Thus, the respondent carried the issue in further appeal to the Tribunal. The impugned order of the Tribunal without going to the merits of the action of the Assessing Officer in allocating the expenses between the professional income and capital gains, proceeded to allow the appeal on the basis of principle of consistency.

It observed that for the assessment years relating to Assessment Years 1995-96 to 2012-13, no such allocation of expenses between professional income and the earning on account of capital gain was made. All expenses were allowed to be set off against the professional income.

It is only for two assessment years namely Assessment Years 2008-09 and 2007-08 that the Assessing Officer had done this exercise of allocating the expenditure under the heads of business income and capital gain.

The Revenue before the Tribunal as recorded in the impugned order, was not able to point out any distinguishing facts in the subject assessment year, which would warrant a different view from that taken in the earlier and subsequent assessment where no allocation of expenditure was done between various heads of income. Therefore, on application of the principles of consistency following the decision of the Apex Court in RadhasoamiSatsangVs. Commissioner of Income Tax, 193 ITR 321 the respondent's appeal was allowed. The revenue challenged the order before the honourable High Court.

Issue

Whether on the facts and circumstances of the case and in law, the tribunal was justified in following the rule of consistency and the case of Radhasoami Satsang without going into merits of the case?

Held

So far as the decision of RadhasoamiSatsang (supra) is concerned, it is true that there are observations therein that restrict its applicability only to that decision and the Court has made it clear that the decision should not be taken as an authority for general applicability.

However, subsequently the Apex Court in Bharat Sanchar Nigam Ltd. Vs. Union of India 282 ITR 273 has after referring to the decision of RadhasoamiSatsang (supra) has observed as under:

The decisions cited have uniformly held that res judicata does not apply in matters pertaining to tax for different assessment years because res judicata applies to debar courts from entertaining issues on the same cause of action whereas the cause of action for each assessment year is distinct. The courts will generally adopt an earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual position.

The reason why courts have held parties to the opinion expressed in a decision in one assessment year to the same opinion in a subsequent year is not because of any principle of res judicata but because of the theory of precedent or the precedential value of the earlier pronouncement. Where facts and law in a subsequent assessment year are the same, no authority whether quasijudicial or judicial can generally be permitted to take a different view. This mandate is subject only to the usual gateways of distinguishing the earlier decision of where the earlier decision is per incuriam.

However, these are fetters only on a coordinate Bench which, failing the possibility of availing of either of these gateways, may yet differ with the view expressed and refer the matter to a Bench of superior strength or in some cases to a Bench of superior jurisdiction." (emphasis supplied)

The principle accepted by the Revenue for 10 earlier years and 4 subsequent years to the Assessment Years 2007-08 and 2008-09 was that the entire expenditure is to be allowed against business income and no expenditure is to be allocated to capital gains. Once this principle was accepted and consistently applied and followed, the Revenue was bound by it. Unless of course it

wanted to change the practice without any change in law or change in facts therein, the basis for the change in practice should have been mentioned either in the assessment order or atleast pointed out to the Tribunal when it passed the impugned order.

None of this has happened. In fact, all have proceeded on the basis that there is no change in the principle which has been consistently applied for the earlier assessment years and also for the subsequent assessment years. Therefore, the view of the Tribunal in allowing the respondent's appeal on the principle of consistency cannot in the present facts be faulted with, as it is in accord with the Apex Court decision in Bharat Sanchar Nigam Ltd. (supra).

Important Judgments of Honourable ITAT

Mahesh H. Hinduja [2018] 95 taxmann.com 168 (Mumbai - Trib.)

There is no bar/restriction in provisions of section 139(5) that assessee cannot file a revised return after issuance of notice under section 143(2), AO could not reject assessee's claim for deduction under section 54 raised in revised return on ground that said return was filed after issuance of notice under section 143(2).

Navneet Agarwal vs. ITO (ITAT Kolkata)

The assessee has been allotted fifty thousand equity shares of "Smart Champ IT & Infra ltd", on an application made by the assessee, and the amount in question was paid through banking channels and the name of the assessee was reflected by the company "Smart Champ IT & Infra Ltd." in its return filed before the Registrar of companies as a shareholder in the year 2011-12 and that the assessee had lodged the shares with a depositary, with a demat request on 11.02.2012. Further, the Hon'ble Bombay High Court hadapproved the Scheme of Amalgamation of "Smart Champ IT & Infra Ltd." with a company M/s."Cressanda Solution ltd.". That in accordance with the scheme of amalgamation the assessee was allotted fifty thousand equity shares of M/s.Cressanda Solution Ltd. and that the documents filed reflected the transaction statement for the period 01.11.2011 to 31.12.2013. It was further submitted that these shares were sold through the broker "SKP Stock Broking Pvt. Ltd." who is a SEBI registered broker and all the evidences in this regard were filed. It was pleaded that the scripts were held for more than 500 days, which proves the bona fide nature of the shareholdings as no sale was done immediately on completion of 365 days. It was submitted that the assessee is not connected with the promoters and has nothing to do with the alleged rigging of shares, if any. Reliance was placed on number of decisions for the proposition that, evidence cannot be discarded by applying theory of human behavior and the theory of preponderance of probabilities.

The assessing officer as well as the Ld. CIT(A) have rejected these evidences filed by the assessee by referring to "Modus Operandi" of persons for earning long term capital gains which his exempt from income tax. All these observations are general in nature and are applied across the board to all the 60,000 or more assessees who fall in this category. Specific evidences

produced by the assessee are not controverted by the revenue authorities. No evidence collected from third parties is confronted to the assesses. No opportunity of cross-examination of persons, on whose statements the revenue relies to make the addition, is provided to the assessee. The addition is made based on a report from the investigation wing.

The issue for consideration before us is whether, in such cases, the legal evidence produced by the assessee has to guide our decision in the matter or the general observations based on statements, probabilities, human behavior and discovery of the modus operandi adopted in earning alleged bogus LTCG and STCG, that have surfaced during investigations, should guide the authorities in arriving at a conclusion as to whether the claim in genuine or not. An alleged scam might have taken place on LTCG etc. But it has to be established in each case, by the party alleging so, that this assessee in question was part of this scam. The chain of events and the live link of the assesee's action giving her involvement in the scam should be established.

The Dept cannot rely on alleged modus operandi & human behavior and disregard the evidence produced by the assessee.

Prakash Chand Bhutoria vs. ITO (ITAT Kolkata)

31000% increase in value of shares over 2 years is highly suspicious but cannot take the place of evidence. The addition cannot be made based on generalizations. Evidence collected from third parties cannot be used against the assessee without giving him a copy & an opportunity to rebut the same.

Other Supporting Judgments on Penny Stock

Other Supporting Judgments on Penny Stock

a. Pr. CIT v. Prem Pal Gandhi in ITA-95-2017 (O&M) dt. 18-1-2018 (Punjab & Haryana HC)

b. ITO v. Arvind Kumar Jain HUF ITA No. 4862/MUM/2014 dt. 18-9-2017 (Mum.)(ITAT)

c. ITO v. M/s. Indravadan Jain (HUF) ITA No. 4861/Mum./2014 dt. 27-5-2016

d. CIT v. Shyam R. Pawar [2015] 229 Taxman 256 (Bombay)

e. CIT v. SmtJamna Dev Agarwal 328 ITR 656 (Bombay)

f. CIT v. Vivek Mehta 204 Taxmann 177 (Punjab & Haryana)

g. CIT v. Mahesh chandra G. Vakil 220 Taxman 166 (Gujarat)(HC)

h. Ms. Farrah Marker v. ITO (Mumbai) ITA No. 3801/Mum/2011

i. CIT v. Smt. Sumitra Devi 49 taxmann.com 37 (Rajasthan)

j. Arvind Mehta v. ITO ITA No. 2799/Mum/2015 pronounced on 29-2-2016

k. Commissioner of Income-tax-I v. Himani M. Vakil [2013]10 taxmann.com 326 (Guj.)

l. ITO v. Aarti Mittal 41 taxmann.com 118 (Hyderabad – Trib.)

m. DCIT v. Anil Kaniya ITA No. 4077/Mum/2013 (Mumbai)

n. Sudhanshu Suresh Pandhare v. ITO I.T.A. No. 5185/Mum/2012 (Mumbai)

o. Surya Prakash Toshniwal HUF v. ITO ITA No.1213/Kol/2016 (Kol. ITAT)

ITO vs. Raj Kumar Parashar (ITAT Jaipur)

The consideration as determined under section 50C based on the stamp duty authority valuation is not a consideration which has been received by or has accrued to the assessee. Rather, it is a value which has been deemed as full value of consideration for the limited purposes of determining the income chargeable as capital gains under section 48 of the Act. Therefore, in the instant case, the provisions of section 54F(1)(a) are complied with by the assessee and the assessee shall be eligible for deduction in respect of the whole of the capital gains so computed under section 45 read with section 48 and section 50C of the Act.

CLC & Sons Pvt. Ltd vs. ACIT (ITAT Delhi) (Special Bench)

Goodwill is an intangible asset. It falls under the expression "any other business or commercial rights of similar nature" and is eligible for depreciation u/s 32(1)(ii) of the Act.

Deepak Sales & Properties Pvt. Ltd vs. ACIT (ITAT Mumbai) (Special Bench)

There is no dispute between the parties that bonafide nature of transactions alone would not be sufficient to escape the clutches of sec. 271D of the Act. As per the decision rendered by Hon'ble Supreme Court in the case of Kum. A.B. Shanthi (supra), it is required to be established that there was some bonafide reasons for the assessee for not taking or accepting loan or deposit by account payee cheque or account payee bank draft, so that the provisions of sec.273B of the

Act will come to the help of the assessee. Only in such cases, the AO is precluded from levying penalty u/s 271D of the Act.

Chandigarh Lawn Tennis Association [2018] 95 taxmann.com 308 (Chandigarh - Trib.)

Where pre-dominant object of assessee society Chandigarh Lawn Tennis Association was promotion of game of tennis including selection of players, training of players, and conduct of matches both domestic and international, other income of assessee such as from nominal registration fees or nominal coaching fees which was charged so as to attract only genuinely interested trainees / players could not be said to be its business income as it was sans profit motive. Further, holding of matches for commercial purpose was not a regular feature or regular activity of assessee. Even Davis Cup organized by assessee was as part of its objects and even incidental income had been ploughed back and applied for carrying aims and objects of assessee society.

Therefore, it could be said that though assessee was carrying out activities towards advancement of objects of general public utility, which was its dominant activity, however, it was also involved in carrying out incidental activity in nature of trade, commerce or business in course of actual carrying out of advancement of object of general public utility by way of commercially exploiting rights of hosting 'Davis Cup Match'. Thus, as per amended provisions of section 2(15), 10(23C), 11(4), 11(4A), 13(8) and section 143(3), income of assessee from incidental and commercial activity i .e. income from organizing of Davis Cup up to limit prescribed as per second proviso to section 2(15), which for relevant assessment year 2013-14 is Rs. 25 lakhs, will be treated as income from 'charitable purposes' and assessee will be entitled to claim exemption under section 11 up to that extent in respect of said income along with other income, if any, from non-business activity of assessee. However, income over and above amount for Rs. 25 lakhs from business activity i.e. from exploitation of its right to hold Davis Cup will be treated as 'business income' of assessee and will be liable to include in its total income.

Atul Ltd. [2018] 95 taxmann.com 161 (Ahmedabad - Trib.)

Having noticed the fact that the Assessing Officer had raised specific questions viderequisite notice dated 15-10-2010 with respect to allowability on 'loss on sale of stores' and that the

assessee had explained the same - without any follow-up question by the Assessing Officer in this regard, the Assessing Officer had indeed formed an opinion about the deductability of loss on sale of stores. It is also not in dispute that no new material has come to the light on account of which the present assessment proceedings were reopened. On these facts, the reopening was clearly on account of change of opinion by the Assessing Officer - something which is impermissible under the scheme of the act and in the light of binding judicial precedent. Thus, the impugned reassessment proceedings were to be quashed.

Second Leasing (P.)Ltd. [2018] 95 taxmann.com 133 (Delhi - Trib.)

Whether assessee is a trader or an investor is to be decided on facts and circumstances of each of case; when assessee makes investment and chooses to rely on same and obtain a higher price out of it than what it originally acquired, enhanced price received is a realization of investment and, hence, same is to be treated as capital gain. Assessee company made investment in shares and had shown as such in books of account - Assessee filed its return of income declaring certain income by way of short-team capital gain from shares sold by it - Though in past, income arising on sale of such investment was accepted as capital gain, during relevant year Assessing Officer did not accept same -It was not open to Assessing Officer to take a different view in respect of relevant assessment year without showing reason for doing same.Since in instant case, all transactions were delivery based, income arising from such investment was to be treated as capital gain.

Basavaraj M Kudarikannur [2018] 95 taxmann.com 106 (Bangalore - Trib.)

It is not disputed by the Assessing Officer that the land acquired was agricultural land and the conditions laid down under section 10(37)(i) to (iv) are applicable to the land which is in question which was compulsorily acquired. It is also not in dispute that the interest in question was interest awarded under section 28 of the Land Acquisition Act, 1894. In the given circumstances, the decision of the Gujarat High Court in the case of MovaliyaBhikhubhaiBalabhai v. ITO [2016] 70 taxmann.com 45/388 ITR 343 will be applicable to the facts of the present case. [Para 11]

In the light of the aforesaid decision of the High Court and in the light of the admitted factual position in the present case, the Commissioner (Appeals) is fully justified in allowing exemption under section 10(37) on the interest received by the assessee under section 28 of the Land Acquisition Act, 1894. [Para 14]

In the result, the revenue's appeal is dismissed.

JM Financial Services Ltd. [2018] 95 taxmann.com 129 (Mumbai - Trib.)

We have considered rival submissions and perused materials on record. First and foremost we have to deal with the primary and fundamental issue raised by the assessee on the point that in the absence of identity of the payee/recipient of income the assessee cannot deduct tax at source as the TDS provisions become unworkable. Before dealing with the aforesaid issue, it is necessary to deal with the nature of transaction leading to payment of borrowing fee by the assessee which is the subject matter of the present appeal. The learned Commissioner (Appeals) in Para–4 and 4.1 of the impugned order has explained in detail the technicalities and nuances of the transaction of lending and borrowing of securities under the SLB Scheme. Therefore, there is no necessity to deal with them in detail in this order. To put it simply, SEBI has formulated the Securities Lending Scheme, 1997 for lending and borrowing of securities through an approved intermediary. As per the definition of Scheme, as provided under SLB Scheme 1997, it involves lending of securities through an approved intermediary to a borrower under an agreement for specified period with the condition that the borrower will return equivalent securities of the same type or class at the end of the specified period along with the corporate benefit accruing on the securities borrowed. As per clause (3)(1)(e) of the Scheme, lender means a person who deposits the securities registered in his name or in the name of any other person duly authorised on his behalf with an approved intermediary for the purpose of lending under the Scheme. Borrower, as per clause 3(1)(c) of the Scheme means a person who borrows the securities under the Scheme through an approved intermediary. As per clause 3(1)(a) of the Scheme, approved intermediary means a person duly registered by the Board under the guidelines of the scheme through whom the lender will deposit the securities for lending and the borrower will borrow the securities. Clause 4(1) of the Scheme provides that both the lender and the borrower will separately enter into agreements with the approved intermediary for depositing the securities for the purpose of

lending through approved intermediary and also for borrowing of securities through the approved intermediary. It further makes it clear that there shall be no direct agreement between the lender and borrower for the lending or borrowing of securities. Clause 4(2) of the Scheme provides that the beneficial interest arising out of lending the securities through approved intermediary along with corporate benefit shall accrue to the lender. Clause 4(4) of the Scheme clarifies that lending of securities under the Scheme through an approved intermediary shall not be treated as disposal of the securities. Of–course, the Scheme also provides for payment of fee for borrowing securities. Thus, a reading of the Scheme as a whole would indicate that the entire transaction relating to lending and borrowing of securities has to be mandatorily carried out through the approved intermediary. In the present case there is no dispute that the approved intermediary is NSCCL and lending and borrowing of securities for which the borrowing fee has been paid was carried out through NSCCL. The Assessing Officer has held the payment of borrowing fee to NSCCL to be taxable at the hands of NSCCL and accordingly raised the demand under section 201(1) and levied interest under section 201(1A) of the Act. However, the learned Commissioner (Appeals) has correctly appreciated the role of NSCCL while holding that it only acts as an intermediary or facilitator of the transaction of lending and borrowing securities and the borrowing fee is not an income of NSCCL. In fact, NSCCL has also clarified the aforesaid factual position by stating that the borrowing fee received by it is being shown as a liability in its books of account. Thus, to that extent, now it is settled that the borrowing fee paid by the assessee cannot be treated as income of NSCCL requiring the assessee to deduction tax at source under section 194A of the Act. However, the dispute does not end there. It is a fact on record, the ultimate beneficiary of the borrowing fee paid by the assessee is the lenders of the securities borrowed by the assessee through the approved intermediary. In other words, the borrowing fee paid by the assessee was ultimately received by the respective lenders of securities and NSCCL has only acted as a pass through entity. Thus, in effect, the borrowing fee paid by the assessee is to be treated as income of the lenders of securities borrowed by the assessee. The issue which arises for consideration before us is, whether the assessee can be held to be an assessee in default for not deducting tax at source under section 194A of the Act in respect of borrowing fee paid to the lenders through NSCCL. In this regard, it is the contention of the assessee from the very beginning that since the identity of the lenders are not known to the assessee it could not have deducted tax at source while making such payment. Thus, the TDS provisions become

unworkable. However, though, the Assessing Officer has not at all dealt with the aforesaid contention of the assessee in depth, learned Commissioner (Appeals) has rejected the contention of the assessee by observing that all details relating to the lenders of securities and the respective transactions are available with NSCCL and, therefore, the assessee must also be aware of such informations relating to the lender of securities to whom the borrowing fee has ultimately been paid. On carefully scanning through the impugned order of the learned Commissioner (Appeals) we are unable to find any factual basis for the learned Commissioner (Appeals) to arrive at such a conclusion. As already discussed earlier, clause 4(1) of the Scheme mandates that the lender of securities and borrower of securities will have to enter into separate agreements with approved intermediary for lending and borrowing of securities. The Scheme specifically prohibits any direct agreement or contact between the lender and the borrower for lending and borrowing of securities. In fact, the code of conduct for approved intermediaries as per clause 11 of Annexure–C clearly states that the approved intermediary shall maintain confidentiality of information about lender or borrower which it has come to possess as a consequence of dealings with it and shall not divulge the same to other clients, the press or any other interested parties. Thus, on a reading of the Scheme as a whole, it appears that the lender and borrower of securities have no contact with each other as the entire transaction is regulated through NSCCL. Keeping in perspective the aforesaid facts, the contention of the assessee that, while making payment of borrowing fee it was not aware of the identity and other details of the lender, assumes importance. The learned Commissioner (Appeals) has not referred to any material to demonstrate that at the time of making payment to the NSCCL or prior to it the assessee knew the identity and other details of the lenders to whom NSCCL was ultimately going to pay the borrowing fee. It further appears, neither the Assessing Officer nor the learned Commissioner (Appeals) have conducted any enquiry with the NSCCL for ascertaining the fact as to whether at the time of making the borrowing fee or prior to it assessee was in knowledge of the identity and other details of the lender. Ascertainment of these facts is of utmost importance since from the very beginning it is the consistent stand of the assessee that it is not aware of the identity and other details of the lenders to whom the borrowing fee is ultimately paid by the NSCCL. The contention of the assessee that, in the absence of availability of the identity and other details of the lender to whom the borrowing fee is ultimately paid by the NSCCL the assessee could not have complied the provisions of section 200(3) and section 203(1) of the Act, has substantial

force and cannot be brushed aside with some general observations. Since, the Departmental Authorities have not properly appreciated the contentions of the assessee and have not made any enquiry to ascertain the assessee's claim that at the time of paying borrowing fee, it has no knowledge or information about the identity and other details of lenders, we are inclined to restore the issue to the file of the Assessing Officer for re–adjudication after proper enquiry. We make it clear, in the event it is ultimately found that at the time of paying the borrowing fee to NSCCL or even prior to it, the assessee was unaware of the identity and other details of the lenders, then it cannot be fastened with the liability of deduction of tax under section 194A of the Act, since, the TDS provisions will become unworkable and the assessee cannot be compelled to perform an impossible act. As regards the without prejudice submissions of the learned Sr. Counsel for the assessee that the borrowing fee is not in the nature of interest, since the decision on the aforesaid issue will depend upon the ultimate outcome of the issue relating to assessee's claim that in the absence of identity of the payee could not have deducted tax at source, we refrain from deciding the issue at this stage and restore it to the Assessing Officer for deciding afresh, if warranted. Needless to mention, the Assessing Officer must afford a reasonable opportunity of being heard to the assessee. Grounds are allowed for statistical purposes.

DCIT vs. Inventaa Industries Private Limited (ITAT Hyderabad Special Bench)

It is clear that we cannot restrict the word “product” to ‘plants’, ‘fruits’, ‘vegetables’ or such botanical life only. The only condition is that the “product” in question should be raised on the land by performing some basic operations. Mushroom produced by the assessee is a product. This product is raised on land/soil, by performing certain basic operation. The product draws nourishment from the soil and is naturally grown, by such operation on soil which require expenditure of “human skill and labour”. The product so raised has utility for consumption, trade and commerce and hence would qualify as an “agricultural product” the sale of which gives rise to agricultural income.

Usha Agarwal vs. ITO (ITAT Agra)

The second point which is very important is that in regard to the cases falling under section 34(1A), action can be taken only where the income which has escaped assessment is likely to

amount to Rs.1 lakh or more. In other words, it is only in regard to cases where the escaped income is of a high magnitude that the restriction of the period of limitation has been removed. Since no reasons were recorded that the escaped income is likely to be Rs.1 lac or more so that the Chief Commissioner or Commissioner may record his satisfaction under section 151, the initiation of reassessment proceedings after more than four years was clearly barred by time.

ITO vs. Arihant Estates Pvt. Ltd (ITAT Mumbai)

In the case on hand before us it is an undisputed fact that both assessees have treated the unsold flats as stock in trade in the books of account and the flats sold by them were assessed under the head 'income from business'. Thus, respectfully following the above said decisions we hold that the unsold flats which are stock in trade when they were sold they are assessable under the head 'income from business' when they are sold and therefore the AO is not correct in bringing to tax notional annual letting value in respect of those unsold flats under the head 'income from house property'. Thus, we direct the AO to delete the addition made under Section 23 of the Act as income from house property."

DCIT vs. DipenduBapalal Shah (ITAT Mumbai)

We found that CIT(A) as dealt with the issue threadbare and after applying judicial pronouncements laid down by High Court and Supreme Court reached to the conclusion that assessee being non-resident is not liable to tax in respect of money lying in the foreign country unless AO bring something on record to show that assessee has not fulfilled the test of taxability of non-resident under the provisions of the Act. The detailed finding so recorded by CIT(A) are as per material on record and do not require any interference on our part.

Ghanshyam vs. ITO (ITAT Agra)

Apparently, from the approval recorded and words used that "Yes. I am satisfied.", it has proved on record that the sanction is merely mechanical and Addl. CIT has not applied independent mind while according sanction as there is not an iota of material on record as to what documents he had perused and what were the reasons for his being satisfied to accord the sanction to initiate the reopening of assessment u/s 148 of the Act.

Baniara Engineers Pvt. Ltd vs. ITO (ITAT Kolkata)

It is essential that for application of Sec. 50C that the transfer must be of a capital asset, being land or building or both. If the capital asset under transfer cannot be described as "land or building or both" then section 50C will cease to apply. Booking advance cannot be equated with the capital asset and therefore section 50C cannot be invoked.

Mateen PyaraliDholkia vs. DCIT (ITAT Mumbai)

In the instant case, the deduction on account of fees paid for PMS had been claimed by the assessee as deduction in computing capital gains arising from sale of shares and securities. He however had failed to explain as to how the said fees could be considered as cost of acquisition of the shares and securities or the cost of any improvement thereto. He had also failed to explain as to how the said fees could be treated as expenditure incurred wholly and exclusively in connection with sale of shares and securities. On the other hand, the basis on which the said fees was paid by the assessee showed that it had no direct nexus with the purchase and sale of shares and as rightly contended by the revenue, the said fees was payable by the assessee going by the basis thereof even without there being any purchase or sale of shares in a particular period.

Vora Financial Services P. Ltd vs. ACIT (ITAT Mumbai)

The provisions of sec. 56(2)(viia) should be applicable only in cases where the receipt of shares become property in the hands of recipient and the shares shall become property of the recipient only if it is "shares of any other company". In the instant case, the assessee herein has purchased its own shares under buyback scheme and the same has been extinguished by reducing the capital and hence the tests of "becoming property" and also "shares of any other company" fail in this case. Accordingly we are of the view that the tax authorities are not justified in invoking the provisions of sec. 56(2)(viia) for buyback of own shares

Visvesvaraya Technological University [2018] 94 taxmann.com 431 (Bangalore - Trib.)

As per provisions of section 12A(1)(a), application for registration of trust or institution in the prescribed form should be filed within a period of one year from the date of creation of the trust or the establishment or the institution. Undisputedly, the trust was created on 01-04-1998 and

application was moved on 25-5-1999. There was delay of 1 month 25 days for which assessee has moved an application requesting therein that the delay may be condoned and registration may be granted from the date of its inception. Though the revenue was required to dispose of the application for registration under section 12A within a period of 6 months but it was not done.

In the light of these facts and the judgments of the Apex Court in the case of *CIT* v. *Society for promotion of Education* [2016] 67 taxmann.com 264/238 Taxman 330/382 ITR 6 the registration is deemed to have been granted from the date of inception of the University as the delay in filing of the application was only 1 month and 25 days for which request for condonation of delay was moved. Therefore, the order of Commissioner is set aside and he is directed to grant registration with effect from 1-4-1998. Accordingly, the appeal of the assessee stands allowed.

River View Hotels [2018] 94 taxmann.com 433 (Ahmedabad - Trib.)

Clause (iv)(c) of sub-section (8) of section 35AD stipulates that 'building and operative anywhere in India a hotel of two-star or above category as classified by the Central Government'. There is no such time limit of obtaining star certificate is prescribed in the above clause. The only requirement is to build an operation of two or more star hotel classified by Central Government. The Assessing Officer misconstrued the said clause and observed that 'in order to avail the benefit of a three star category hotel, the assessee was required to be classified as a three star category hotel in the year of operation as the benefit of this can only be given to a two and above star hotels. As the assessee does not fulfil the criteria, deduction claimed by the assesee is hereby withdraw'. The Commissioner (Appeals), on the other hand, allowed the appeal preferred by the assessee against the said order. As per the provisions of section, any capital expenditure incurred by the assessee prior to the commencement of operations of the new unit shall be allowed as deduction in the previous year in which the assessee commences the operation of offices as new specified business if the assessee had capitalized the amount of expenditure in its books of account on the date of commencement of operation of the specified business which is present in the case in hand. Furthermore, the assessee commenced its business on 17-11-2011 and he applied for the star classification certificate on 7-6-2013 which was granted by the concerned department on 24-9-2013 with effect from 11-9-2013 till 10-9-2018. In fact, the application was made by the assessee in due time, inspection was conducted by the concerned department and ultimately certificate was issued. There is no fault on the part of the

assessee to apply and/or obtain the said certificate so far delay is concerned nor there any time limit specified for obtaining such certificate in this statute. The assessee thus fulfils the criterion prescribed under the statute and was entitled to deduction on capital expenditure incurred by him prior to the commencement of its operation and therefore there is no infirmity in the order passed by the Commissioner (Appeals) and thus the same is upheld. Revenue's appeal on this ground stands dismissed. Consequently, addition/disallowance made by the Assessing Officer is hereby deleted.

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