

Recent judgements under Direct taxes encompassing the provisions of the Income-tax Act, 1961 and the Wealth Tax Act, 1957 is a vast topic and the judgements being rendered is more a “Judge made law” rather than the interpretation of the subject on hand. This has lead to conflicts of decisions and the tax payer has to wait in vain until the Apex court clears the issue. Further, if the decision is rendered in favour of the taxpayer, the legislature in its wisdom transcends all barriers to make retrospective amendments. Nevertheless an endeavor is made for a discussion on some of the recent judgements under Direct Tax Laws. The paper does not cover precedents on “Capital Gains’ and “International Tax” which are dealt by my fellow paper writers.

A. SUPREME COURT DECISIONS

1. **Applicability of interest under sections 234A, 234B and 234C to Settlement Commission proceedings and Rectification under section 154**

Brij Lal v. Commissioner of Income Tax [2010] [328 ITR 477]

In view of the divergent judgements of the Supreme Court in Anjum Ghaswala¹, Hindustan Bulk Carrier² and Damani Brothers³, a reference was made to the Full Bench of the Supreme Court to answer the questions (i) Whether sections 234A, 234B and 234C applies to proceedings of the Settlement Commission under Chapter XIX-A? (ii) If answer to the above question is in the affirmative, what is the terminal point for levy of such interest — whether such interest should be computed up to the date of the order under section 245D(1) or up to the date of the order of the Commission under section 245D(4); and (iii) Whether the Settlement Commission can reopen its concluded proceedings by invoking section 154 so as to levy interest under section 234B, though it had not been so done in the original proceedings?

The Supreme Court brought finality to the issues by holding as under:

- Though Chapter XIX-A is a self-contained Code, the procedure to be followed by the Settlement Commission under sections 245C and 245D is nothing but assessment or computation of total income which takes place at the section 245D(1) stage. In that computation, provisions dealing with a regular assessment, self-assessment and levy and computation of interest for default in payment of advance tax, etc. are engrafted. Accordingly, sections 234A to 234C are applicable.
- Interest under sections 234A to 234C is payable only up to the date of the section 245D(1) order and not up to the date of the section 245D(4) order. The Legislature has not contemplated levy of interest for the period between the section 245D (1) and the section 245D(4).

1 252 ITR 1

2 259 ITR 449

3 259 ITR 475



- Section 245-I provides that the order of the Settlement Commission shall be final and conclusive. Hence, the Settlement Commission cannot reopen its concluded proceedings by invoking section 154 of the Act so as to levy interest under section 234B, particularly, in view of section 245-I.
- Accordingly, the Supreme Court held that the Settlement Commission cannot reopen concluded proceedings by having recourse to section 154 to levy interest under section 234B if it was not done in the original proceedings.

2. Reopening of the assessment based on valuation cell report

Assistant Commissioner of Income Tax v. Dhariya Construction [2010] [328 ITR 515]

In the above case, the Supreme Court held that a valuation report could not be treated as information for the purpose of invoking jurisdiction under section 147 of the Income-tax Act.

Reference may also be made to the Supreme Court decision in the case of “*Sargam Cinema v. ACIT*”⁴ in the context of the categorical finding of the Tribunal that where the books of account are not rejected, reference to department valuation officer is misconceived.

3. Section 115JB — “book profits” as computed under section 80HHC(3) is deductible while computing MAT and not “actual” deduction

Ajanta Pharma v. Commissioner of Income Tax [2010] [327 ITR 305]

The Supreme Court in a landmark judgement while reversing the judgement of the Bombay High court⁵ held that:

- Sections 80HHC and 115JB operate in different spheres.
- Two essential conditions for invoking section 80HHC(1) are that the assessee must be in the business of export; and secondly, the sale proceeds of such exports should be receivable in India in convertible foreign exchange. Section 80HHC(1) refers to ‘eligibility’, whereas section 80HHC(3) refers to computation of tax incentive. Section 80HHC(1B) does not deal with ‘eligibility’ but with the ‘extent of deduction’.
- Section 115JB is a self-contained Code. It taxes deemed income. It begins with a non obstante clause. Section 115JB refers to computation of ‘book profits’ which have to be computed by making upward and downward adjustments. In the downward adjustments, *vide* clause (iv), it seeks to exclude ‘eligible’ profits derived from exports.
- On the other hand, under section 80HHC(1B), it is the extent of deduction which matters. The word ‘thereof’ in each of the items under section 80HHC(1B) is important. However, for the purposes of computation of book profits under section 115JB, where computation is different from normal computation under the Act/computation under Chapter VIA, one needs to keep in mind the upward and downward adjustments and, if so read, it becomes clear that clause (iv) covers full export profits at 100 per cent as ‘eligible profits’ and that the same cannot be reduced to 80 per cent by relying on section 80HHC(1B).

4 328 ITR 513

5 318 ITR 252



- The dichotomy between 'eligibility' of profit and 'deductibility' of profit is not kept in mind, then section 115JB will cease to be a self-contained code. In section 115JB, as in section 115JA, it has been clearly stated that the relief will be computed under section 80HHC(3)/(3A), subject to the conditions under sub-sections (4) and (4A) of that section.
- The conditions are only that the relief should be certified by the chartered accountant. Such condition is not a qualifying condition but it is a condition of compliance. Therefore, one cannot rely upon the last sentence in clause (iv) of the Explanation to section 115JB [Subject to the conditions specified in sub-sections (4) and (4A) of that section] to obliterate the difference between 'eligibility' and 'deductibility' of profits as was contended on behalf of the department.
- The impugned judgement of the High Court was set aside and the judgement of the Tribunal was restored.

Thus the Supreme Court upheld the decision of the Mumbai bench in the case of *ACIT v. Ajanta Pharma Ltd.*⁶ by holding that the entire 100 per cent of export profits earned by the assessee as computed under section 80HHC(3) were eligible for reduction under clause (iv) of the Explanation to section 115JB.

4. Admissibility of depreciation allowance on Bombay Stock Exchange membership card

Techno Shares and Stocks Limited v. Commissioner of Income Tax [2010] [327 ITR 323]

On a question whether BSE membership card to trade in share was a "licence" or "any other business or commercial right of a similar nature" owned by the assessee and used for the business purpose in terms of section 32(1)(ii) of the Income-tax Act, the Hon'ble Supreme Court quoting extensively the provisions of the Act and the Bombay Stock Exchange Rules held that the right of membership conferred upon the member under the Bombay Stock Exchange Membership Card is a "business or commercial right" which gives a non-defaulting continuing member a right to access the Exchange and to participate therein and in that sense it is a licence or akin to licence in terms of section 32(1)(ii) of the Income-tax Act which has an economic and money value. Accordingly, held that the depreciation is allowable on cost of Bombay Stock Exchange membership card under section 32(1)(ii) of Income-tax Act.

However, the Supreme Court struck a note of caution that its decision was strictly confined to the right of membership conferred upon the member under the BSE membership card and should not be understood to mean that every business or commercial right would constitute a "licence" or a "franchise" in terms of section 32(1)(ii) of the Income-tax Act.

5. Withholding obligation under section 195(1) of the Income-tax Act when there is no income chargeable to tax

GE India Technology Centre Private Limited v. Commissioner of Income Tax [2010] [327 ITR 456]

In a landmark judgement, the Supreme Court put an end to the controversy created by the Karnataka High Court on the need to withhold taxes even when the underlying payment was not chargeable to tax in India. The Supreme Court while setting aside the judgement of the Karnataka High Court⁷ in respect of payments to non-residents held that:

⁶ 21 SOT 193

⁷ *CIT v. Samsung Electronics Company Limited [323 ITR 456]*



- The expression “sums chargeable under the provisions of the Act” in section 195(1) of the Income-tax Act is the crucial determining factor.
- The phrase “sums chargeable” under the provisions of the Act refers to the amounts that have an element of income in them as required under the provisions of the Income-tax Act and the treaty provisions.
- The contention of the tax authorities that the assesseees have to make an application in every case of remittance even when the income has no territorial nexus with India or is not chargeable in India was rejected.
- Accepting the contention of the tax authorities would lead to the obliteration of the expression “sum chargeable under the provisions of the Act” as given under section 195(1) of the Income-tax Act.
- Any person paying any sum to a non-resident is not liable to deduct tax if such sum is not chargeable to tax under the Income-tax Act

Explaining the judgement of the Supreme Court in Transmission Corporation of A.P. Ltd⁸, the Supreme Court at pages 465 and 466 of its judgement held as under:

“.....In our view, S. 195(2) is based on the “principle of proportionality”. The said sub-section gets attracted only in cases where the payment made is a composite payment in which a certain proportion of payment has an element of “income” chargeable to tax in India. It is in this context that the Supreme Court stated, “If no such application is filed, income-tax on such sum is to be deducted and it is the statutory obligation of the person responsible for paying such ‘sum’ to deduct tax thereon before making payment. He has to discharge the obligation to TDS”. If one reads the observation of the Supreme Court, the words ‘such sum’ clearly indicate that the observation refers to a case of composite payment where the payer has a doubt regarding the inclusion of an amount in such payment which is exigible to tax in India. In our view, the above observations of this Court in Transmission Corporation case (1999) 239 ITR 587 (SC) which are put in italics have been completely, with respect, misunderstood by the Karnataka High Court to mean that it is not open for the payer to contend that if the amount paid by him to the non-resident is not at all ‘chargeable to tax in India, then no tax is required to be deducted from such payment....”

6. Liquidated damages – whether capital or revenue receipt

Commissioner of Income-tax, Gujarat v. Saurashtra Cement Ltd. [2010] [233 CTR 209]

On a question whether the liquidated damages received by the assessee from the supplier of the plant and machinery on account of delay in the supply of plant is a capital or a revenue receipt, the Supreme Court held that it was clear from the agreement that the liquidated damages were to be calculated at 0.5 per cent of the price of the respective machinery and equipment which were delivered late, for each month of delay, without proof of the actual damages suffered by the assessee on account of the delay. The delay in supply could be of the whole plant or a part thereof but the determination of damages was not based upon the calculation made in respect of loss of profit on account of supply of a particular part of the plant. It was evident that the damages to the assessee were directly and intimately linked with the procurement of a capital asset, i.e., the cement plant, which would obviously lead to delay in coming into existence of the profit-making apparatus, rather than a receipt in the course of profit-earning process. Compensation paid for the delay in

8 239 ITR 597



procurement of capital asset amounted to sterilization of the capital asset of the assessee as supplier had failed to supply the plant within time as stipulated in the agreement. The amount received by the assessee towards compensation for sterilization of the profit-earning source and not in the ordinary course of its business, was a capital receipt in the hands of the assessee.

7. Dividend stripping transactions

Commissioner of Income Tax v. Walfort Share and Stock Brokers [2010] [326 ITR 1]

On a question whether the loss arising in the course of dividend stripping transaction (prior to 1-4-2002) was disallowable on the ground that such loss was artificial as the dividend stripping transaction was not a business transaction. The Supreme Court while holding it was deductible held as under:

- A return on investment or a pay back is not an expenditure within the scheme of section 14A.
- For attracting section 14A there has to be a proximate cause for disallowance, which is its relationship with the tax exempt income.
- The losses arose prior to insertion of section 94(7) w.e.f 1-4-2002. Even after 1-4-2002 the losses are mitigated only to the extent of dividend received.
- Loss on sale of units could not be considered as expenditure in relation to earning dividend income exempt under section 10(33) as section 14A deals only with expenditure and not loss.
- The assessing officer erred in disallowing the loss. There was a sale, price was received and the assessee received dividend which was exempt under section 10(33). This cannot be called "Abuse of law".
- Section 14A and section 94(7) of the Income-tax Act operates in different fields. Section 14A comes into operation when there is a claim for expenditure in earning tax free income. Whereas section 94(7) comes in when there is a claim for allowance for the loss.
- The conceptual difference between loss, expenditure, cost of acquisition, etc must be kept in mind while interpreting the scheme of the Income-tax Act.

8. Interconnect/access/port charges paid to BSNL whether liable to withholding under section 194J of the Income-tax Act services'

Commissioner of Income-tax, Delhi v. Bharti Cellular Ltd. [2010] [234 CTR 146]

On a question whether TDS was deductible by M/s. Bharti Cellular Limited when it paid interconnect charges/access/port charges to BSNL, the Supreme Court while remanding the case held that:

- The expression 'technical services' comes in between the words 'managerial' and 'consultancy' services in the Act. Various decisions of the High Courts and Tribunals have taken a view that the expression 'technical services' has to be read in the narrower sense by following the rule of Noscitur a sociis i.e., questionable meaning of a word can be derived from its association with other words.
- There is, however, no expert evidence from the Department's side to show how human intervention takes place in the present fact pattern. Expert evidence is required to decide whether there is any manual intervention involved during the traffic of such calls. In a situation where the taxpayer is allotted a fixed capacity and in case this capacity is exhausted, it is unclear whether any human involvement is required in allocating additional capacity on an urgent basis. Thus, whether at any stage, any human intervention is involved needs to be



examined based on the technical evidence from technical experts. This would enable appellate authorities to decide the legal issue based on factual foundation.

- The matter was remanded, directing the assessing officer to examine a technical expert from the side of the Department and to decide the matter within a period of four months. Further, the Court also gave an opportunity to the Respondent to examine its expert and to adduce any other evidence.
- The CBDT to issue directions to all its officers, that in such cases, the Department need not proceed only by the contracts placed before the officers. With the emergence of our country as one of the BRIC countries and with the technological advancement matters such as present one will keep on recurring and hence time has come when Department should examine technical experts so that the matters could be disposed of expeditiously and further it would enable the Appellate Forums, including this Court, to decide legal issues based on the factual foundation.
- However, interest or penalty cannot be levied on the taxpayer and other parties to this case for the following reasons:
 - There is no loss of revenue to the Tax Authority for not withholding taxes on such payments as taxes have already been paid by the recipient; and
 - The question of taxability of the payments as FTS is still not determined. Therefore, there would be no levy of penal interest prior to the date of fresh adjudication.

9. “Actual write off” of individual debtor’s account is not necessary under 36(1)(vii) Bad Debt, of the Income-tax Act, 1961

Vijaya Bank v. Commissioner of Income Tax [2010] [323 ITR 166]

On a question before the Hon’ble Supreme Court whether it is imperative for assessee-bank to close individual account of each of its debtors in its books for claiming deduction under section 36(1)(vii) of the Income-tax Act, the Supreme Court referring to its judgement in *Southern Technologies Limited v. Joint CIT*⁹ held that in order to understand the term “write-off” one has to see how the write off has been effected. If an assessee debits an amount of doubtful debtors to profit and loss account and credits the asset account (i.e., sundry debtors) it would constitute an actual write off of a debt. On the contrary, if the amount is credited to “current liabilities and provisions”, then it would be a provision. In the latter case the assessee would not be entitled to the deduction after 1-4-1989. It was also held that the assessing officer was empowered to tax the subsequent repayment, if any, under section 41(1) of the Income-tax Act.

Reference may also be made to the Supreme Court decision in *TRF Limited vs CIT*¹⁰ wherein it was held that bad debts need not be proven to be irrecoverable under section 36(1)(vii). It is sufficient if they are written off.

9 320 ITR 577

10 323 ITR 397(SC)



10. Incorrect claim will not attract penalty under section 271(1)(C) of the Income-tax Act, 1961

Commissioner of Income Tax v. Reliance Petro Products (P) Limited [2010] [322 ITR 158]

On a question whether the assessee was liable to penalty under section 271(1)(C) for making an incorrect claim, the Hon'ble Supreme Court held that:

- Section 271(1) (c) applies where the assessee “has concealed the particulars of his income or furnished inaccurate particulars of such income”. The present was not a case of concealment of the income.
- The words “inaccurate particulars” mean that the details supplied in the Return are not accurate, not exact or correct, not according to truth or erroneous. In the absence of a finding by the AO that any details supplied by the assessee in its Return were found to be incorrect or erroneous or false, there would be no question of inviting penalty under section 271(1)(c).
- A mere making of claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding income of the assessee.
- The law laid down in **Dilip Shroff**¹¹ as to the meanings of the words “conceal” and “inaccurate” continues to be good in law because what was overruled in **Dharmendra Textile Processors**¹² was only that part in Dilip Shroff's case where it was held that *mens rea* was not an essential requirement for penalty under section 271(1)(c) of the Income-tax Act.

Relying on the Supreme Court judgement [Supra], the Delhi High Court in *Devsons Private Limited v. C.I.T.*¹³ reiterated the above principles.

11. Reopening of an assessment on mere change of opinion without any tangible material is unsustainable.

Commissioner of Income Tax v. Kelvinator of India Limited [2010] [320 ITR 561]

On a question whether the concept of ‘change of opinion’ stands obliterated with effect from 1-4-1989, i.e., after substitution of section 147 by the Direct Tax Laws (Amendment) Act, 1987. The Supreme Court held that:—

- Prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under two conditions, viz., if (a) the ITO had reason to believe that, by reason of the omission or failure on the part of an assessee to make a return under section 139 for any assessment year to the ITO or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax had escaped assessment for that year, or (b) the ITO had in consequence of information in his possession reason to believe that income chargeable to tax had escaped assessment for any assessment year. The fulfilment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a reassessment.
- With effect from 1-4-1989 those conditions are given a go-by and only one condition has remained, viz., where the Assessing Officer has reason to believe that income has escaped assessment, the section confers jurisdiction to reopen the assessment.

11 291 ITR 519 (SC)

12 306 ITR 277 (SC)

13 329 ITR 483



- Therefore, post 1-4-1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words 'reason to believe', failing which section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of 'mere change of opinion', which cannot be *per se* reason to reopen.
- One must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess, but the reassessment has to be based on fulfilment of certain pre-conditions and if the concept of 'change of opinion' is removed as contended on behalf of the department, then in the garb of reopening the assessment, review would take place.
- One must treat the concept of 'change of opinion' as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1-4-1989, the Assessing Officer has power to reopen, provided there is 'tangible material' to come to conclusion that there is escapement of income from assessment.
- Under the Direct Tax Laws (Amendment) Act, 1987, the Parliament not only deleted the words 'reason to believe' but also inserted the word 'opinion' in section 147. However, on receipt of representations from the companies against omission of the words 'reason to believe', the Parliament re-introduced the said expression and deleted the word 'opinion' on the ground that it would vest arbitrary powers in the Assessing Officer.
- Circular No. 549 dated 31-10-1989 (1990) 182 ITR (STAT) 1, 29 was quoted to support its conclusion.

Reference may also be made to the Supreme Court decision in the case of *ACIT v. Rajesh Jhaveri Stock Brokers (P) Ltd.*¹⁴ where in it was held that the principle relating to "change of opinion" was held to be not applicable.

12. Manufacture and production meaning of

Income Tax Officer v. Arihant Tiles and Marbles (P) Limited [2010] [320 ITR 79]

Commissioner of Income Tax v. Emptee Poly-Yarn (P) Limited [2010] [320 ITR 665]

Commissioner of Income Tax v. Oracle Software India Limited [2010] [320 ITR 546]

On a question whether conversion of marble blocks by sawing into slabs and tiles and polishing amounts to "manufacture or production of article or thing" for claiming benefit of section 80-IA of the Income-tax Act. The Supreme Court held as under:

- The word 'production' is wider in its scope as compared to the word 'manufacture'. Further, the Parliament itself has taken note of the ground reality and has amended the provisions of the Act by inserting section 2(29BA) *vide* the Finance Act, 2009, with effect from 1-4-2009, wherein the word 'manufacture' is defined.
- In the instant case, the Court was not concerned only with cutting of marble blocks into slabs, but was also concerned with the activity of polishing and ultimate conversion of blocks into polished slabs and tiles. From the processes/activities undertaken by the assessee, it was clear that there were various stages through which the blocks had to go through before they became polished slabs and tiles. One has to examine the scheme of the Act also while deciding the question as to whether the activity constitutes manufacture or production.



- In the instant case, the blocks converted into polished slabs and tiles after undergoing the various processes certainly resulted in emergence of a new and distinct commodity. The original block did not remain the block; it became a slab or tile. In the circumstances, not only there was manufacture, but also an activity which was something beyond manufacture and which brought a new product into existence. Therefore, the activity undertaken by the assessee constituted manufacture or production in terms of section 80-IA.
- The test for determining whether “manufacture” can be said to have taken place is whether the commodity which is subjected to a process can no longer be regarded as the original commodity but is recognized in trade as new and distinct commodity. The word ‘Production’ takes in all the byproducts, intermediate products and residual products which emerge in the course of manufacture of goods.
- Further, the assessees before the Court were also job workers duly registered under the provisions of the Excise Act/Rules framed thereunder. If the contention of the revenue was accepted, namely, that the activity undertaken by the assessees was not manufacture, then it would have serious revenue consequences. Each of the assessees was paying excise duty. Some of the assessees were job workers and the activity undertaken by them had been recognised by the various Governmental authorities as manufacture. To say that the activity would not amount to manufacture or production under section 80-IA would have disastrous consequences, particularly in view of the fact that the assessees in all the cases would plead that they were not liable to pay excise duty, sales tax, etc., because the activity did not constitute manufacture. Therefore, the activities undertaken by each of the assessees constituted manufacture or production and, they would be entitled to benefit of section 80-IA.

In *CIT v. Oracle Software India Limited*, the Supreme Court held that the term “manufacture” implies a change, but, every change is not a manufacture, despite the fact that every change in an article is the result of a treatment of labour and manipulation. However, this test of manufacture needs to be seen in the context of the process adopted by the assessee. If an operation/ process renders a commodity or article fit for use for which it is otherwise not fit, the operation/ process falls within the meaning of the word “manufacture”.

B. HIGH COURT DECISIONS

13. Bid amount disbursed is not interest payable on borrowed money

Commissioner of Income Tax v. Sahib Chits (Delhi) (P.V.T.) Limited [2010] [328 ITR 342, Delhi]

On a question whether the bid amount paid to subscribers of the chit would be in the nature of interest as defined under section 2(28A) of the Income-tax Act and whether the same would be subject to withholding under section 194A of the Income-tax Act, the Delhi High Court held that the amount disbursed by a chit fund company to the members from their contribution cannot be treated as ‘interest’ payable on borrowed money. In the case of a chit fund, there is no borrowing of moneys nor any debt is incurred and as such the provisions of section 2(28A) are not attracted. The payments made/disbursed to the subscribers/members are not ‘interest’ and therefore, the question of deducting any tax at source therefore would not arise.

14. Jurisdiction of the Tribunal

Marubeni India Private Limited v. Commissioner of Income Tax [2010] [328 ITR 306, Delhi]

On a question whether the tribunal was right in law in holding that it did not have a jurisdiction to direct that the amount be allowed in the year of payment which was not the assessment year in appeal. The Delhi High Court held that under section 245(1) of the Income-tax Act, the power to



pass such orders as the tribunal thinks fits could be exercised only in relation to the matters that arise in the appeal and that it was not open to the Tribunal to adjudicate on a question which was not in dispute and which did not form the subject matter of appeal.

The Delhi High Court in the instant case held that the Tribunal could not give a finding in respect of the assessment for any other year which is not the subject matter of the appeal before it. The Tribunal could give a finding that the deduction/income does not belong to the relevant assessment year / years but though it may incidentally find that the deduction/income relates to other assessment year, it could not give a finding that the deduction/income belongs to another assessment year.

15. Share application money

Commissioner of Income Tax v. Orbital Communications (P) Ltd. [2010] [327 ITR 560, Delhi]

Following the decision of the Supreme Court in *CIT v. Lovely Exports (P) Limited*¹⁵, the Delhi High Court held that in the case of share application money, where the persons are identified, the assessing officer cannot come to the conclusion that the moneys belonged to the company without making any enquiries against the members. The fact that some of the persons did not respond to the letters of enquiry under section 133(6) does not render the contributors non-genuine. It was further stated that it was for the revenue to pursue the matter in the hands of the share holders. Reference may also be made to the Andhra Pradesh High Court in the case of *CIT v. Lanco Industries Limited*¹⁶ at page 360 the Andhra Pradesh High Court held as under:—

“If the ostensible shareholders failed to explain the means of investment, that should have been treated as unexplained income in their hands. In order to add it to the income of the assessee there must be a further finding that in fact the shareholders were name lenders and the money allegedly invested by them really belonged to the directors of the assessee-company. In the absence of a finding that the persons to whom share certificates were issued on receipt of consideration as per the book entries were in fact dummies or stooges of the directors of the assessee company, the same cannot be treated as unaccounted income of the assessee.”

16. Section 14A of Income-tax Act — Provisions of sub-sections (2) and (3) of section 14A are constitutionally valid

Godrej and Boyce Mfg. Co. Ltd. v. Deputy Commissioner of Income-tax [2010] [328 ITR 81, Bombay High Court]

In the instant case, the following question arose before the Bombay High Court:

- Whether section 14A can be invoked in respect of dividend income from shares and mutual fund income;
- Whether the Rule 8D which was notified on 24-3-2008 is retrospective in operation;
- Whether sub-sections (2) and (3) of section 14A are arbitrary and violative of Article 14 of the Constitution; and
- Whether the provisions of rule 8D are *ultra vires* sub-section (2) of section 14A and are even otherwise arbitrary and violative of Article 14.

15 319 ITR (STAT) 5

16 242 ITR 357



On the above, the Bombay High Court held as under:—

- Dividend income and income from mutual funds falling within the ambit of section 10(33), as was applicable for the assessment year 2002-03, is not includible in computing the total income of the assessee. Consequently, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to such an income which does not form part of the total income under the Act, by virtue of the provisions of section 14A(1).
- The payment by a domestic company under section 115-O(1) of additional income-tax on profits declared, distributed or paid is a charge on a component of the profits of the company. The company is chargeable to tax on its profits as a distinct taxable entity and it pays tax in discharge of its own liability and not on behalf of or as an agent of its shareholders.
- In the hands of the shareholder as the recipient of dividend, income by way of dividend does not form part of the total income by virtue of the provisions of section 10(33). Income from mutual funds stands on the same basis.
- The provisions of sub-sections (2) and (3) of section 14A are constitutionally valid.
- The provisions of rule 8D as inserted by the Income-tax (Fifth Amendment) Rules, 2008 are not *ultra vires* the provisions of section 14A, more particularly sub-section (2) and do not offend article 14 of the Constitution.
- The provisions of rule 8D which have been notified with effect from 24-3-2008 shall apply with effect from the assessment year 2008-09. However the Court held that the applicability of Rule 8D is not automatic as the provisions of section 14(2) clearly mandate that it would be applicable and arise only if the assessing officer is not satisfied with the claim of the expenditure made by the assessee in relation to income which does not form part of the total income. Thus the court ruled sub section (2) of section 14 does not *ipso facto* give powers to the assessing officer to apply Rule 8D. Thus the assessing officer must determine the claim of the assessee and examine the correctness of claim having regard to the accounts of the assessee. Therefore if the assessee demonstrates an objective basis by which the assessing officer is in a position to support the correctness of the claim then there would be no warrant of application of Rule 8D.
- Even prior to the assessment year 2008-09, when rule 8D was not applicable, the Assessing Officer had to enforce the provisions of sub-section (1) of section 14A. For that purpose, the Assessing Officer was duty bound to determine the expenditure which had been incurred in relation to income which did not form part of the total income under the Act. The Assessing Officer must adopt a reasonable basis or method consistent with all the relevant facts and circumstances after furnishing a reasonable opportunity to the assessee to place all germane material on the record.

Reference is also made to the Kerala High Court in the case of *CIT v. Leena Ramachandran*¹⁷ wherein it was held that the only benefit derived by the assessee from the investment in shares was the dividend income and no other benefit was derived from the company for the business carried on by it. As dividend is exempt under section 10(33), the disallowance under section 14A would apply. The Tribunal was not correct in estimating the section 14A disallowance to a lesser figure than the

17 235 CTR 512 [2010]



interest paid on the borrowing when the whole of the borrowed funds were utilized by the assessee for purchase of shares. Deduction of interest under section 36(1)(iii) on borrowed funds utilized for the acquisition of shares is admissible only if shares are held as stock in trade and the assessee is engaged in trading in shares. So far as acquisition of shares in the form of investment is concerned and where the only benefit derived is dividend income which is not assessable under the Act, disallowance u/s 14A is squarely attracted.

17. Charitable Trust – Surplus is not a disqualification

Pinegrove International Charitable Trust v. UOI [2010] [327 ITR 73, Punjab and Haryana High Court]

On a question whether earning of surplus to achieve its objects by a charitable trust is fatal to its exemption under section 10(23) of the Income Tax Act. In the instant case, the Chief Commissioner while denying the exemption under section 10(23) of the Act held as under:

- There could be only a reasonable surplus and only then could the Trust claim the exemption.
- Capital expenditure incurred by the Trust could not be deducted while computing the surplus.
- The relevancy of the Trust that it had in the past three years had utilized 100% of its surplus was not relevant.
- The trust was an institution existing for profits.
- Since substantial profits were being earned year after year the trust was not entitled to exemption.

The Punjab and Haryana High Court held that all the aforesaid conditions laid down by the CCIT arose on wrong foundation of facts and misconception of law as a charitable trust could make surplus to achieve its objectives and as long as the Trust was promoting its objects and utilizing the surplus in the right direction it was entitled to the exemption.

Please also refer to the decision of the Bombay High Court in *Vanita Vishram Trust v. CCIT*¹⁸.

18. Income from letting of warehouse whether would constitute Business or Property Income

Nutan Warehousing Company Limited v. Dy. Commissioner of Income Tax [2010] [326 ITR 94, Mumbai]

The question before the Bombay High Court was whether the income from warehousing activity received by the assessee was assessable as “Income from House Property” or “Income from Business”, the High Court held that the question has to be resolved on the basis of the well-settled decisions laid down by the Law in decided cases. The primary object of the assessee while exploiting the property is material. If the dominant intention to exploit commercial asset by carrying on a commercial activity, the income would be treated as Income from Business and whether letting out of the property constitutes a dominant aspect of the transaction or whether it was subservient to the main business of the assessee.

On the facts of the case before the Lordship it was found that the transactions of the warehousing agreements were not considered by the Tribunal. Merely styling an agreement as warehousing

18 327 ITR 121



agreement would not be conclusive of the nature of the transaction. The question that is to be answered by the Tribunal, it was noted, whether the transaction was a bare letting out of the asset or whether the assessee was carrying on a commercial activity involving warehousing operations. The matter was remanded to consider these aspects.

What is to be noted from the aforesaid decisions is that the transactions of the leasing deed and also the dominant intention of the assessee was to exploit commercial asset by carrying out commercial activity. If the answer is in the positive, it is to be assessed as business income subject to examination of the terms of warehousing agreements.

Please also refer to the decision of the Madras High Court in *C.I.T. v. Indian Warehousing Industries Ltd.*¹⁹ and also the judgement of the Karnataka High Court in *C.I.T v. Karnataka State Warehousing Corporation*²⁰.

19. Remission of a liability under section 41(1) of the Income Tax Act

Commissioner of Income Tax v. GP International Limited [2010] [325 ITR 25, Punjab and Haryana High Court]

The facts of the case centered around an outstanding liability of ₹ 3,30,000 towards one M/s. Axis Chemicals and Pharmaceuticals Ltd. The Punjab and Haryana High Court held that merely because the assessee failed to prove the existence and genuineness of such liability, cessation of such liability cannot be presumed, so as to bring it to tax as deemed income under section 41(1) of the Act, with the result, the addition was deleted. It was also found that a similar addition made in another case in respect of liability to the same party, had been deleted in an assessment, which had become final.

In such cases, where a liability, shown as a carried forward item of credit in the balance sheet in a later year is not found to be genuine, the proper course is only to take reassessment proceedings for the year in which it was first credited and not in a later year, since what was not genuine in a later year could not have been genuine in the year it was booked as a liability.

Commissioner of Income-tax v. Smt. Sita Devi Juneja [2010] [325 ITR 593, Punjab and Haryana High Court]

The High Court held that merely because liability was outstanding for the last six years, it could not be presumed that the said liability had ceased to exist. It was also conceded that there was no bilateral act between the assessee and the creditors, which indicated that the said liability had ceased to exist. In absence of any bilateral act, the said liability could not have been treated as ceased. In view of these facts, the Commissioner (Appeals) as well as the Tribunal had rightly come to the conclusion that the Assessing Officer had wrongly invoked the Explanation I to section 41(1) and made the aforesaid addition on the basis of presumptions, conjectures and surmises. It had been further found that the Assessing Officer had failed to show that in any earlier year allowance of deduction had been in respect of any trading liability incurred by the assessee. It was also not proved that any benefit was obtained by the assessee concerning such a trading liability by way of remission or cessation thereof during the concerned year. Thus, there did not accrue any benefit to the assessee which could be deemed to be the profit or gain of the assessee's business, which would otherwise not be the assessee's income. It had been further found as a fact that the assessee had filed the copies of accounts of sundry creditors signed by the concerned creditors.

19 258 ITR 93, Madras

20 195 Taxmann 281



Commissioner of Income-tax v. Goyal M.G. Gases Ltd. [2010] [321 ITR 437, Delhi High Court]

On a write back of the loan liability, the Delhi High Court held that the assessee did not claim nor was allowed any deduction or benefit of allowance by way of allowable expenditure and trading liability, and the same being credited to the profit and loss account had been subjected to tax as part of book profit under section 115JB of the Act. Therefore, the conclusions of the Tribunal is based on a correct appreciation of law and, does not warrant any interference by this court. The High Court upheld the Tribunal's decision that section 41(1) will apply only when the cessation of liability is in respect of such liability which is allowed as deduction in any of the preceding assessment years. Thus, section 41(1) has no application in the present case.

20. Wealth Tax Act 1957 — Building under construction whether liable to wealth tax

Commissioner of Income Tax v. Giridharam G. Yadalam [2010] [325 ITR 223, Karnataka High Court]

The claim of the assessee with reference to the terms of the development agreement, was that the assessee continued to be owner even when construction was in progress, so that it could not be treated as vacant urban land. This was not accepted. The Tribunal following its earlier orders held that land under joint development cannot be treated as a taxable asset.

On a question whether land with building under construction can form part of the Wealth as urban land defined under section 2(ea) of the Wealth Tax Act, the Karnataka High Court remarked that the Tribunal was swayed by the theory of openness of land for purposes of taxation. The Tribunal has failed to notice the principle that each word in the taxing statute has its own significance for the purpose of taxation. The words, "land on which the buildings is constructed" has not been properly appreciated/ considered by the Tribunal. It was felt that the word "constructed" in section 2(ea) of the Wealth-tax Act should have been understood as fully constructed, so that construction should have been completed within two years of purchase to merit exemption. Such land which forms the subject matter of joint development agreement, it was held, could be treated as exempt urban land for purposes of wealth-tax only if it were fully constructed within a period of two years. The building in the process of construction could not be understood as a building which has been constructed. The wording being that the urban land would mean land on which complete building stands, such lands alone would qualify for exemption.

21. Interest on borrowed capital

Commissioner of Income Tax v. HB Stock Holdings [2010] [325 ITR 316, Delhi High Court]

Where the loan to a sister concern is for the overall benefit of the assessee's business prompted by commercial expediency, it is deductible even as pointed out by the Supreme Court in *S.A. Builders Ltd v. CIT (Appeals)*²¹. Where a loan has been advanced to sister concerns prior to borrowing, the interest on such borrowing could not be disallowed at all. It was held by the Delhi High Court that no disallowance is possible in such cases. In *CIT v. DCM Ltd.*²², the Delhi High Court referred to *S.A.Builders Ltd.*'s case (supra) for coming to the same conclusion in favour of the tax payer on similar facts. However, the Kerala High Court in *CIT v. Popular Vehicles and Services Ltd.*²³ held that where the interest-free loan to a sister concern was not shown to be for its benefit or promoted by commercial expediency, disallowance was held justified.

21 288 ITR 1

22 325 ITR 310

23 325 ITR 523



22. Capital Asset – Agricultural land

Commissioner of Income Tax v. Lal Singh [2010] [325 ITR 588, Punjab and Haryana High Court]

There can be no liability for capital gains on sale of agricultural lands situated outside the municipal limits or notified periphery. The dispute as to whether it fell within the geographical limit or otherwise had come up before the Punjab High Court. The Assessing Officer relied upon an inspector's report for the inference that it was within the notified periphery of eight kilometers of the Gurgaon municipal limits, while the assessee relied upon a certificate from the Tahsildar that it was outside the limit. The Tribunal accepted the Tahsildar's certificate as having relevance and not that of the inspector. The High Court found that the decision of the Tribunal could not be characterized as "perverse, illegal or contrary to the evidence available on the records". The physical location of a property could probably be ascertained precisely, since it is a matter of fact and not law. If the Assessing Officer had doubt about the correctness of the Tahsildar's certificate, further enquiry with reference to the records of the Public Works Department and the land survey records should give a more satisfactory solution to such problems than merely going by the certificate of Revenue authorities and much less of on an Inspector's report.

In the context of determining the exclusion of agricultural land from the definition of capital asset as under section 2(14)(iii) of the IT Act, the Punjab and Haryana High Court in the case *CIT v. Satinder Pal Singh [2010, 188 Taxmann, 54]* held that, the distance of 2 Kms. from the municipal limits of city of Khanna had to be taken in terms of approach by road and not as per straight line distance on a horizontal plane. The Court contended that if the principle of measurement of distance was considered straight line distance on a horizontal plane or as per crow's flight then it would have no relationship with the statutory requirement of keeping in view the extent of urbanization.

23. Deduction under section 10B – Satisfaction of conditions

Commissioner of Income-tax, Delhi-VI v. Teehdrive (India) (P.) Ltd [2010] [232 CTR 117, Delhi High Court]

In the instant case the assessee registered with STPI was an exporter of computer software. For the assessment year under consideration the assessee filed its return claiming deduction under section 10B of the IT Act, which was rejected by the AO on the ground that the assessee was not having its own infrastructure and was using old plant/machinery of another concern to develop its software. The Hon'ble High Court of Delhi held that in the instant case it was not a case of manufacture of any article but development and creation of intellectual property, namely, software programme. The essential and main inputs for such developments were that of the personnel belonging to the assessee, their intellect and creation of the aforesaid property. Hence, use of computers would not be of much significance. Therefore assessee was entitled for deduction under section 10B of the Act.

Reference is also made to the Bangalore Tribunal in the case of *Assistant Commissioner of Income Tax v. Vaidel Engineers & Constructions Pvt. Ltd.*²⁴ where, on the question of applicability of reconstruction or splitting up of unit condition to onsite development unit, the ITAT held that there is no dispute that the activity of onsite development of computer software qualifies for the deduction. Since the activities were carried on at the client premises outside India, there was no need for having full-fledged infrastructural facilities in India. Such facility is not called for in the line of taxpayer's business. Therefore, it could not be said that the new unit was formed by splitting up of the existing business and hence the taxpayer was eligible for the deduction under the section. The ITAT came

²⁴ ITA Nos. 616 to 618/ Bang / 2008, Bangalore Tribunal



to the above conclusion based on the findings of the assessing officer that the new unit utilized the premises, infrastructure facilities and services of employees belonging to the existing business.

24. Reassessment – Time limit under section 150 (1)

Kalyan Ala Barot v. M.H. Rathod [2010] [328 ITR 521, Gujarat

In the instant case, the Gujarat High Court held that section 150(1) read with Explanation 2 under section 153(3) would reckon the time limit for initiation of proceedings under section 148 with reference to a finding or a direction in an order. In an appeal for the assessment year 1984-85, the finding was that the liability related to an earlier assessment for the assessment year 1983-84. This finding for the relief in the appeal for the assessment year 1984-85 constituted a finding to enable the Income-tax Department to avail the extended time limit. In such cases, it is the language of the order on which a finding or a direction is presumed will be relevant. Even a specific direction in a different year may not fall under section 150, if such a finding or direction is not necessary for disposal of the appeal, but not whereas in this case, relief itself depended upon the finding of assessability in a different year.

Reference may also be made to the Judgment of the A.P. High Court in *C.I.T. v. G. Viswanatham*²⁵ on the issue whether the provisions of section 150(2) of the Income-tax Act, 1961 would come to the aid of the assessee. Held that the intention of reassessment proceedings would be bad, even when they are initiated in sequence of or to give effect to any finding or direction contained in the Appellate order, if such intention of reassessment proceedings is barred by any provision of the Act on the date of the order which was the subject matter of the Appeal.

In view of the above decisions, even if an assessment is reopened keeping in view the provisions of section 150(1), the applicability of section 150(2) of the Act is to be examined.

25. Computation of profits eligible for tax holiday in the initial assessment year under section 80-IA of the Income-tax Act

Velayudhaswamy Spinning Mills vs Assistant Commissioner of Income Tax [2010] [231 CTR 368, Madras High Court]

On the questions whether initial assessment year in section 80-IA(5) would only mean the year of commencement and not the year of claim and whether unabsorbed depreciation of earlier years before the first year of claim, which has already been absorbed, could be notionally carried forward and taken into consideration for computation of deduction under section 80-IA, the Madras High Court agreed with its own ruling referred to by the assessee and the ruling of the Rajasthan High Court in the case of *CIT v. Mewar Oil and General Mills Ltd.*²⁶ which were rendered in the context of similarly worded provisions allowing income-linked deduction held that:

- The assessment years in which a taxpayer exercises the option to claim deduction would be the initial assessment year for the purpose of reckoning the period of deduction. Once the option is exercised, the taxpayer is required to set off only those losses pertaining to the assessment years beginning from the initial assessment year. The taxpayer is not required to set off losses pertaining to the earlier assessment years if such losses have already been set off against other income of the taxpayer in the earlier assessment years.

25 172 ITR 401

26 271 ITR 311



- The fiction of treating the eligible business as the only source of income of the taxpayer is applicable only to the assessment years beginning with the initial assessment year. This fiction does not extend to assessment years ending prior to the initial assessment year. Hence, losses and unabsorbed depreciation pertaining to earlier assessment years, which have been set off against other income of the taxpayer, cannot be notionally brought forward for determining quantum of profit eligible for deduction in the initial assessment year.

26. Withholding obligation under section 194H on discount to distributors on sale of Sim cards or recharge coupons

Vodafone Essar Cellular Ltd. v. ACIT [2010] [45 DTR 217, Kerala High Court]

On a question whether Section 194H is applicable for the “discount” given by the assessee to the distributors in the course of selling Sim Cards and Recharge coupons under prepaid scheme against advance payment received from the distributors, the Kerala High Court held that the supply of the Sim Card is only for the purpose of rendering continued services by the assessee to the subscriber of the mobile phone. Consequently, the charges collected by the assessee at the time of delivery of Sim Cards or Recharge coupons is for rendering services to ultimate subscribers. The distributor is the middleman arranging customers or subscribers for the assessee after ensuring proper identification and documentation. Besides the discount given at the time of supply of Sim Cards and Recharge coupons, the assessee is not paying any amount to the distributors for the services rendered by them, like getting the subscribers identified, doing the documentation work and enrolling them as mobile subscribers to the service provider namely, the assessee. The argument that the relationship between the assessee and the distributors is principal to principal basis is not acceptable. The distributor is an agent and canvasses business for the assessee. The terminology used by the assessee for payment to the distributors is immaterial. In substance the discount given at the time of sale of Sim Cards or Recharge coupons by the assessee to the distributors is a payment for services rendered to the assessee and falls within section 194H. The contention that discount is not paid by the assessee to the distributor but is reduced from the price and so deduction u/s 194H is not possible is not acceptable because the assessee should have given discount net of the tax amount or given full discount and recovered tax amount thereon from the distributors.

The above principle has been upheld by the Delhi High Court in *C.I.T v. Idea Cellular Limited [2009, 325 ITR 148]*.

27. Reassessment — If Assessing Officer does not assess income for which reasons were recorded under section 147, he cannot assess other income under section 147

Commissioner of Income Tax v. Jet Airways (I) Ltd. [2010] [195 Taxmann 117, Bombay High Court]

The substantial question of law before the court was whether if the AO issues a notice under section 148 to assess/reassess a particular item of income but does not assess/reassess that income, is it open to the AO to assess independently any other item of income, which does not form the subject matter of notice. The Bombay High Court dismissing the Revenue’s appeal held:

- Section 147(1) as it stands, postulates that upon the formation of a reason to believe that income chargeable to tax has escaped assessment for any assessment year, the assessing officer may assess or reassess such income ‘and also’ any other income chargeable to tax which comes to his notice subsequently during the proceeding as having escaped assessment.
- The words “and also” indicate that reassessment must be with respect to the income for which the AO has formed an opinion and also in respect of any other income which comes to his



notice subsequently. However, if the AO accepts the objection of the assessee and does not assess the income which was the basis of the notice, it is not open to him to assess income under some other issue independently and if he intends to do so, a fresh notice under section 148 would be necessary, the legality of which would be tested in the event of a challenge by the assessee.

- Explanation 3 lifts the embargo inserted by judicial interpretation on the making of a section 147 assessment in respect of items not referred to in the recorded reasons. However, it does not and cannot override the substantive part of section 147 that the income for which the notice was issued must be assessable.

28. Stay of collection of taxes

Soul v. Deputy Commissioner of Income Tax [2010, 323 ITR 305, Delhi High Court]

The Delhi High Court held that although Instruction No. 1914 dated 2nd December, 1993 supercedes Instruction No. 96 dated 21st August 1969, it clearly provides that demand should be stayed in “exceptional circumstances as mentioned in Instruction No. 96 dated 21-8-1996 where the assessment order appears to be unreasonably high-pitched or where genuine hardship is likely to be caused to the assessee”. A case where the assessed income is several times the returned income falls within the expression “unreasonably high pitched” and stay on recovery of demand must therefore be granted to the assessee.

Reference is drawn to the CBDT’s clarifications on instructions of stay of demand in letter No. (F. No. 404/10/2009-ITCC) dated 1-12-2009 wherein it seeks to clarify that there is no separate existence of any instruction except instruction No. 1914 of 2-12-1993. This instruction has been quoted in the decision of the Delhi High Court (supra).

29. Income from other sources – Deduction of interest under section 57(iii)

Commissioner of Income Tax v. Smt. Swapna Roy [2010] [233 CTR 10, Allahabad High Court]

On a question whether the amount invested by the assessee in sister concerns running in loss since several years may be treated as investment or expenditure made exclusively for the purpose of making or earning such income, the Allahabad High Court held that the expenditure towards interest on loan cannot be said to have been laid out wholly and exclusively for the purpose of making earning income but was a colourable device, to utilize the funds of one company in the other sister concern and therefore, the interest on loan is not allowable deduction under section 57(iii).

Further on the principle of consistency, the High Court held that in case an assessee changes his or her stand repeatedly and does not come with a clean hand, then it shall be sufficient to depart from earlier practice and the principle of consistency shall not come in the way to assess the income on the basis of the material on record.

30. Interest free loan vis-a-vis section 56 (2)(v) of the Income-tax Act, 1961

Commissioner of Income Tax v. Saranpal Singh HUF [2010] [48 DTR 95, Punjab and Haryana High Court]

On a question whether interest free loans could be brought within the ambit of section 56(2)(v), the Punjab and Haryana Court held that the amount contemplated under section 56(2)(v) cannot include loan which is shown to be repaid. Accordingly, the said amount cannot be treated as income of the assessee under section 56(2)(v) of the Act.



31. Maintainability of 154 application subsequent to High Court decision

Commissioner of Income-tax v. Krone Communication Ltd. [2010] [233 CTR 203, Karnataka High Court]

On an application under section 154 for rectification of order of assessment, against which no appeal was filed by assessee and which had become final based on change of legal position pursuant to verdict of any Court, the Karnataka High Court held that the Assessing Officer had refused to grant the relief to the assessee under section 80HHC. Being aggrieved by the order of assessment, it was for the assessee to file an appeal before the Commissioner (Appeals) which it did not do. The assessment order became final since the assessee did not challenge the order of assessment. The rectification application was filed by the assessee relying upon subsequent decision of the High Court, which could not be maintained on the said ground. In such circumstances on account of changed decision of the High Court or a Supreme Court, an application under section 154, cannot be entertained by reopening the order of assessment. Therefore, the rejection of the rectification application was justified.

The finding of the court that subsequent decision of the Supreme Court cannot be entertained under section 154 of the Act is totally contrary to the Supreme Court decision in the case of *ACIT v. Saurashtra Kutch Stock Exchange Ltd.*²⁷. Reference is invited to the decision of the Madras and Allahabad High Courts in the case of *Dinosaur Steels Ltd. v. JCIT*²⁸, *Southern Industrial Corporation Ltd v. C.I.T.*²⁹ and *C.I.T. v. Bindal Industries Ltd.*³⁰.

32. Estimation of income – Civil contractors

Samurai Techno Trading Corporation Ltd. v. C.I.T. [2010] [37 DTR 386, Kerala High Court]

In the instant case, the Kerala High Court held that in estimation of income in the case of building contractors a percentage of 8 per cent can be adopted even where the turnover exceeds 40 lakhs.

C. TRIBUNAL DECISIONS

33. Section 10B — Deduction of foreign currency expenditure and turnover retained abroad from Export turnover

Zylog Systems Limited v. Income Tax Officer [2010] [ITA Nos. 1138 and 1141/Mds/2007, Chennai Special Bench]

On a question whether, while computing deduction in respect of export profits of a 100% export oriented undertaking under section 10B of the Act.

- (a) Expenses incurred in foreign currency onsite computer software development at the client's place outside India should be excluded from export turnover; and
- (b) Export proceeds utilized outside India for expenses relating to export should be excluded from export turnover as a non-qualifying export turnover.

²⁷ 305 ITR 227

²⁸ 288 ITR 476

²⁹ 258 ITR 481

³⁰ 328 ITR 160



The Special Bench while allowing the assessee's appeal held that:

- Expenses incurred in foreign exchange in providing technical services outside India in connection with onsite development of computer software should not be excluded from export turnover as there is no provision of technical services to any outside agency but it is towards fulfillment of the object to develop software.
- The Special Bench referred to the meaning of 'Fees for Technical Services' provided in the Act and held that the assessee was not rendering managerial or consultancy outside India or providing technical services to other personnel or any outside agency.
- Even as per Circular Nos. 621 dated 19, December 1991 and 694 dated 23rd November 1994, expenditure incurred on site abroad is eligible for deduction u/s 10B.
- Section 10B requires the foreign exchange to be brought to India within the prescribed period; the RBI permits the assessee to retain the said foreign exchange abroad for specific purposes. Therefore, circulars of RBI, allowing retention, utilization or capitalization of export proceeds abroad, cannot be ignored.
- Export proceeds utilized outside India for meeting export related expenses in accordance with the RBI guidelines could not be reduced from the export turnover.

34. If NPV of future sales-tax liability is paid, there is no "remission" for section 41(1)

Sulzer India Limited v. Joint Commissioner of Income Tax [2010] [42 SOT 457, Mumbai Special Bench]

On a question whether premature repayment of the deferred sales-tax liability at its Net Present Value (NPV), the difference between the deferred sales-tax and its NPV amounting to ₹ 4,14,87,795 would be "remission" liable to tax under section 41(1), the Special Bench held that -

- For section 41(1) to apply, two conditions have to be satisfied. First, the assessee should have obtained an allowance or deduction in respect of any loss, expenditure or trading liability and second, the assessee should have subsequently (i) obtained any amount in respect of such loss or expenditure or (ii) obtained any benefit in respect of such trading liability by way of remission or cessation thereof.
- The first requirement of section 41(1) that the assessee should have obtained an allowance or deduction in respect of loss, expenditure or trading liability is not satisfied because all that CBDT Circular No. 496 dated 25-9-1987 provides is that "...the statutory liability shall be treated to have been discharged for the purposes of section 43B". Accordingly, the benefit of deduction was allowed for the purpose of section 43B only and not under any other provisions of the Act. The Assessing Officer applied the aforesaid Board Circular while giving the benefit of deduction under section 43B. Circulars are binding on the department.
- The second requirement of section 41(1) is also not satisfied because in paying the NPV, the assessee has paid the equivalent of the Future Value of the sum. As the sum of ₹ 3,37,13,393 is the NPV of the future sum of ₹7,52,01,378 and its payment discharges the full liability, there is no remission or cessation of liability by the State Government. It is a simple case of collecting the amount at net present value which is due later on.
- The fact that the assessee has not obtained the modified Eligibility Certificate or that it used the expression 'remission' of loan liability in its books are irrelevant because the making or absence of an entry cannot determine rights and liabilities of parties.



35. Business loss — Exchange Fluctuation loss on unmatured forward contracts is an “accrued” loss

Dy. Commissioner of Income Tax v. Bank of Bahrain & Kuwait [2010, 41 SOT 290] [Mumbai Special Bench]

In this case Special Bench of the Income Tax Appellate Tribunal dealt with the issue of allowability of losses on account of unmatured forward contracts in foreign exchange entered into by the taxpayer. The Special Bench while dismissing the contentions of the tax department held that -

- The Act allows a deduction in respect of crystallized liabilities. As per commercial principles of policy of prudence, all anticipated liabilities have to be accounted for, whereas under the Act only “accrued” liabilities are allowable. Anticipated liabilities which are contingent in nature are not allowable, but if an anticipated liability is coupled with present obligation and only quantification can vary depending upon the terms of the contract, then it can be said to be a crystallized liability. A contingent liability depends purely on the happening or not happening of an event, whereas if an event has already taken place, such as, the entering into the contract and undertaking of an obligation to meet the liability, and only consequential effect of the same is to be determined, then, the liability is not a contingent liability.
- The Accounting standards issued by ICAI which are mandatory for preparation of financial statements have to be followed inasmuch as the deviation from the same is to be reported in the audit report. Accounting Standard-11 (AS-11) issued by the ICAI mandates that if foreign exchange transactions are not settled in the same accounting period, the effect of exchange difference has to be recorded on 31st March.
- On facts, there is no dispute that the foreign exchange currency held by the assessee bank is its stock-in-trade and the assessee had entered into forward foreign exchange contracts in order to protect its interest against the wide fluctuations in the foreign currency itself. Therefore the contract was incidental to assessee’s holding of the foreign currency as current asset and in substance, it cannot be said that the forward contract had no trappings of the stock-in-trade.
- The assessee has consistently followed the same method of accounting in regard to recognition of profit and loss. The AO, having assessed the profits, could not have disallowed the loss.
- Accordingly, relying on the Supreme Court decision in the case of Woodward Governor India (P)³¹ Limited it was held that where a forward contract is entered into by the assessee to sell foreign currency at an agreed price at a future date falling beyond the last date of accounting period, a loss is incurred by the assessee on account of valuation of the contract on the last date of the accounting period and before the date of maturity of the forward contract is allowable.
- The Special Bench further observed that where profits were being taxed by the tax department in respect of such unmatured foreign exchange contracts then there was no reason to disallow the loss on such contracts.



36. Income exempt under the normal provisions of the Income-tax Act 1961 is taxable under section 115JB unless specifically permitted under the Explanation to section 115JB.

Rain Commodities Ltd. v. Deputy Commissioner of Income-tax [2010] [40 SOT 265, Hyderabad Special Bench]

On a reference, whether capital gains on transfer of assets to subsidiary which is exempt under section 47 could be excluded from the computation of “book profits” under section 115JB, the Special Bench held that:

- The assessing officer can alter the “book profit” only in two circumstances (a) if the P&L A/c is not drawn up in accordance with Parts II & III of Schedule VI to the Companies Act or (b) If accounting policies & standards, method & rate of depreciation have been incorrectly adopted for preparation of the P & L A/c. Except for the said two cases, the AO has no power to alter the net profit shown in the P&L A/c. Under (a), the AO cannot disturb the Net Profit shown by the assessee where there are no allegations of fraud or misrepresentation but only a difference of opinion as to whether a particular amount should be properly shown in the P&L A/c or Balance sheet.
- Parts II & III of Schedule VI to the Companies Act do not permit the exclusion of capital gain from the P & L A/c. The P & L A/c is required to disclose every material feature including credits or receipts and debits or expenses in respect of non-recurring transactions or transactions of an exceptional nature including capital profits. Disclosures made in the Notes to Accounts are a part of the Financial Statements.
- The assessee had included the said capital gains in the P & L A/c and it was not the case that same was not includible. The fact that the capital gains was exempt under section 47(iv) does not mean it can be excluded from the “book profit” because no such exclusion was permitted under the Explanation to section 115JB. The taxability of capital gain is relevant only for the purpose of computation of income under the normal provisions and has nothing to do with the computation of “book profits”.
- The argument that section 115JB (4) provides that “save as otherwise provided in this section all other provisions of the Act shall apply” does not mean that the exemption provisions of section 47(iv) can be read into section 115JB. This only means that while the computation has to be as per section 115JB, anything over and above that will be subject to other provisions of the Act.
- Accordingly, in the absence of any provision for exclusion of exempted capital gain in the computation of book profit under section 115JB, the assessee is not entitled to the exclusion claimed.

37. Deduction under section 10A and set off of losses of non eligible units

Scientific Atlanta India Technology Pvt Limited v. Assistant Commissioner of Income Tax [2010] [37 DTR46, Chennai Special Bench]

The Special Bench in this case was constituted to answer the question whether the business losses of non-eligible unit would be set off against the profits of the undertaking eligible for deduction under section 10A. The Special Bench while deciding the appeal in favour of the assessee held as under:

- Even though section 10A falls under Chapter III, it has been mentioned in the section itself that what is to be given is only a deduction and not exemption. A deduction in respect of profits eligible under section 10A is required to be made at the stage of computing the income under the head “Profits and gains of business and profession” and not from the gross total income.



- Section 80AB applies to deductions mentioned in Chapter VI-A. Section 10A does not fall in Chapter VI-A, and hence, section 80AB cannot be applied to section 10A.
- It can be noticed from the language of section 10A(1) that a deduction of such profits and gains that are derived by “an” undertaking, qualify under section 10A for deduction from the total income. In case the assessee has more than one undertaking, one has to consider the profits and gains of that “particular undertaking” which qualifies for deduction under section 10A. Section. 10A(4) uses the words “profits and gains of the business of the undertaking” and not total profits of the business of the assessee. The deduction under section 10A attaches to the undertaking and not to the assessee.
- The losses of a unit which is not eligible for deduction under section 10A cannot be set off against the profits of the unit which is eligible for deduction under section 10A. The loss of the non-eligible unit can be set off against other incomes or may be carried forward.
- If there is more than one undertaking which is eligible for deduction under section 10A, and if some of the units have profit and other units have loss, it would be an entirely different case from the present one. The decision rendered in this case would not be applicable to such cases.

However, the Bangalore Bench of the Tribunal in *Intellinet Technologies India Pvt. Ltd v. Income Tax Officer*³² preferred to follow the jurisdictional Karnataka High Court decision rendered in the context of Section 10B in the case of *C.I.T. v. Himatasingike Seide Ltd.*³³, which the Tribunal equally held was applicable to section 10A. It was held that unabsorbed depreciation and brought forward losses have to be set off against the profits while computing the deduction under section 10A. Also, the Delhi Bench of the Tribunal in the case of *Global Vantedge Pvt .Ltd. v. Dy. Commissioner of Income Tax*³⁴ (2010) (T10L-24-Trib.Delhi) held that deduction under section 10A should be allowed after reducing the carry forward losses and unabsorbed depreciation.

However, another question that arises for consideration is whether the aforesaid decisions of the Karnataka High Court would be binding on the other Tribunals outside the State of Karnataka. This question was answered by a Third Member Judgment in the case of *Kanel Oil and Export Industries Ltd. v. Joint Commissioner of Income Tax*³⁵ wherein it was held that the Judgement of the Court, though not of the jurisdictional High Court prevails over an order of the Special Bench, even though it is from the jurisdictional bench of the Tribunal; but when there are several decisions of non-jurisdictional High Courts expressing contrary views, the Tribunal is free to choose to adopt that view which is more likely in its favour.

The Special Bench applied the principles laid down in *Rishi roop Chemical Company Pvt. Ltd. v. Income Tax Officer*³⁶ to the effect that “if there were conflicting decisions of the High Courts, other than the jurisdictional High Court, the Benches of the Tribunal were free to adopt the view which appeared to be better and that in certain circumstances the view which was favourable to the tax payers should be adopted.

32 48 DTR

33 286 ITR 255

34 2010 TIOL 24

35 126 TTJ 158 (TM)

36 39 TTJ 660 (Delhi SB)

**38. Assessment - Cross-examination**

B.Ramakrishnaiah v. Income Tax Officer [2010] [134 TTJ 600, Hyderabad]

In the instant case, the Hyderabad Tribunal held that statement recorded under section 131 consequent to the survey action cannot be the sole basis for addition unless there is a material to support the departmental case. Further the Tribunal also held that the Department cannot rely on a statement or material and at the same time, seek to deny cross-examination on the ground that the statement of the assessee also recorded the same issue. Natural justice requires cross-examination of witnesses, and if asked for, must be granted. If the Department relies on any exceptions, the onus lies on them to establish the existence of any exceptions. Non-providing of cross examination of witness clearly constitutes infraction of the right conferred on the assessee and that vitiated the order of assessment made against the assessee.

Reference is also made to the decision of the Delhi Tribunal in the case *Centurion Investment & International Trading Co. (P) Ltd. v. Income Tax Officer, Ward 3(2), New Delhi*³⁷ wherein it was held that not allowing cross examination is a defect which is procedural in nature. It is only a procedural requirement to be complied with before making the assessment under the Act. Not following the procedural provisions like allowing cross examination will not make an assessment null and void. At the most, it can be an irregularity liable to be cured and in such a case, the assessment can be set aside to be redone.

39. Carrying on the same business in new unit or stoppage of business in old unit cannot be held as reconstruction of a business already in existence

Abbas Nabi Shaikh v. ACIT [2010] [8 Taxmann.com 72, Ahmedabad]

In the instant case, the Ahmedabad Tribunal held that the Revenue authorities are not justified in treating the case as a case of reconstruction merely because assessee continued to carry on the same business in the new unit also. On the basis that old unit did not function or it has stopped activities may give rise to an impression that the new unit is the reconstruction of business already in existence. But carrying on the same business in the new unit is not sufficient at its own to hold that the new unit is a reconstruction of business already in existence unless location is the same and there is no installation of new plant and machinery. The old unit may stop functioning immediately or after sometime. If old unit runs parallel for sometime and thereafter it stops functioning then it is not going to make any difference. One cannot say that if the old unit stops functioning immediately on the start of new unit it would be a case of reconstruction or if the old unit stops functioning after a year or so, after the new unit starts functioning, that it will not be a case of reconstruction of business already in existence. Further, if the argument of the learned DR is accepted then several units where same business is carried out, would always be treated as reconstruction of a business already in existence and thus denying the benefit otherwise available to the taxpayer. Therefore, carrying on the same business in the new unit or stoppage of business in the old unit cannot be a criteria to hold that it is a case of reconstruction of a business already in existence for the purpose of considering deduction under section 80-IB of the Act.

37 126 ITD 356



40. Section 153 A — Scope

Royal Marwar Tobacco (P) Limited [2009, 120 TTJ 387, Ahmedabad]

LMJ International v. DCIT [2009, 119 TTJ 214, Kolkata]

KGR Express v. JCIT [ITA No. 494/vsk/2007, Vishakhapatnam]

In all the above judgements, the Tribunal (s) held that while assessing income under section 153A, the undisclosed income arising out of the seized material alone is to be considered. If for any assessment year in consideration, if no incriminating material is found no additions could be made.

In post search proceedings fishing enquiries cannot be made to unearth undisclosed income when no evidence was found during the search proceedings.

However, the Chennai Tribunal in *Harvi Heart Hospital Limited v. DCIT*³⁸ held otherwise. Further, the Hyderabad Tribunal in *Vishnu Agarwal and others*³⁹ held that assessing officer can place reliance on all materials even though it was not found during the search proceedings.

A.N. Rangaswamy v. ACIT [2010] [134 TTJ 723, Bangalore]

The Bangalore Bench of the Tribunal in the instant case held that under section 153A the assessing officer is empowered to assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which the search is conducted. Therefore the date of search being 4-7-2003 which falls within the previous year relevant to the assessment year 2004-05 is outside the purview of section 153A. The section does not say that the assessment year relevant to the accounting year in which the search took place shall also be reckoned for assessment under that section. The assessment year therefore stands excluded from the purview of section 153A of the Act.

41. Educational Institution - Withdrawal of exemption under section 12AA (3) of the Income-tax Act

Maharashtra Academy of Engineering & Educational Research v. Commissioner of Income Tax [2010] [133 TTJ 706, Pune]

In the instant case, the Investigation Wing of IT Department in search and survey proceedings found that the assessee trust was taking donation and capitation fees for admission though prohibited under Maharashtra Educational Institutions (Prohibition of Capitation Fees) Act, 1987. Therefore the C.I.T cancelled the registration under section 12AA (3) of the Income tax Act.

On a question whether or not the trust is a genuine trust, whether its activities were in accordance with the objects and whether there was any infringement of the provisions of section 12AA of the Act, the tribunal held that section 12AA(3) confines itself to inquire about the activities of the trust and its genuineness. In other words the activities of the trust must be in consonance, with the objects for which created and those objects as also activities should not be a camouflage but should be pure, sincere, charitable and for public utility at large. The CIT is not to enter into the area of investigation of source of income and also application of income, so that the amount of correct exempt income is not prejudged. On the contrary if the CIT has any information of wrongful means of earning fees in the form of a donation the information reveals excessive charging of fees, then the CIT can pass on the information to the office of the Maharashtra Capitation Fees (Prohibition) Act.

38 36 DTR 201

39 ITA 585/H/2008



While quashing the order of the C.I.T, the Tribunal held as under:

- When the assessee is engaged in *bona fide* activities, with the framework of law, to pursue its objectives, it cannot be said that the activities of the assessee are not genuine.
- The CIT has also not brought on record any material to demonstrate activities of the assessee are not being carried out in accordance with the objects of the trust or the institution.
- Whether the activities of the assessee are for charitable purposes is an exercise to be undertaken under the relevant assessment proceedings.
- If the objects as permissible in the eyes of law are carried out legally and the object of advancement of education as also the object of general public utility are carried out with due sincerity then the claim of registration is within the provisions of section 12A of the Act.

The Tribunal noticed that the Department did not deny the fact that the assessee was imparting education. On the question of morality the Tribunal observed as under:

“The aspect of morality as touched by the learned CIT is appreciable. Every vigilant and law abiding citizen has to be fair in his conduct and should refrain from immoral activities. But existing laws are derived from the numerous extremely rigorous laws designed to regulate morals and conduct. These laws are enacted in such a fashion that if implemented correctly and efficiently then there is no scapegoat for an offender. We are tempted to write an idiomatic language due to the sensitivity of the issue, that a CIT cannot be allowed to hold a baton of morality in his hand to hit an immoral; but the statute has given him a flexible stick for inflicting tax on defaulter; that includes a trust or educational institution. The gist is that if the CIT had an information of some wrongful means of earning fees in the form of a donation or the information tells about excessive charging of fees; then the CIT in his rights can pass on the information to the concerned office bearers working under the Maharashtra Capitation Fees (Prohibition) Act. These authorities have enough power to deal with such nature of default, side by side the CIT is to limit his jurisdiction within the ambits of provisions of the Act and is expected to give a finding on facts that either the objects are not for general public utility or not achieved as prescribed under law”.

Donations were raised for imparting education. If there is any infringement of Anti Capitation Prohibition Act; that comes within the clutches of that Act but definitely not under the Section 12AA(3) Provisions of the Income-tax Act. The Tribunal revoked the cancellation of Registration.

Reference may also be made to the following decisions on the subject:

- M/s. Vodithala Education Society Hyderabad v. ADIT (Exemptions)-II, Hyderabad [20 SOT 353]*
M/s. Vodithala Education Society Hyderabad v. ADIT (Exemptions)-II, Hyderabad [MP No 43/H/08 arising out of 20 SOT 353]
- Deputy CIT v. Cosmopolitan Educational society [244 ITR 494 , Rajasthan]*
- CIT v. Khalsa Rural Hospital and Nursing Training Institute [304 ITR 20, Punjab and Haryana]*
- P.S. Govindaswamy Naidu & Sons v. ACIT [324 ITR 44, Madras]*
- Dera Baba Jodh Sachiar v. UOI [328 ITR 178, Punjab and Haryana]*
- DIT (Exemptions) & Another v. Sri Bela Matha Educational Trust [46 DTR 290, Karnataka]*
- Maa Saraswati Educational Trust v. UOI [194 Taxmann 84, Himachal Pradesh]*



viii. *Governing Body of Ranga Raya Medical College v. ITO* [117 ITR 284, AP]

ix. *DIT (Exemptions) vs Moti Bagh Mutual Aid Education* [298 ITR 190, Delhi]

42. Charitable institution — Section 2(15)/12AA

Himachal Pradesh Environment Protection and Pollution Control Board v. Commissioner of Income Tax [2010] [42 SOT 343, Chandigarh]

The Chandigarh Bench of the Tribunal while interpreting the second limb of explanation to section 2(15) arising out of rendering of service to 'trade, commerce or business' held that it must be with a profit-motive and where activities are performed by an assessee for public good, any collection of fees or charges in the course of discharging these functions could not be viewed as consideration of rendering the services of Pollution Control Measures and hence these services were not with a profit-motive and therefore the registration could not be withdrawn under the aforesaid proviso.

SUPPLEMENT

Recent Judgements under Direct Tax Laws

CA. K. C. Devdas

ISSUES FOR DISCUSSIONS

Having brought out the gist of the recent judgements in the paper, some of the issues/controversies that still persist/unanswered in certain judgements are brought out for discussion in this Annexure.

1. **Applicability of interest under sections 234A, 234B and 234C to Settlement Commission proceedings and Rectification under section 154**

Brij Lal v. Commissioner of Income Tax [2010] [328 ITR 477]

In the instant case, the Apex court had held that in view of section 245-I of the Act, the Settlement Commission cannot reopen its concluded proceedings by invoking section 154 of the Act so as to levy interest under section 234B.

Chapter XIX-A does not contain specific provisions to rectify any order passed by the Settlement Commission. However, section 245F(1) of the Act confers all the powers which are vested in an Income tax Authority under the Income Tax Act to the Settlement Commission. Under section 154 of the Act, an income tax authority may amend any order passed by it under the Act to rectify any mistake apparent from record.

Points for consideration

- Whether in view of the provisions of section 245F read with section 154 of the Act, the Settlement Commission has powers to invoke section 154 of the Act?
- By virtue of this decision does it follow that the applicant is not left with any remedy in case of obvious errors/mistake of fact and law apparent from the order/records (i.e., arithmetical errors, credit for taxes, computational errors, inclusion of any income by mistake, etc..) ?

8. **Interconnect/access/port charges paid to BSNL whether liable to withholding under section 194 J of the Income-tax Act services’.**

Commissioner of Income-tax, Delhi v. Bharti Cellular Ltd [2010] [234 CTR 146]

On the question whether the Department is entitled to levy interest under section 201(1A) of the Act for non-deduction of TDS, at Para 11 of the order, the Supreme Court held that in the facts and circumstances of the case, it would not be justified since there is no loss of revenue to the Tax Authority for not withholding taxes on such payments as taxes have already been paid by the recipient.

Points for consideration

- In a situation where there is a dispute on the applicability of provisions of section 194C or 194J of the Act to a particular receipt and the recipient had paid the taxes on such receipt, is the Department justified in levying interest under section 201(1A) of the Act on the difference in tax arising on account of TDS rate; and
- Whether the decision of the Supreme Court in *Hindustan Coca Cola Beverages (P) Ltd. v. C.I.T.* [293 ITR 226] on the levy of interest under section 201(1A) could still be relied upon subsequent to the insertion of Explanation to section 191 of the Act by the Finance Act, 2008 w.r.e.f 1-6-2003 ?



9. “Actual write off” of individual debtor’s account is not necessary under 36(1)(vii) Bad Debt, of the Income-tax Act, 1961

Vijaya Bank v. Commissioner of Income Tax [2010] [323 ITR 166]

The issue what constitutes a write off, for deduction under section 36(1)(vii), has been a subject matter of litigation. However, the Supreme court in the above case held that if an assessee debits an amount of doubtful debtors to profit and loss account and credits the asset account (i.e., sundry debtors) it would constitute an actual write off of a debt.

Issue for consideration

- Notwithstanding the explanation to section 36(1)(vii) of the Act introduced by Finance Act 2001 w.r.e.f. 1-4-1989, whether a provision made for bad and doubtful debts by debiting the profit and loss account and crediting the debtors accounts would still be allowable for deduction under 36(1)(vii) of the Act ?

12 Manufacture and production meaning of

Income Tax Officer v. Arihant Tiles and Marbles (P) Limited [2010] [320 ITR 79]

In the above case, the Apex Court has held that once the article/ good is subject to excise duty under the Central Excise Act, 1944, to say that the activity would not amount to manufacture or production under section 80-IA would have disastrous consequences, particularly in view of the fact that the assesseees in all the cases would plead that they were not liable to pay excise duty, sales tax, etc., because the activity did not constitute manufacture. There have been number of litigations in the past on what constitutes ‘manufacture’ under the Act since the Act did not provide the definition of the term ‘manufacture’. The Finance Act, 2009 inserted a definition of ‘manufacture’ with effective from 1st April, 2009.

Issue for consideration

Post introduction of the definition of manufacture under the Act, whether manufacture of any article/ good which is subject to excise duty would automatically constitute manufacture under the Act?

16. Section 14A of Income-tax Act - Provisions of sub-sections (2) and (3) of section 14A are constitutionally valid

Godrej and Boyce Mfg. Co. Ltd. v. Deputy Commissioner of Income-tax [2010] [328 ITR 81, Bombay High Court]

Does the tenor of Rule 8D permit the consideration of the entire interest debited to profit and loss account for the purpose of computing the disallowance under section 14 A of the Act read with Rule 8D(2)(ii) of the Income Tax Rules.

19 Remission of a liability under section 41(1) of the Income-tax Act

Commissioner of Income-tax v. Goyal M.G. Gases Ltd [2010] [321 ITR 437, Delhi High Court]

In the absence of specific provisions in the Act in respect of tax treatment of waiver of loans, the issue of taxability of the benefit obtained on remission/ waiver of a loan liability has been a subject matter of litigation between the assessee and the Tax Authority.

Issues for consideration

- Whether the applicability of the provisions of section 41(1) of the Act vis-a-vis waiver of loan is governed by its utilization?



- Can the allowance of depreciation be brought within the ambit of section 41(1) of the Act, when the loan obtained for acquisition of plant and machinery is waived?

Please refer to the decision of the Bombay High Court in the case of *Solid Containers Ltd v. DCIT* [308 ITR 417] and Delhi Tribunal in the case of *Addl. CIT v. Rollainers Ltd* [2010-TIOL-379-ITAT-DEL]

24 Reassessment – Time limit under section 150 (1)

***Kalyan Ala Barot v. M.H. Rathod* [2010] [328 ITR 521, Gujarat]**

Section 150 (1) of the Act lifts the embargo contained in section 149 of the Act by providing that a notice under section 148 of the Act may be issued at any time to make an assessment or reassessment to give effect to any finding or direction of an appellate authority.

Issue for consideration

Whether the provisions of section 150(2) of the Act, shall override the provisions of section 150(1) of the Act which may result in annulment of an assessment? Consider the following illustration:

Particulars	Relevant dates
Assessment year — 2003-2004	
Return filed on	30-6-2003
Assessment completed under section 143(3) of the Act	30-3-2005
Appeal under section 246A filed on	28-4-2005
Date of CIT(A) order	15-4-2010
On further appeal to the ITAT, ITAT passed an order giving a direction which was necessary for the disposal of appeal	22-12-2010
148 notice issued in pursuance of the ITAT order	8-1-2011

Considering the provisions of section 150(2) whether the reassessment proceeding initiated under the section 148 of the Act is valid under the Act?

32 Estimation of income – Civil contractors

***Samurai Techno Trading Corporation Ltd. v. C.I.T* [2010] [37 DTR 386, Kerala High Court]**

Whether while estimating the income of a civil contractor @ 8% of gross receipts a further allowance for depreciation could be granted?

33 Section 10B — Deduction of foreign currency expenditure and turnover retained abroad from Export turnover

***Zylog Systems Limited v. Income Tax Officer* [2010] [ITA No. 1138 and 1141/Mds/2007, Chennai Special Bench]**

Considering the decision of the Apex court in the case of *Southern Technologies* [320 ITR 577] whether the directions/permission of RBI shall prevail over the provisions of the Act unless expressly provided in the Act?



38 Assessment - Cross examination

B. Ramakrishnaiah v. Income Tax Officer [2010] [134 TTJ 600, Hyderabad]

Where an assessee demands cross examination and the witness does not respond/ appear, whether it is open to the assessing officer to rely on such evidence for framing the assessment?

40 Section 153 A — Scope

Royal Marwar Tobacco (P) Limited [2009, 120 TTJ 387, Ahmedabad]

In view of the conflicting decisions of the courts, a point that merits consideration is that in the absence of any material/ evidence, whether an assessment could be done under section 153A or 153C of the Act by making roving enquiry.

A.N. Rangaswamy v. ACIT [2010] [134 TTJ 723, Bengaluru]

Having regard to the provisions of clause (b) of sub section (1) of section 153(B) of the Act, can the assessment relating to the year of search be outside the purview of section 153A of the Act.

41 Educational Institution — Withdrawal of exemption under section 12AA (3) of the Income-tax Act

Maharashtra Academy of Engineering & Educational Research v. Commissioner of Income Tax [2010] [133 TTJ 706, Pune] and other precedents referred thereto

Issues for consideration in case of educational institutions enjoying exemption under the Act

- Whether education would remain a charity only in a case where it is imparted for a fee as prescribed by the Government;
- Whether it is mandatory for a educational institution to collect infrastructure fees as recommended by applicable regulation and as directed by the apex Court in *Islamic Academy of Education v. State of Karnataka* [2003] [6 SCC 697];
- Whether collection of money over and above the fee prescribed by the committee would amount to capitation fee disentitling the institution to be a charitable institution;
- Whether approval under section 10(23)(c)(vi) is mandatory even if the educational institution is recognized under section 12AA of the Act;
- If there is no nexus or live link between the grant of admission and donation can it still fall within the definition of capitation fee disentitling the institution to the benefit of exemption; and
- Is it mandatory for all charitable trusts to register under other applicable acts if any as per their respective state regulations and whether the failure of such registration, would automatically lead to de-recognition of its status as charitable trust.

42 Charitable institution — Section 2(15)/12AA

Himachal Pradesh Environment Protection and Pollution Control Board v. Commissioner of Income Tax [2010] [42 SOT 343, Chandigarh]

Points for consideration

- Will the second proviso to section 2(15) of the Act make charitable trust in and out of section 2(15) depending on the aggregate receipts each year.



- In case the aggregate receipts exceed ten lakhs how would the voluntary contributions under section 2(24)(ii)(a) be treated under the Act.
- Can the CIT invoke powers under section 12AA(3) of the Act cancelling/granting the registration to an institution based on the applicability of the first/second proviso to section 2(15) of the Act.

