DIRECT TAX – RECENT JUDGMENT

CA. Paras Savla, CA. Ketan Vajani

S. 28(i) Losses on Penny Stock

The assessee is continuously dealing in share trading of various shares/scrips and the said fact is not disputed. It was further observed that the scrip of M/s. VAS Infrastructure Ltd. was not blacklisted by the SEBI at the relevant point of time. ITAT has also considered the order passed by the SEBI and has observed that in the said order of SEBI dated 9-1-2018, nowhere in the said order stated that for the particular period mentioned, the scrip of M/s. VAS Infrastructure is blacklisted or is penny stock or sham and bogus scrips/shares. The Tribunal has also considered and observed that the assessee has purchased shares online through various brokers and the payments were made to brokers are reflected in the Bank Account. The Assessing Officer was also having all these details before him. Such as details of DP Accounts with all the brokers and the proof of payment of Securities Transactions Tax paid as per the contract note was also submitted before the Assessing Officer. It is further observed by the Tribunal that the assessee had transferred the shares through online platform of stock exchange that too through broker. The report of investigation wing is much later than the dates of purchase/sale of shares and the order of SEBI is also much later than the date of transaction and the order of SEBI nowhere stated that the transaction at earlier dates as void.

It was also observed that the entire transaction of purchase and sale of the scrips was through National Stock Exchange or Bombay Stock Exchange and that also through the authroised brokers. Accordingly it was held that merely on the conjecture and surmises, loss incurred in share transactions could not be disallowed. *PCIT v. Genuine Finance P. Ltd. [2023] 152 taxmann.com 330 (Gujarat)*

S. 28(i) Income from sale carbon credits

The transfer value of the REC/SECs (Carbon credits) was claimed in the returns of the income as taxable u/s 115BBG. Thereafter during the assessement proceeding same was claimed as exempt. It was held that income earned from sale of RECs/ESCs (carbon credits) is a capital receipt and not business income as carbon credit is an offshoot from environmental concern and not an offshoot from business, thus, it will not be taxable *Satia Industries Ltd. v NFAC [2023] 151 taxmann.com 358 (Amritsar - Trib.)*

S. 142(2A) Applicability of MSME Act for the fees to paid paid to Special Auditor

The IT Department cannot be termed as a 'buyer' when it is nominating the accountant for conducting a Special Audit and neither can the CA Firm be termed as a 'supplier'. The remuneration payable to the accountant cannot also be termed as 'consideration' as the Special Audit is a statutory duty being performed by the accountant for and on behalf of the AO. The invocation of the provisions of the MSMED Act under such circumstances, in respect of Special Audit remuneration under Section 142(2A) of the IT Act, would, therefore, not be tenable and is completely misplaced.

The MSMED Act has no applicability to the nature of the assignment which has been given to the Respondent/CA Firm. The CA Firm may be registered as a Micro or Small enterprise and may be entitled to invocation of the jurisdiction of the MSMED Act for other purposes. Insofar as the assignment is one which is emanating from a statute i.e., under Section 142(2A) of the IT Act, the determination of the remuneration is solely the prerogative of the Commissioner or the Chief Commissioner. The same would not be liable to be called into question either in a civil court or in a commercial suit or civil suit as one of recovery of money. The nomination as a Special Auditor for the conduct of Special Audit is governed purely by the provisions of the Income Tax Act and Rules. This would, however, not bar the remedy of filing of a writ petition.

Insofar as Audits under Section 142(2A) are concerned, the IT Act would have to be reckoned as the Special Act and the MSMED Act as the general Act dealing with MSME disputes. The Income Tax Act would thus prevail over the provisions of the MSMED Act. *PCIT v. Micro & Small Enterprise Facilitation Council [2023] 152 taxmann.com 177 (Delhi)*

Tax adjustment when tax paid by wrong assessee

Due to mistake assessee has not declared one transaction involving capital gain on sale of the property which was in the name of the assessee and it is fact on record that the same was declared by wife of the assessee in her return of income and duly paid the relevant tax on record. It is also fact on record that both the assessee as well as assessee's wife are falling under same tax bracket. We observe that the Assessing Officer has come to know that assessee has failed to declare the above said transaction in his return of income, however,

he is aware of the fact the same income was declared by wife of the assessee, even though the property was not in the name of the assessee's wife and the same was duly accepted by the revenue and assessed to tax. At the same time, it is also fact on record that assessee has failed to declare the same in his return of income and as per the opinion of the tax authorities that the income has to be declared and assessed in the right person. Accordingly, the income has to be assessed in the hands of the assessee only.

It is a peculiar case wherein the income has been declared and rightfully paid the due tax but in the hands of the wrong person. In order to do the right thing assessee has to revise his return of income at the same time even wife of the assessee has to revise her return of income, we observe that at this point of time this is not possible considering the fact that the issue involved relating to A.Y. 2013-14. Since the assessee has brought on record that the assessee's wife has paid the relevant tax in her return of income it shows that even though by mistake the assessee has remitted the relevant tax on this transaction. However, we observe that the income was not declared by the original person and paid the relevant tax by the proper person. We are of the view that the same transaction cannot be charged to tax twice. Therefore, in ITAT's considered view in order keep the record straight and also agreeing the line of argument put forth by the tax authorities, ITAT has directed the Assessing Officer who is aware of the fact that assessee has declared the relevant transaction in the hands of the assessee's wife, therefore they direct the Assessing Officer to intimate the Assessing Officer of the assessee's wife to revise the assessment in case assessment has been already completed or initiate the proceeding of re-assessment and reject the capital gain declared by her in her return of income and initiate the refund along with interest till this date and as soon as the refund is initiated the present Assessing Officer may initiate the recovery of demand arising out of the assessment in the present case.

With Extra Caution, ITAT directed that the Assessing Officer to make sure that there should not be any burden on the assessee in collecting the due tax along with interest considering the fact that the relevant taxes were already paid by the assessee's wife properly on time, the relevant amount of tax was with the revenue. Therefore, there is absolutely no loss to the revenue in this case. *Shrikant Ghanshyam Shah v. ITO [2023] 152 taxmann.com 547 (Mumbai - Trib.)*

S. 149 Notice of reassessment

The notices under Section 148A(b) of the Act, having been mailed after 03.06.2022, do not just abrogate the mandate of the CBDT instructions No. 1/2022, dated 11-5-2022 but also violate the provisions of Section 282A of the Act insofar as the name and designation of the concerned officer issuing the same find no mention in the same. Accordingly, notices under section 148A(b) and order under section 148A(d) were to be set aside. *Jindal Exports and Imports (P.) Ltd.v. DCIT [2023] 152 taxmann.com 609 (Delhi)*

S. 179 Directors responsibility when taxes not paid by the company

The assesse erstwhile director brought on record material to show that he had lack of financial control, lack of decision making power and had very limited role in the assessee company even as director. The entire decision making process being with the directors appointed by single largest share holder of the assessee company. Accordingly, it was held that Petitioner has sufficiently discharged the burden cast upon him in terms of section 179(1) of the Act to absolve him from the liability thereunder. Although the burden cast upon the director of a private company in the later part of Section 179(1) of the Act is a negative burden of proving that non-recovery "cannot be attributed" to any gross neglect misfeasance or breach of duty on his part, in the present case, as observed above, Petitioner has discharged such burden by placing on record his specific case and supporting material. *Prakash B. Kamat v. PCIT [2023] 151 taxmann.com 344 (Bombay)*