DIRECT TAX – RECENT JUDGMENT

CA. Paras Savla, CA. Ketan Vajani

1. Allowability of Expenses incurred on Consultancy Fees for purpose of studying and preparing strategy to reduce cost of production – Section 37(1)

Assessee was engaged in manufacture, purchase and sale of excavators, loaders, cranes, dumpers and spare parts, etc. During the year the assessee paid consultancy fees for the purposes of studying and preparing a strategy to reduce the cost of production of its products. The Assessing Officer treated the same to be capital in nature and disallowed the same. The CIT (A) allowed the claim following the ratio of the judgment of the Supreme Court in the case of Empire Jute Co. Ltd. Vs. CIT 124 ITR 1 (SC). This was also confirmed by the Tribunal. On further appeal by the revenue the High Court observed that no new asset has come into existence and the study conducted was only for improving the sales and profitability of the assessee. The High Court held that the aforesaid concurrent findings of fact by the lower authorities have not been challenged on the ground of perversity. Therefore, no interference is called with the aforesaid concurrent findings of fact and accordingly the appeal was dismissed.

CIT –III Bangalore Vs. Telco Construction Equipment Co. Ld. (2021) 1276 taxmann.com 488 (Karnataka)

2. Section 206AA – Applicability to assessees despite the Income being not taxable

In the case of A. Kowsalya Bai Vs. Union of India & Others (2012) 346 ITR 156 single Judge of Karnataka High Court, while dealing with a challenge to constitutional validity of section 206AA read down section 206AA and held that it is inapplicable to persons whose income is below taxable limit. On Intra Court appeal preferred by Union of India under section 4 of the Karnataka High Court Act ,1961 the division bench of the High Court has held that constitutional validity of provision has to be tested on grounds of legislative competence and violation of fundamental rights. Hardship or equity is not relevant in interpreting provisions relating to taxation. The single judge had neither recorded a finding that parliament does not have legislative competence to enact section 206AA nor had recorded a finding that aforesaid provision was violative of fundamental rights and therefore, it could not have applied principle of reading down merely on basis of hardship or equity. The conclusion recorded by Single Judge that section 206AA would not be applicable to persons whose income is below taxable limit could not be upheld.

Union of India Vs. Smt. A. Kowsalya Bai (2021) 126 taxmann.com 155 (Karnataka)

3. Faceless Assessment Scheme – Section 144B of the Act

Assessment in the case of the petitioner for A.Y. 2018-19 was taken up under the faceless assessment regime. During the course of the assessment proceedings, the department issued a show-cause notice cum draft assessment order dated 13-4-2021 on the petitioner proposing disallowance of Rs. 1,00,26,692/- which was claimed under the head of Income from other sources. The petitioner sought for personal hearing on account of the fact that the matter was complex and required proffering explanation. The requests were made on 15-4-2021 and also 20-4-2021. The revenue, however did not pay any heed to such request and issued one more show cause notice dated 23-4-2021 seeking compliance by 25-4-2021. The petitioner replied to the notice on 24-4-2021. Finally, the assessment order was passed on 28-4-2021 without allowing personal hearing as requested by the petitioner. On writ petition before the Delhi High Court, the petitioner contended that the revenue has committed infraction of the statutory scheme provided under section 144B of the Act. Accordingly, as per sub-section (9) of section 144B the assessment proceedings are non-est in the eyes of law. Revenue contented that the word used in sub-section (7) (vii) is "may" and not "shall" and therefore, there is no vested right in petitioner to claim a personal hearing. The High Court held that the use of the word in clause (vii) of sub section (7) leads to liberty being given to the assessee to seek a personal hearing in the matter if his income is proposed to be varied. The usage of the word 'may' cannot absolve the respondent/revenue from the obligation cast upon it, to consider the request made for grant of personal hearing. Besides under sub-clause (h) of Section 144B (7)(xii) read with Section 144B (7) (viii), the respondent/revenue has been given the power to frame standards, procedures and processes for approving the request made for according personal hearing to an assessee who makes a request qua the same. Since no standards, procedures and processes have been so set up it was incumbent upon the respondent/revenue to accord a

personal hearing to the petitioner. The assessment order was accordingly set-a-side. The court did not feel appropriate to make any observation as regards the claim of the revenue to proceed a fresh in the matter.

Sanjay Aggarwal Vs. National Faceless Assessment Centre, Delhi (2021) 127 taxmann.com 637 (Del.)

4. Reassessment on account of bogus sale of shares – validity of reassessment – Section 148 and section 68

In the Return of Income filed by the assessee for A.Y. 2012-13, the assessee had claimed exemption in respect of Long Term Capital gains on sale of shares. The said return was accepted u/s. 143(1) of the Act. Later on an information was received from DDIT (Investigation) that during search conducted upon one JS, it was found that he was director in several companies which were actually shell companies not in existence and were engaged in providing bogus accommodation entries regarding long term capital gain on sale of shares. It was also found that the assessee had also sold shares of such company held by it and claimed exemption in respect of the same. On the basis of this information the assessing officer initiated reassessment proceedings in the case of the assessee. The assessee filed a writ petition against the proposed reassessment. The Gujarat High Court observed that subsequent information on basis of which Assessing Officer acquired reasons to believe that income chargeable to tax had escaped assessment on account of omission of assessee to make a full and true disclosure of primary facts was relevant, reliable and specific. It was not at all vague or non – specific. Further the High Court also held that there was no question of change of opinion in this case more so for the reason that the original assessment was not a scrutiny assessment. The HC relied on the judgment of the Hon. Supreme Court in the case of ACIT Vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd. 291 ITR 500 (SC) to conclude that no opinion can be said to have been formed where the original assessment is not a regular assessment. Further, since transaction itself on basis of subsequent information was found to be a bogus transaction, mere disclosure of that transaction at time of original assessment proceedings could not be said to be disclosure of true and full facts.

Mehrunnisa Mohammed Fazal Maniar Vs. ITO (2021) 127 taxmann.com547 (Guj.)

5. Exemption not claimed in original Return – Claim made later on account of a decision of the Supreme Court in similar facts – Claim admissible and allowed – Section 264 of the Act

The assessee received certain sum of money on voluntary retirement from a bank. The assessee was under a belief that he is not entitled to claim this amount as exempt and hence offered the same for tax while filing the Return for A.Y. 2004-05. The assessment was completed in a regular assessment on 1-12-2006. Later on the Supreme Court in another case of another employee of the same bank decided that the amount of voluntary retirement compensation was eligible for exemption u/s. 10(10C) of the Act. On the basis of this decision, the assessee made a request to the CIT to allow exemption in his case as well. The application of the assessee was rejected by the CIT for two reasons viz. (a) The assessee has himself offered the amount to tax in Return of Income as against the case before the Supreme Court, where the assessee has claimed the exemption in the Return. (b) The assessee has not made an application under section 264 of the Act but has made a simple representation.

On writ petition before the High Court, the High Court held that though the assessee has not claimed the income to be exempt in the Return of Income, he can always claim the same at later point of time. As regards the second objection, the High Court took notice of the fact that the application filed by the assessee before the CIT was wrongly mentioned as a writ petition instead of revision petition due to error by the typist who typed the petition. The petitioner had made payment of the requisite fees of Rs. 500/- as required under section 264 and hence the petition was a revision petition. The High Court allowed the writ petition and held that the assessee was eligible for exemption u/s. 10(10C) of the Act since the facts were similar to the case decided by the Supreme Court. However, the High Court has also observed that the decision is given on peculiar facts of the case and shall not be cited as a precedent.

Gopalbhai Babubhai Parikh Vs. Principal Commissioner of Income Tax (2021) 127 taxmann.com 245 (Gujarat)

6. Prosecution u/s. 276C of the Act – Not Permissible for mere failure to pay Self-assessment Tax

While filing the Return of Income the assessee had not remitted the self-assessment tax which was remitted later on with interest by availing instalment facility. Assessing officer initiated prosecution proceedings u/s. 276C. Assessee contended that it was not a case of wilful attempt to evade any tax penalty or interest and hence the criminal liability u/s. 276C couldn't be fastened on to it. Before the Court the revenue tried to support the prosecution relying on the words "evade the payment of any tax" as incorporated in section (2) of Section 276C. The High Court while allowing the writ petition held that there was no concealment of any source of income or taxable

item, the inclusion of a circumstance aimed to evade tax or furnishing of inaccurate particulars regarding any assessment or payment of tax. A mere failure to pay the amount due will not satisfy the requirement that constitutes the offence u/s. 276C. The High Court relied upon the judgment of the Supreme Court in the case of Prem Dass Vs. ITO 103 Taxman 65 (SC) for the proposition that there should be concealment of income or furnishing of inaccurate particulars of income to attract sections 276C and 277. The High Court also held that the Explanation given in the section will be relevant only for the purpose of sub-section (1) of the section and not for the purpose of sub-section (2) thereof.

Forzza Projects Pvt. Ltd. Vs. PCIT (2021) 127 taxmann.com 259 (Kerala)

7. National Faceless Appeal Centre – Binding Precedence of High Court having jurisdiction over the Assessing Officer

Assessing Officer had made disallowance u/s. 36(1)(v) of the Act in respect of Employees contribution to PF /ESIC which was not deposited within the due dates prescribed under the relevant statutes. The appeal of the assessee before CIT (A) was decided by the National Faceless Appeal Centre – NFAC due to the new scheme of Faceless Appeals. NFAC confirmed the disallowance relying upon a judgment of the Gujarat High Court. Before the Tribunal the assessee contended that NFAC should have followed the jurisdictional High Court of Allahabad in the matter instead of following the decision of the non-jurisdictional High Court of Gujarat while deciding its appeal. The Tribunal held that though the centralised NFACE was created as per the scheme, it should be ensured that whenever any appellate order is passed, the decision of jurisdictional High Court having jurisdiction over the assessing officer should be followed and applied by the NFAC.

Mahadev Cold Storage Vs. Assessing Officer (2021) 127 taxmann.com 722 (Agra Trib.)

8. Sections 132(9D) and 142A of the Act – Reference to Valuation Officer for purpose of making assessment – Effect of Amendment made w.e.f. 1-4-2017

A search and seizure operation under section 132(1) was conducted at office/residence of assessee on 13-3-2014. Pursuant to search, DDIT (Investigation) made a reference to DVO on 11-7-2014 in respect of valuation of immovable properties held by assessee. DVO furnished valuation report showing value of properties at higher amount than what was shown by assessee. On the basis of this report, the Assessing Officer invoked proceedings under section 153A and passed an assessment order making addition on account of difference in valuation of properties as submitted by DVO. Assessee objected to reference made by DDIT (Investigation) to DVO on ground that only Assessing Officer under section 142A could make reference to DVO for valuation of property. Prior to 1-4-2017, the DDIT (Inv.) did not have such power to refer the matter to the DVO. The Tribunal observed that authorized officer of search DDIT (Investigation)/ADIT (Investigation) was empowered to make reference to Valuation Officer by section 132 (9D) which was inserted only after 1-4-2017 by an amendment by Finance Act, 2017. Considering this, the reference to DVO given by DDIT (Investigation) on 11-7-2014 when he did not have power/jurisdiction for same was unlawful and the addition made on the basis of such valuation report was to be deleted. It was also held that the valuation report of the DVO cannot be said to be incriminating material unearthed during the search so as to justify the assessments u/s. 153A of the Act for A.Y. 2008-09 to 2012-13 which were already completed at the time of the search.

Asst. CIT Vs. Narula Educational Trust (2021) 126 taxmann.com 158 (Kol. Trib.)

9. Interest on Overdraft / Cash Credit Account – Disallowance u/s. 43B of the Act –Not justified since the interest is not converted into loan or borrowing

During the course of the assessment, the assessing officer observed that assessee debited interest expense in his profit and loss account. The same was proposed to be disallowed u/s. 43B of the Act as the assessing officer took a view that the same was not actually paid. Assessee submitted that the interest charged by the bank was fully recovered from his bank accounts and the same was not pending for payment. The entire interest was paid in subsequent months and hence section 43B was not applicable as per assessee's contention. The AO however observed that the amount of liability towards the bank stood increased by an amount equal to the interest amount and thus it resulted into conversion of interest into further loan or advance. The AO also opined that the subsequent payment will be towards the repayment of the loan which stood at higher amount. The AO accordingly disallowed the amount u/s. 43B. On appeal, the CIT (A) held that interest amount paid by the assessee through overdraft / cash credit was not similar to loan accounts and thus the Explanation 3C or Explanation 3D to section 43B would not be applicable in the facts of the case. On further appeal by the assessing officer, the Tribunal dismissed the appeal of the revenue. The Tribunal also observed that the issue was decided in favour of the

assessee by some decisions correctly applied by the CIT (A) and was also covered by the assessee's own case for earlier years on the point.

CIT Vs. Ashok Radhakishen Mehra (2021) 127 taxmann.com 468 (Mumbai Trib.)

10. Cash deposit during demonetization – Section 69A of the Act – Assessment Year : 2017-18

Assessee was a housewife. During the period of demonetization, she deposited cash of Rs. 2,11,500 in her bank account. During the assessment proceedings, she was asked to explain the source of deposit. Assessee replied that she has no business activities and she only earns income from interest on her savings. The Assessing Officer made addition of total amount deposited in bank account which was also confirmed by the CIT (A). On appeal the Tribunal held that as per Instruction No. 03/2017, dated 21-2-2017, which are statutory and binding on revenue, the Assessing Officer has no mandate to tax cash deposit in bank account during Demonetization Scheme, 2016 if it is less than 2.5 lakhs. The assessee had given explanation to AO that sum deposited during demonetization in bank were her money saved in last many year's and were kept for herself and for family in case of emergency need. Considering these factors, it could be held that assessee had duly explained source of deposit as required by Section 69A of the Act. ITAT also held that this ruling may be treated as precedent in respect to proceedings arising out of cash deposit made by housewives during demonetisation, up to limit of Rs 2.5 lakhs.

Smt. Uma Agrawal Vs. ITO (2021) 127 taxmann.com 735 (Agra Trib.)