DIRECT TAX – RECENT JUDGMENT

CA. Paras Savla, CA. Ketan Vajani

1. S. 2(15) – Trust running newspaper not entitled to exemption u/s. 11 where advertisement receipts exceed quantitative threshold imposed by the proviso to section 2(15)

The assessee society was founded in the year 1921 and was enjoying exemption u/s. 11(1) for past many years. The activity of the assessee inter-alia included managing and running a printing press and a newspaper. For the assessment years 2010-11 and 2011-12, the assessing officer denied the exemption u/s. 11 by invoking proviso to section 2(15) of the Act on the ground that the assessee is engaged in trade, commerce or business as it manages and runs a printing press and newspaper. The assessee argued that it was primarily a non-profit institution involved in charitable activities and did not engage in any trade, commerce or business or any such activity. The CIT (A) allowed the appeal of the assessee which was confirmed by the Tribunal and also the High Court. All the appellate authorities have followed the judgment of the Delhi High Court in the case of *India Trade Promotion Organisation v. DGIT (Exem) 371 ITR 333 (Del.)* in support of the assessee's claim.

On appeal to Supreme Court, the Hon. Supreme Court observed that the law with regard to interpretation of Section 2 (15) has undergone a change, due to the decision in *Asst. CIT (Exem) v. Ahmedabad Urban Development Authority (2022) 449 ITR 1 (SC)*. As a result, the Supreme Court was of the opinion, that matter should be remitted for fresh consideration of the nature of receipts in the hands of the assessee, in the present case. Accordingly, the matter was sent back to the assessing officer for the purpose of re-examination and deciding the question as to whether the amounts received by the assessee qualify for exemption, under Section 2 (15) or Section 11.

Pr. CIT (Exemptions) v. Servants of People Society [2023] 147 taxmann.com 79 (SC)

2. Non communication of order under section 142(2A) – Order directing special audit will not be given effect to

During the course of the assessment for A.Y. 2018-19 in the case of the assessee, a show cause notice was issued u/s. 142(2A) for initiation of special audit. The assessee raised objection against the special audit. The said objections were responded by the revenue and an order was also passed approving the special audit u/s. 142(2A). The said order was however not served on the assessee. The assessee came to know about the same on receipt of the notice by the chartered accountant for undertaking the special audit. This was challenged by the assessee in a writ petition before the High Court on the ground that the order was never served upon the assessee and hence the special audit cannot be carried out. The High Court, however dismissed the writ petition of the assessee.

The assessee filed appeal against the said order of the High Court. During the course of the hearing before the Supreme Court, the ASG accepted that the order u/s. 142(2A) of the Act was never communicated to the assessee or uploaded on the portal of the department. He, however, submitted that the written order was placed in the order sheet file. The Supreme Court held that it was fundamental that the order was required to be communicated to the assessee so as to know the reasons and if required to exercise the option to challenge the order. Further, in this case, the assessment order had not been passed and the same had become barred by time. There was an ambiguity as to whether the report of special audit had been filed before the assessing officer or not. The Supreme Court gave a direction that the order directing the special audit u/s. 142(2A) of the Act will not be given effect to and will be treated as not passed as it was never communicated to the assessee. As regards the assessment, being time barred, with the consent of the counsel of the assessee, the Supreme Court extended the time limit for passing the assessment order till 31-12-2023. The Supreme Court also left it open for the assessing officer to invoke the provisions of special audit by following the proper procedure and giving opportunity of hearing to the assessee and also gave liberty to the assessee to challenge such order if felt necessary. In such an event, the Supreme Court held that the time available will get extended beyond 31-12-2023 as per the provisions of the Act.

Rajiv Gandhi Proudyogiki Vishwavidayalaya v. Union of India [2023] 146 taxmann.com 353 (SC)

3. Reassessment initiated to determine issue of residence status – Not permitted where TRC is issued by other country – TRC to be accepted as the basis of benefits under DTAA

The Tax Residency Certificate (TRC) is statutorily, the only evidence required to be eligible for the benefit under DTAA and the revenue cannot go behind the TRC since it is contrary to Government of India's consistent policy and repeated assurances to Foreign Investors. Indian Revenue Authorities cannot disregard the TRV since it will be contrary to the international law. Consequently the High Court held that reassessment proceedings initiated to determine the residence status and decide eligibility of treaty benefit are to be quashed.

Blackstone Capital Partners (Singapore) Vi Fdi Three Pte. Ltd v. Asst. CIT [2023] 146 taxmann.com 569 (Delhi)

4. Revision of orders prejudicial to the interest of revenue – inquiries made during the assessment – order cannot be subjected to revision where the issue involved is debatable – S. 263

The assessee had acquired shares of unlisted company @ Rs.10/- per share. During the regular assessment in the case of the assessee, the assessing officer had issued queries regarding investment which was responded by the assessee. Various details including details of shares purchased, entities from whom shares were purchased, copies of bank accounts evidencing payments of consideration and computation of book value of shares were furnished by the assessee. The Commissioner was of the view that provisions of section 56(2)(vii)(a) would be applicable and assessee would be liable to pay tax on difference between consideration paid for said shares and their FMV, which was taken by the Commissioner at Rs.10.83 per share. According to the Commissioner, valuation under Rule 11U was not correct since the same did not include MAT credit entitlement. He invoked the revision powers under section 263 and Explanation 2 thereto. On appeal by the assessee, the Tribunal found that the Commissioner was not justified in assuming jurisdiction on the ground that no inquiries were conducted by the assessing officer.

On appeal to the High Court, the High Court upheld the decision of the Tribunal. The High Court held that the tribunal was correct in holding that the assessing officer has made due inquiries and therefore the revision was not justified in the case of the assessee. The High Court observed that inclusion of MAT Credit entitlement for the purpose of determining FMV under Rule 11U is debatable and therefore the same cannot be a ground to contend that the order of the assessing officer is prejudicial to the interest of the revenue.

Pr. CIT v. Pushp Steel & Mining P. Ltd. [2023] 146 taxmann.com 478 (Delhi)

5. Collection and Recovery of Tax – Sec. 220 – Adjustment of Refunds against pending demand – Direction to refund amount adjusted in excess of 20% of demand in dispute

Assessment for A.Y. 2012-13 was completed in the case of the assessee resulting in tax payable. Assessee preferred appeal against the same before the CIT (A). While the appeal of the assessee was pending before the CIT (A), the department adjusted refunds of other years against the demand for the A.Y. 2012-13. The amount so adjusted was approximately 65% of the total demand raised. Assessee filed application requesting release of the refund beyond 20% of the demand raised as per the guidelines of the CBDT. The said application was rejected by the assessing officer on the ground that the adjustment of refund against the demand was done by CPC system in accordance with the total outstanding demand and the CPC would not have no reference to the CBDT Office Memorandum.

On petition filed by the assessee, the High Court held that since the assessee had filed stay application two days prior to filing of appeal against the assessment order, the order refusing refund was to be set aside and revenue was directed to refund the amount adjusted beyond 20% of the demand raised.

Neo Structo Construction P. Ltd. v. Asst. CIT [2023] 147 taxmann.com 238 (Gujarat)

6. Reassessment – Sec. 147 – No fresh tangible material information – Reassessment held invalid

The assessee was a co-operative housing society. In the original assessment, the deduction u/s. 80P was allowed in the case of the assessee including the deduction u/s. 80P(2)(d) for the interest earned from Co-operative banks. The said assessment was sought to be reopened u/s. 148 of the Act. However, the reason for reassessment made reference only to the records of the original assessment.

On writ petition filed challenging the reassessment, the High Court held that there was no tangible material with the assessing officer and the reference was made only to the original assessment proceedings. Thus, it appeared that between the date of order of assessment and date of issuance of notice, nothing new had happened. There was no new information received by the assessing officer nor was any reference made to any new material on record. The assessing officer was simply attempting to accord a fresh consideration on issue of deduction u/s. 80P claimed and allowed in favour of the assessee. Therefore, reopening of assessment being a mere change of opinion was not justified.

Tahnee Heights CHS Ltd. v. ITO [2023] 147 taxman.com 335 (Bom.)

7. Penalty u/s. 270A – Not justified in case of addition u/s. 43CA on the basis of value determined by DVO.

During the assessment year 2017-18, the assessee had sold certain land at less than stamp duty value. The assessing officer proposed to make addition on the basis of the stamp duty value. The assessee made a request for reference to DVO. The assessment was completed pending the report of the DVO. However, later on the same was rectified on the basis of the valuation as per the report of the DVO, the assessment was completed making addition of Rs. 7,05,000/-. The assessing officer levied penalty on the basis of the final addition of Rs. 7.05 Lakhs which was confirmed by the CIT (A).

On assessee's appeal, the Tribunal held that the only basis for imposition of penalty u/s 270A is the making of addition u/s 43CA on the strength of report of the DVO. It is apparent from such report that the value determined by the DVO is again an estimate, in as much as he considered certain other properties at different rates and then averaged such rates to find out the value which the property ought to have realized on the transfer. Further sub-section (6)(b) of section 270A provides that "the amount of under-reported income determined on the basis of an estimate shall not be included as under-reported income, if the accounts are correct and complete to the satisfaction of the Assessing Officer. Accordingly it is ostensible from the language of sub-section (6) that an addition made on the basis of estimation cannot provide foundation for under-reported income for the purpose of imposition of penalty u/s 270A of the Act. The penalty was accordingly deleted.

Jaibalaji Business Corporation P. Ltd. v. Asst CIT [2023] 147 taxmann.com 333 (Pune Trib.)

8. Credit for Tax Deducted at Source – Sec. 199 r.w.s. 143(1) – Credit not dependent on deposit by the deductor

For the assessment year 2019-20, the Return of Income filed by the assessee was processed u/s. 143(1) of the Act. While processing the Return, the assessee was not allowed credit for TDS deducted on salaries by the employer on account of non-payment of the same in the government treasury. On appeal by the assessee against not allowing the credit, the Tribunal held that the credit for the tax deducted is not dependent upon its subsequent deposit by deductor. As per section 199, once there is deduction of tax at source the credit for the same has to be allowed notwithstanding the fact that the tax so deducted was not deposited by the employer.

Mukesh Padamchand Sogani v. Asst. CIT [2023] 147 taxmann.com 24 (Pune Trib.)

9. Share of profit from partnership firm – Sec. 10(2A) – An LLP deriving share of profit from another firm eligible to claim exemption

The assessee was a limited liability partnership and was inter-alia deriving income from share of profits in another partnership firm. The share of profit so earned was claimed as exempt u/s. 10(2A) of the Act. The assessing officer denied the said exemption on the ground that the LLP being treated as a firm under Income-tax Act, was not a person with a legal existence and it could not become partner in another firm. The appeal of the assessee was dismissed by the CIT (A).

On further appeal to the Tribunal, held that as per section 2(23) LLP is to be treated as firm and there is no restriction in the Act on firm to become a partner in another partnership firm. Thus, the assessee was deemed to be a partner in a partnership firm for a limited purpose of section 10(2A) and would be eligible for exemption in respect of the share of profit received from partnership firm.

Mulberry Textiles LLP v. ITO [2023] 147 taxmann.com 267 (Bangalore Trib.)