

Recent decision of Income- tax Appellate Tribunal

Advocate Neelkanth R. Khandelwal

Recent decisions of Income-tax Appellate Tribunal

1. **JR Properties – A.Y. 2010-11 – ITA No 6003/Mum/2019** – Addition confirmed by the CIT(A) as regards the loan borrowed by the assessee – Remand report called for by the CIT(A) – AO mentions in the remand report that summons issued to the loan party and Mr Bhanwal Lal Jain (*alleged* entry provider) has returned unserved – Assessee has also failed to produce the parties – Tribunal mentions the argument that had been taken that the loan pertains to March, 2010 whereas the remand report is being called for in late 2019, that is, almost 10 years have elapsed since the loan was taken and as such it is possible, that the summons would have returned unserved due to the parties having left the premises – Loan repaid after 3 years that is, much prior to the summons issued during remand proceedings – Nothing whatsoever to show that cash got exchanged – Assessee has discharged primary onus – Assessee appeal therefore, allowed

Other aspect – letter filed during the course of assessment proceedings that cross examination is required of the party and Mr Bhanwar Lal Jain – to which the AO mentions that this is delaying tactics and the fact that the loan is non genuine is gospel truth

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2. **Mudra Securities – A.Y. 2010-11 – ITA No 1944/Mum/2019** – Issue of client code modification - Assessee is a sub broker – Information received by the AO from DIT (Intelligence & Criminal Inv.) regarding tax evasion through CCM with a view to reduce tax liabilities by shifting profits – Modification from assessee code to client code – It was argued that the modification is merely 1.15% of the total trades executed during the year – Due procedure followed for modification and such modification allowed by NSE – NSE has not levied any penalty – Sub-broker code M1 was allotted to the assessee, followed by another serial numbers – Own volume of trade was as high as 90% of the total trades executed – Since, the trades of assessee are this high, the staff of the assessee, in order to save time, could have prefixed the client code of the assessee and as such, the error of wrong client code – the error is thus not a typo error but a punching error at the time of executing the trade of the clients – Letter obtained from the respective clients that the trades have been considered in their returns – No reply by the AO to the remand report called for by the CIT(A) – Assessee has done all that it could do – Department has made addition on the basis of conjectures and surmises – Onus was on the Department to substantiate the allegations being made with corroborative evidences which the Department has failed to do – Consequently, assessee appeal allowed

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3. **Malchand Dindayal Salts Pvt Ltd – A.Y. 2010-11 – ITA No 6908/Mum/2018 (Deptt.) and 7097/Mum/2018 (Assessee appeal)** – Share capital matter – It was argued that no tangible material to have reason to believe that income chargeable to tax has escaped assessment – Assessment re-opened on analysis of financial statement that the assessee could not fetch certain premium is no reason to believe that income has escaped assessment – Further, in the reasons nowhere it is mentioned that the shares were overvalued or what amount the premium exceeds the value of shares which has led to income escaping assessment – Thus, the re-opening is bad in law, accordingly, re-opening quashed

Other aspect – Proviso to section 68 also not applicable as assessment year involved is A.Y. 2010-11 whereas proviso is inserted by FA, 2012, w.e.f. 01.04.2013; proviso is applicable prospectively and not retrospectively

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4. **Mr Vaidyanathan Vembu – A.Y.s 2014-15 to 2016-17 – ITA Nos 1577 to 1579/Mum/2020** – section 263 matter – Pr CIT order dated 16.3.2020, received on 17.3.2020; thus the due date to file appeal to Tribunal was 16.5.2020 whereas the appeal was filed on 9.6.2020 – Circular extending time limit to 30.6.2020 – thus, no delay

Further, appeal filing fee Rs 10,000 paid for each appeal; ought to have been Rs 500; Registry directed as regards balance Rs 28,500 to be either adjusted or to be refunded within a period of one month from the date of receipt of the order

Facts – Assessee purchased flat from builder – Builder subsequently, searched – *Alleged* that builder maintains parallel books as regards cash received from flat buyers – Builder files application before the Settlement Commission – In the case of the assessee, AO makes addition as regards aforesaid facts – CIT(A) deleted the addition – Department chose not to file further appeal with the Tribunal

Mr Vaidyanathan Vembu – A.Y.s 2014-15 to 2016-17 – ITA Nos 1577 to 1579/Mum/2020...Contd

Thereafter, on the same issue, the present 263 – Tribunal held that the provisions of section 263 are clear; provisions of section 263 shall extend to such matters as has not been considered and decided in such appeal – Therefore, appeal of the assessee allowed and order passed by the Pr. CIT under section 263 quashed.

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5. **Mr Dhiren Vora & others – A.Y. 2011-12 – MA No 401/Ahd/2019 arising out of IT(ss)A – 178/Ahd/2018 and others** – Tribunal dismissed appeal of the Revenue on the ground of low tax effect – Thereafter, the Department filed present miscellaneous application to recall the order of the Tribunal referring to Circular no 23 of 2019; Department has also issued Office Memorandum F. No. 279 dated 16.9.2019 – Tribunal held that, applicable for appeals to be decided in future and not those that have been decided – Ahd Tribunal relied on Jaipur Tribunal in MA No 23/Jp/2020

6. **Ms Jolly Singhal – A.Y. 2011-12 – ITA No 1076/Jp/2019** – Low tax effect – Information received from Investigation Wing of the Department is not covered in clause (e) of the exceptions as regards low tax effect circular – Jp Tribunal relied on decision in ITA No 627/Jp/2019

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7. **Mr Kalyanji Velji (HUF) – A.Y. 2010-11 – ITA No 2284/Mum-2019 and others** – Assessment under section 153C vis-à-vis assessment under section 148 explained in detail – Amendment to section 153C discussed – Addition of *alleged* on money received could not have been made by the AO under section 68 of the Act – Aspect of cross examination discussed – Assessee appeal allowed on technical and merits

8. **Byke Hospitality Limited – A.Y.2013-14 – ITA No 7208/Mum/2018 – CIT(A)** confirmed penalty levied by the AO under section 271(1)(c) – AO initiated penalty for furnishing inaccurate particulars of income in the assessment order itself – Notice issued under section 274 r.w.s. 271, wherein the AO did not tick mark the relevant limb – In the penalty order, the AO mentions that clause (B) to Explanation 1 of section 271 (1)(c) is applicable in the present case – It was argued that clause (B) to Explanation 1 of section 271 (1)(c) is applicable for concealment of income and Assessing Officer having initiated penalty proceedings for furnishing inaccurate particulars of income could not have levied the penalty for concealment of income – Accordingly, penalty order was bad in law – Appeal of the assessee allowed

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9. **Shelf Drilling Ron Tappmeyer Ltd. – 123 taxmann.com 49 (Mumbai Tribunal)** – Where for assessment year 2014-15, assessee's books of account was rejected and assessee's claim of loss of Rs. 81 crores was declined but on appeal, Co-ordinate Bench of Tribunal remitted matter to the AO for framing assessment de novo, assessee's claim of set off of unabsorbed business losses of assessment years 2016-17 and 2017-18 being Rs. 20.30 crores and Rs.18.44 crores respectively could not be declined in view of fact that returns for these were filed prior to appellate order

10. **Grasim Industries Limited – 122 taxmann.com 249 (Mumbai Tribunal)** – Powers of recovering disputed taxes are with the AO; once the AO has himself decided not to take coercive measures for time being and direct assessee to make payment of any part of disputed demands, it cannot be open to Tribunal to direct assessee to pay same; question of such directions by Tribunal would have relevancy only when Tribunal was to pass any stay order subject to such a condition

Grasim Industries Limited – 122 taxmann.com 249 (Mumbai Tribunal) – ...Contd

Demands in respect of collection/recovery of tax and interest was raised – A conscious decision was taken by revenue authorities not to recover outstanding demands for time being – The AO did not wish to recover demands in hope that as a law-abiding corporate citizen, assessee would volunteer to co-operate with income tax department and the AO chose to wait till suitable clarification was obtained from High Court to effect that stay granted in a writ petition challenging validity of order declining stay under section 220(6) ceases to hold good – Whether powers of recovering disputed taxes are with the AO; once an AO had himself decided not to take coercive measures for time being and to direct assessee to make payment of any part of disputed demands, it could not be open to Tribunal to direct assessee to pay same; question of such directions by Tribunal would have relevancy only when Tribunal was to pass any stay order subject to such a condition

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11. **Kashmir Road Lines – 123 taxmann.com 5 (Amritsar Tribunal)** – Where assessee claimed condonation of delay of 124 days in filing appeal due to reason that appeal papers were prepared and handed over to Assistant of assessee's counsel for filling who failed to do so and ultimately appeal was filed belatedly through another local counsel and such contention was also supported by affidavit of previous counsel, since assessee had demonstrated *bona fide* reason and sufficient cause for such delay, same was to be condoned

Where assessee filed an appeal against assessment order before the CIT(A), however, assessee neither attended appellate proceedings nor filed any adjournment application and, therefore, the CIT(A) observing that assessee was not interested in pursuing its appeal, dismissed its appeal since CIT(A) did not pass such order on merit, same was to be set aside and case was to be remanded back to him for passing afresh decision on merits

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12. **Mr Santosh Kumar Subbani – 122 taxmann.com 169 (Hyderabad Tribunal) –** Section 2(47) of the Act – Capital gains – (Land and buildings - Joint development agreement) – Assessment year 2007-08 – Assessee had entered into development agreement for construction of duplex houses and assessee was to receive constructed area of 5000 sq.ft by virtue of development agreement – However, after entering into agreement, developer vanished and neither any development had taken place nor developed area was received by assessee – This fact was verified and confirmed by the AO himself – From above it was clear that only notional income as per development agreement had been received by assessee, however, no real income had been received – Further, till date development agreement had not been cancelled and no public notice was issued by assessee for cancellation of development agreement – Whether therefore, issue was required to be remitted back to the AO with a direction to decide capital gains after verifying whether possession was taken back by assessee or not and assessee had cancelled development agreement or not, because, in case, possession had been taken back by assessee and there was no development, assessee would not be liable for short term capital gains

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13. **Mr Uddhav Krishna Bankar – 121 taxmann.com 53 (Pune Tribunal)** – Section 54B of the Act – Capital gains – Transfer of land used for agricultural purpose (Capital gain account scheme) – Assessment year 2012-13 – Assessee sold agricultural land on 12-10-2011 and filed its return of income declaring long term capital gains after claiming exemption under section 54B towards purchase of another agricultural land – The AO denied assessee's claim under section 54B on ground that she did not deposit amount of capital gains in designated capital gains account maintained with a bank before due date of filing return under section 139(1) – However, it was found section 139 was to be read here as section 139(4) and not to be confined to section 139(1) alone – It was observed that time under section 139(4) was available up to 31-3-2014 – Assessee opened a bank account under designated Capital gain account scheme on 3-8-2013 and purchased a new property on 26-8-2013 which was well within given period of two years from date of transfer – Whether therefore, assessee having complied with requirement of section 54B(2) in light of time limit as per section 139(4) exemption could not have been denied

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14. **Buniyad Developers Pvt. Ltd. – 120 taxmann.com 31 (Delhi Tribunal) –** Minimum alternate tax – (Exemption under section 10) – Assessment year 2009-10 – Whether where income which is exempt under section 10 is included in book profit under section 115JB, which should not be done, tax should be computed in accordance with provisions of section 115JB by reducing amount of income to which section 10 applies, if such amount is credited to profit and loss account – Held, yes

15. **Ms G. Vijay Padma – 119 taxmann.com 441 (Bangalore Tribunal) – (In favour of revenue)** – Section 2(14) of the Act – Capital gains – Capital asset (Agricultural land) – Assessment year 2007-08 – Assessee sold a land and claimed that said land was an agricultural land and, thus, proceeds were exempt from tax – Assessing Officer disallowed claim of assessee and treated land as capital asset – It was noted that records of land produced by assessee did not show any crop grown on said land by assessee –

Ms G. Vijay Padma – 119 taxmann.com 441 (Bangalore Tribunal) – (In favour of revenue)...Contd

Thus, such records of land could not be considered as conclusive evidence to prove that assessee's land was agriculture land – Assessee had not placed any other evidence on record to show that impugned land was an agricultural land and it had only relied on said record – Further, assessee had not claimed any expenses incurred in carrying out any agriculture operations – There was no evidence of agriculture produce having been sold by assessee – Further, land was situated in area which was an upcoming residential area with many upcoming private residential flats to be built – Land sold by assessee was in middle of area where huge development activity was carried out by builders – Sale price received by assessee was very high which a normal agriculture land would not fetch – Whether, on facts, land sold by assessee could not be considered as agricultural land and same was to be treated as a capital asset liable to be taxed – **In favour of revenue**

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16. **Mr Santosh Kumar Subbani – 122 taxmann.com 169 (Hyderabad Tribunal)** – Section 2(47) – Transfer (Land and buildings – Joint development agreement) – Assessee had entered into development agreement for construction of duplex houses and assessee was to receive constructed area of 5000 sq.ft by virtue of development agreement – However, after entering into agreement, developer vanished and neither any development had taken place nor developed area was received by assessee – This fact was verified and confirmed by the AO himself – From above it was clear that only notional income as per development agreement had been received by assessee, however, no real income had been received – Further, till date development agreement had not been cancelled and no public notice was issued by assessee for cancellation of development agreement – Whether therefore, issue was required to be remitted back to the AO with a direction to decide capital gains after verifying whether possession was taken back by assessee or not and assessee had cancelled development agreement or not, because, in case, possession had been taken back by assessee and there was no development, assessee would not be liable for short term capital gains

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17. **Valencia Nutrition Ltd. – 120 taxmann.com 238 (Bangalore Tribunal) – section 56(2)(viib), Rule 11UA** – The AO should scrutinize valuation report prepared under DCF method and if necessary, he can carry out fresh valuation either by himself or by calling a final determination from an independent valuer to confront assessee; he cannot change method of valuation and he has to follow DCF method only.

Where assessee-company, engaged in business of manufacturing of energy drinks, had issued shares at a share premium, but the AO took view that share valuation under DCF method had been carried out on basis of projections and estimations given by management and that value of share should be based on 'net Asset Method' mentioned in rule 11UA and accordingly, AO worked out value of shares under Net Asset Method and assessed excess share premium as income of assessee under head 'income from other sources' under section 56(2)(viib), since AO had proceeded to determine value of shares by adopting different method without scrutinizing valuation report furnished by assessee under DCF method, matter be remanded to file of the AO with direction to examine said issue afresh.

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18. **Facts of Mr Ghewarchand Shah – ITAT Mumbai**

19. **Facts of Al Ghurair Construction Foundations India Private Limited –
ITAT Mumbai**

Al Ghurair Construction Foundations India Private Limited...Contd

AFFIDAVIT

I, _____, aged about ___ years, do hereby solemnly affirm and state as under:

that I am the **Managing Director** of **Al Ghurair Construction Foundations India Private Limited** (hereinafter referred to as ‘the Company’);

that the order of the CIT(A) dated 07.12.2017 for income-tax assessment year 2013-14 was served on the Company on 5th January, 2018;

that the appeal against the aforesaid order of the CIT(A) was due to be filed before the Honourable Tribunal on 6th March, 2018;

Al Ghurair Construction Foundations India Private Limited...Contd

that the company was engaged in the business of setting up foundation for any construction activity; however, the company did not have many contracts on hand and hence since 2017, it has not had any employees who could look after the day to day operations of the company and as such, the appeal was missed to be filed

that today the Company was filing the form for Vivad Se Vishwas for income-tax assessment year 2012-13 (pending in Tribunal – ITA No 6947/M/2016 in K-Bench, Mumbai) and immediately realised that there is this matter for assessment year 2013-14 for which appeal has not been filed and hence, immediately sent the order of the CIT(A) and relevant papers to R.S. Khandelwal & Associates, Chartered

Al Ghurair Construction Foundations India Private Limited...Contd

that they prepared the appeal immediately and the same has been filed today itself, on 30th December, 2020 with a delay of 1030 days.

I further state that whatever stated hereinabove is true to the best of my own knowledge and belief and I believe the same to be true.

Solemnly affirmed at Mumbai }

this 30th December, 2020 }

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20. Mr Zile Singh – A.Y. 2016-17 – ITA No 6863/Del/2019 – (In favour of Revenue) –

The case of the assessee was selected for scrutiny under CASS for limited scrutiny for examination of “substantial” increase in capital” in a year part A-BS of ITR with reason Code BL01.02 in order to check whether the capital is genuine and from disclosed sources.

Section 263 – The reasons for issue of show cause notice was on the ground that in the absence of proper verification and investigations by the the AO on this issue the assessment order passed is erroneous and also prejudicial to the interest of revenue.

Mr Zile Singh – A.Y. 2016-17 – ITA No 6863/Del/2019 – (In favour of Revenue)...Contd

The assessee submitted its reply on 26.07.2019 stating that transaction entered into by the assessee is genuine transaction and all the information, documents and evidence regarding the sale and purchase of the shares were submitted to the AO. The assessee claimed that it has submitted the copies of the purchase bills; demat accounts, holding statement, bank statement, broker account statement and contract notes before the AO. It is also stated that transaction compliance with all the transaction u/s 10(38) of the Act.

The Pr. CIT held that the share purchase so cheaply and are sold at a fancy price needs a satisfactory explanation with supporting documents. He held that even during the hearing u/s 263 of the Act no such evidence were produced. He further held that the assessment lacked the necessary enquiries on the genuineness of the capital gain exempt and therefore, the order passed by the AO is erroneous, as it had resulted into escapement of income, therefore, it is prejudicial to the interest of revenue

Mr Zile Singh – A.Y. 2016-17 – ITA No 6863/Del/2019 – (In favour of Revenue)...Contd

On careful examination of the whole issue it is apparent that the AO did not carry out any enquiry with respect to the long term capital gain claimed by the assessee u/s 10(38) of the Act.

On careful examination of the order passed by the PCIT, we found that, necessary enquiries were made by PCIT on the issue, therefore, on this account no fault could be found with the order u/s 263 of the Act. Further, when no inquiries have been made by the AO, for the reason for which the case of the assessee was selected in scrutiny, the order is erroneous and prejudicial to the interest of the revenue – In favour of revenue

Thank you

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