DIRECT TAX – RECENT JUDGMENT

CA. Paras Savla, CA. Ketan Vajani

1. Expln – 1 to section 37(1) of the Act – Freebies gifted to doctors by pharmaceutical companies – not allowable as deduction.

The assessee, a pharmaceutical company had claimed deduction in respect of the freebies provided to medical professionals. The deduction for the same was denied by the assessing officer by invoking Explanation 1 to section 37(1) of the Act. The assessee contended that it has not indulged in any illegal activities and that there was no offence considering the fact that there was no corresponding penal provision applicable to it under the Regulations of the Indian Medical Council as applicable to it. The matter travelled to the Supreme Court at the instance of the assessee.

The Hon. Supreme Court held that gifting of such freebies to doctors is clearly prohibited by law and hit by Explanation 1 to section 37(1) of the Act. Hence the same is not to be allowed as a deduction. The Supreme Court observed that Medical practitioners have a quasi-fiduciary relationship with their patients. A doctor's prescription is considered the final word on the medication to be availed by the patient, even if the cost of such medication is unaffordable or barely within the economic reach of the patient - such is the level of trust reposed in doctors. Therefore, it is a matter of great public importance and concern, when it is demonstrated that a doctor's prescription can be manipulated, and driven by the motive to avail the freebies offered to them by pharmaceutical companies, ranging from gifts such as gold coins, fridges and LCD TVs to funding international trips for vacations or to attend medical conferences. These freebies are technically not 'free' - the cost of supplying such freebies is usually factored into the drug, driving prices up, thus creating a perpetual publicly injurious cycle. The threat of prescribing medication that is significantly marked up, over effective generic counterparts in lieu of such a quid pro quo exchange was taken cognizance of by the Parliamentary Standing Committee on Health and Family Welfare.

In view of the above the Supreme Court held that when acceptance of freebies by medical practitioners is punishable by the Medical Council of India (MCI) for which the range of penalties and sanction can be extending to ban imposed on the medical practitioner, pharmaceutical companies cannot be granted the tax benefit for providing such freebies, and thereby actively and with full knowledge enabling the commission of the act which attracts such opprobrium.

Apex Laboratories Pvt. Ltd. V. DCIT [2022] 135 taxmann.com 286 (SC)

2. Payment of Tax under Income Disclosure Scheme 2016 – Failure to make payment of 3rd Instalment – Credit to be allowed for the two instalments paid against tax liability after the revised assessment.

The assessee had made declaration under Income Disclosure Scheme 2016. The assessee paid two instalments in respect of the disclosure made. However, the assessee could not make the payment of the third instalment within the time permitted. The assessee filed a petition before the High Court with a request to permit extension of time for the payment of third instalment. High Court rejected the request of the assessee. Under these peculiar circumstances, the assessee approached the Hon. Supreme Court with a request to permit adjustment of the amounts paid in two instalments against the final tax liability that may be determined on the revised assessed income. Considering the peculiar facts and circumstances of the case, the Hon. Supreme Court directed for such adjustment as requested by the assessee.

Yogesh Roshanlal Gupta v. Central Board of Direct Taxes [2022] 135 taxmann.com 209 (SC)

3. Unexplained Cash Credit – Sec. 68 – No addition where the assessee routes its own accounted money back to itself as share capital / premium

During the course of the assessments, addition was made in the case of the assessee u/s. 68 of the Act in respect of the Share Capital and Share Premium amounts received by the assessee company. The addition was supported by the statement of the director of the assessee recorded in the course of search proceedings, which was later on retracted within 2 days. The entities who have contributed the funds towards share capital and share premium were financed by the assessee company itself. The amounts financed to the other entities were the accounted money of the assessee company. The assessee was able to establish the same by way of documentary evidences. The Tribunal allowed the appeals of the assessee and deleted the addition made u/s. 68 of the Act for the reason that the monies which were subject matter of addition were assessee's own accounted money.

On appeal by revenue to the High Court, the High Court upheld the orders of the Tribunal considering the fact that there was no material on record which established that unaccounted money had been funnelled in the form of investment by way of share capital / share premium. The High Court also held that the first proviso to section 68 of the Act engrafted a deeming section as to when the explanation would be considered satisfactory. Pertinently, motivation of the assessee in routing its own money, which was given to the investor entities in the form of loan etc., as an investment in share capital / share premium has not been adverted to in the first proviso. The High Court further held that though the assessee, by wrongly padding his accounts has violated other statutes but that by itself cannot be the reason to make addition u/s. 68 of the Act. The evidence placed on record by the assessee established the trail of the money, the mode through which the money had travelled from assessee to the investor entities and back to the assessee and as a matter of fact each of the investor entities were in existence. Considering this, once the assessee was able to establish that it was its own money which was routed back to it in the form of share capital / share premium, the traditional test of creditworthiness, genuineness and identity of the transactions would have to adapt to the circumstances obtaining in the present case.

Pr. CIT (Central) v. Agson Global Pvt. Ltd. [2022] 134 taxmann.com 256 (Del)

4. Sec. 45(3) – Land introduced by partner as capital – Recorded by firm at cost - Revalued subsequently by firm – Not taxable under section 45(3)

The assessee company introduced land which was held as stock in trade as capital contribution in a partnership firm. The land was recorded by the firm in the books of accounts at the cost of the assessee. However, subsequently the same was revalued by the firm at a higher figure. The assessing officer invoked the provisions of section 45(3) and made addition in relation to the difference between the revalued figure and the cost of the assessee. The addition was deleted by the CIT (A) and the order of the CIT (A) was confirmed by the Tribunal.

On appeal to High Court, the High Court affirmed the order of the Tribunal holding that as per the mechanism provided in section 45(3) of the Act, no capital gain arises when the fixed asset is recorded by the firm at the cost of the assessee. The High Court was not in agreement with the revenue that the transaction was a colourable device so as to avoid the tax.

Note : This judgment pertains to A.Y. 2008-09. However, readers are requested to note that with effect from A.Y. 2019-20, conversion of stock in trade into capital asset will be governed by the provisions of section 28(via) as introduced in the Act and hence the ratio of this judgment may not help with effect from A.Y. 2019-20.

Pr. CIT v. Orchid Griha Nirman (P.) Ltd. [2022] 134 taxmann.com 281 (Cal.)

5. Extension of limitation period for filings by litigants – Time period expiring within 15-3-2020 to 28-2-2022 to be extended to minimum 90 days from 1-3-2022

The Hon. Supreme Court has taken cognisance of the surge of the virus on public health and adversities faced by litigants on account of the pandemic. Considering the same, the limitation period for filing any of the appeals / references etc. under any general or special laws in respect of all judicial or quasi- judicial proceedings has been

extended Suo motu by the Supreme Court. As per the direction of the Hon. Supreme Court, the period from 15-3-2020 to 28-2-2022 shall stand excluded for the purposes of limitation as may be prescribed under the respective statute. In cases where the limitation would have expired during this period, all persons shall have a limitation period of 90 days from 1-3-2022 notwithstanding the actual balance period of limitation remaining in respective cases. In the event where the actual balance period of limitation remaining with effect from 1-3-2022 is beyond the period of the 90 days, then such longer period shall apply.

Cognizance for Extension of Limitation in Re [2022] 134 taxmann.com 307 (SC)

6. Manner of disposal of Stay Applications – Should ordinarily be disposed of in assessee's favour

A search was conducted by Income-tax department against the assessee and on assessment, demand of Rs. 373,20,42,319/- was raised on the assessee. The assessments were challenged by the assessee before the CIT (A) and separate stay applications were also preferred by the assessee before the AO with a prayer to stay the demand on ground of high pitched assessment and appeal being pending. The same was rejected by assessing officer. The assessee filed a writ petition before the High Court against the order of rejection.

The High Court allowed the writ and made following observations :

(a) Application u/s 220(6) for a stay of demand is to be decided by AO based on 4 basic parameters; (i) prima facie case, (ii) balance of convenience, (iii) irreparable injury to the assessee, and (iv) whether the assessee has come with clean hands.

(b) While deciding on stay of demand application u/s 220(6), AO should divorce himself from his position as the authority who made the assessment.

(c) AO may stipulate a pre-deposit of less than 20% of demand (even 5%/10%) while granting the stay of demand u/s 220(6).

(d) AO's discretion of not treating the assessee in default, conferred under section 220(6) should ordinarily be exercised in favor of the assessee, unless the overriding and overwhelming reasons are there to reject the application.

(e) The application under Section 220(6) of the Act cannot normally be rejected merely by describing it as against the interest of Revenue if recovery is not made if the tax demanded is twice or more of the declared tax liability.

(f) Powers to grant stay can be implied as an inherent power of the First Appellate Authority, i.e., CIT(A).

Harsh Dipak Shah v. Union of India [2022] 135 taxmann.com 242 (Gujarat)

7. Sec. 147 – Disclosure made by assessee in original assessment – Not specifically mentioned in the assessment order – Reassessment on the matter already considered earlier – Not justified.

On a writ petition challenging the validity of reassessment, the Hon. High Court held that once the assessing officer has raised a query during the original assessment proceedings and the assessee has disclosed all primary facts, which are not rejected by the assessing officer, the assessing officer is deemed to have considered the submission of the assessee even if there is no specific discussion about the same in the assessment order. Later reopening of the assessment on the basis of the same material on records amounts to change of opinion and review of the earlier assessment order which is not permissible under section 147 of the Act. Accordingly, the reassessment was held to be not valid and the writ of the assessee was allowed.

Oracle Financial Services Software Ltd v. Dy. CIT [2022] 135 taxmann.com 143 (Bombay)

8. Reassessment – Linkage of information with the case of the assessee is necessary – In absence of such linkage reassessment held not justified

Assessee company filed its return of income which was accepted and an assessment was completed. Subsequently, the assessing officer issued a reopening notice upon assessee. The reasons as provided to the assessee merely indicated information received from DIT about certain entity being engaged into suspicious

transactions. The material was not further linked by any reason to conclude that assessee had indulged in any activity which could lead to a reason that income has escaped assessment. On writ petition filed by the assessee challenging the validity of reassessment, the High Court held that this was a case of a fishing enquiry in garb of reassessment and not a reasonable belief that income chargeable to tax had escaped assessment. Accordingly, impugned reassessment proceedings initiated against assessee was unjustified.

Reynolds Shirting Ltd. v. ACIT [2022] 135 taxmann.com 78 (Bombay)