DIRECT TAX – RECENT JUDGMENT

CA. Paras Savla, CA. Ketan Vajani

Unreasonable rise in the price of a penny stock – Long Term capital Gains on sale of shares - Onus is on the assessee to establish genuinity – Onus not discharged merely relying on opinion of an expert - Section 68

During the course of the assessment proceedings, for the purpose of explaining the case under section 68 of the Act, the assessee has been harping on the opinion rendered by the financial experts, professionals in the said field, the information available in the media, etc. The assessee also explained that she has also invested in certain bluechip shares. It was however established by the department that the rise of the prices of the shares was artificially done by adopting manipulative practices. Consequently, whatever resultant benefits accrued from such manipulative practices are also to be treated as tainted. In such a factual situation, the assessing officer made addition u/s. 68 of the Act in respect of the sale proceeds of the shares. The order of the assessing officer was confirmed by the CIT (A). However, the Tribunal held in favour of the assessee.

On appeal by the revenue, the High Court held that the opinions of expert are, at best, suggestions to an investor. The assessees cannot state that the increase in the price was genuine merely because an expert had issued a buy call or there was news in the media that a particular share shows an upwards trend and it is a good time for buying those shares. The assessee is to be reminded of the doctrine of "caveat emptor". The assessees cannot take shelter under the opinion given by the experts as it is not the expert who has indulged in the transaction, but it is the assessee. Therefore, by following such an expert's advice, if the assessee gets into a "web" it is for him to extricate himself from the tangle, and he cannot reach out to the expert to bail him out. The assessee cannot say that he had blindly followed the advice of a third party and made the investment. The selection of shares to be purchased is a very complex issue. It requires personal knowledge and expertise as the investment is not in a mutual fund. The assessee has not shown to have made any risk analysis before investing in a penny stock. If he has blindly taken a decision to invest in insignificant companies, he has done so at his own peril to face the consequences. Considering the fact that the assessee had not been able to render proper explanation, the High Court reversed the order of the Tribunal and confirmed the addition made by the assessing officer u/s. 68 of the Act.

Pr. CIT vs. Swati Bajaj [2022] 139 taxmann.com 352 (Cal. HC)

Validity of order of Reassessment on a company during pendency of CIRP under Insolvency and Bankruptcy Code 2016

Where proceedings for re-opening of assessment under section 148 of the Income Tax Act,1961 were initiated against the company when company's voluntary application for CIRP u/s 10 of the IBC, 2016 is pending before NCLT for admission, it was incumbent for the-company to have ensured proper notice to the Income Tax Department (ITD) and obtained appropriate concession in Corporate Insolvency Resolution Plan. Where that was not done and claims of the Income Tax Department were not considered by the NCLT, while approving the Resolution Plan, the question of abatement of rights of the Income Tax Department cannot be countenanced. In such circumstances, moratorium under IBC,2016 does not bar the Income Tax Department to re-open assessment and pass any fresh Assessment Order under Section 148 read with Sections 143(3) and 147 of the Income Tax Act, 1961.

Dishnet Wireless Ltd. vs. Asst CIT [2022] 139 taxmann.com 493 (Mad. HC)

Striking of the name of the company u/s. 248 of the Companies Act 2013 - Maintainability of appeal filed by the company

Assessee company filed appeal before Tribunal challenging order of Commissioner (Appeals) which confirmed additions made by Assessing Officer under section 68. The Revenue contended that name of the assessee company was struck down from Registrar of Companies (ROC) under section 248 of Companies Act, 2013 and therefore the appeal filed by assessee would become infructuous.

The Tribunal held that as per sub-section (6) of section 248 of Companies Act, 2013 it is the duty of Registrar to make provision for discharging liability of company before passing an order for struck off under sub-section (5) to section 248 and if there was any tax due from struck off company, revenue can invoke section 226(3) or 179 of Act, 1961 for satisfying such tax demands. Since in view of sub-sections (6) and (7) of section 248 and section 250 of Act 2013, when revenue had not forgone right to recover tax due on ground of company being struck off by ROC, right of assessee to determine tax liability in due process of law could not be denied

by dismissing appeal pending before Tribunal. Thus, certificate of incorporation issued to assessee company could not be treated as cancelled and appeal filed by struck off assessee company would be maintainable.

Dwarka Portfolio Pvt. Ltd. vs. ACIT [2022] 139 taxmann.com 477 (Del. Trib.)

Section 96 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 – Exemption provided by the section – Compensation Not subjected to deduction of tax

The petitioner was the owner of certain plots of land. The National Hi-Speed Rail Corporation Ltd. (respondent) acquired the said land under an agreement and deducted tax at source from the compensation paid to the petitioner. The petitioner requested the respondent to reverse the tax deducted on the ground that Section 96 read with Section 46 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 ('the Act, 2013') specifically exempts compensation paid under the award or an agreement. However, the respondent submitted that exemption is not available as the acquisition is by an agreement between the parties, and it cannot be said to be compulsory acquisition under the Act, 2013. It further submitted that the sale deed was entered between the petitioner and respondent by negotiation through a direct purchase method. Thus, the tax was deductible.

On a writ petition to the High Court, the High Court noted the fact that the public notice was issued for the acquisition of land through direct purchase and private negotiations by the authorities implementing the project of Mumbai-Ahmedabad Hi-Speed Rail Project. As per the public notice, the policy decision has been taken by the State Government under its Government Resolution for acquiring the property by private negotiations and purchases for implementation of public project. The methodology for computation of the compensation has to be as per the provisions of the Act, 2013. The same is introduced to expedite the acquisition for the implementation of the project. If the parties would not agree with the negotiations and direct purchase, then the compulsory acquisition under the provisions of the Act, 2013 has to be resorted. The Act, 2013 also recognizes the acquisition through an agreement. The High Court further relied on the judgment of the Hon. Supreme Court in the case of *Balkrishnan v. Union of India [2017] 80 taxmann.com 84 (SC)*, where the Apex Court had held that merely because the compensation amount is agreed upon would not change the character of acquisition from that of compulsory acquisition to the voluntary sale. The High Court also took cognisance of Circular No. 36 of 2016 dated 25-10-2016 issued by the CBDT clarifying that the compensation received in respect of award or agreement which has been exempted from levy of income tax vide Section 96 of the Act, 2013 shall not be taxable under the provisions of the Income-tax Act. As per section 96 of the said Act no income tax or duty shall be levied on any award or agreement made under the Act except under Section 46. Section 46 would not be attracted in the present case as Section 46 applies to the specified persons. In view of that, as the exemption under Section 96 would squarely apply, no income tax can be levied in the present matter for the amount of compensation. Accordingly, the respondent could not have deducted the amount of tax from the amount of compensation paid to the petitioner.

Seema Jagdish Patil vs. National Hi-Speed Rail Corporation Ltd. [2022] 139 taxmann.com 249 (Bom. HC)

Response to Notice u/s. 148A(b) by email after closing of window by revenue – Submission required to be considered

The Petitioner was issued a show cause notice under section 148A(b) on 17-3-2022 and was directed to file reply by 24-3-2022. The petitioner filed an application for adjournment requesting the Assessing Officer to grant time till 27-3-2022. However, the window for submissions was disabled on the portal of the department after the date. Later on the petitioner filed the submission by way of e-mail addressed to Assessing Officer as online submission portal was closed by revenue. The assessing officer, without considering the reply of assessee passed order under section 148A(d) and issued reopening notice under section 148. On a writ petition, the High Court held that since the submission of assessee was available on record when Assessing Officer passed impugned order under section 148A(d), the same was required to be considered by Assessing Officer and impugned order passed along with reopening notice was to be set aside.

Meenu Chaufla vs. Income-tax Officer [2022] 139 taxmann.com 170 (Del. HC.)

Reassessment of Income – Notices issued under the new provisions for assessment years 2013-14 to 2015-16 – Income escaping assessment was less than Rs. 50 Lakhs – Notices invalid

Notice u/s. 148 was issued on 1st April 2021 for A.Y. 2013-14 to A.Y. 2015-16. Later on the case was proposed to be decided ex-parte and notice u/s. 144 was issued for the same on 13-1-2022. The income escaping assessment was less than Rs. 50 Lakhs. On writ petition filed by the assessee challenging the validity of notices on the ground of being time barred, the High Court held that as per Clauses 6.2 and 7.1 of Board's Circular dated 11.05.2022, if a case does not fall under Clause (b) of sub-Section (i) of Section

149 for Assessment Years 2013-14, 2014-15 and 2015-16 (where income of an assessee escaping assessment to tax is less than Rs.50,00,000/-) and notice has not been issued within limitation under the un-amended provisions of Section 149, then proceedings under amended provisions cannot be initiated. Impugned notice under Section 148 issued on 01.04.2021 for Assessment Year 2014-15 and impugned notice dated 13.01.2022 under Section 144 and reassessment order dated 13.01.2022 under Section 147 read with Section 144B passed were quashed.

Ajay Bhandari vs. Union of India WT No. 347 of 2022 – Order dated 17-5-2022 (All. HC) – itatonline.org

Editorial comments : The impugned order is with reference to section 149(1)(b) of the Act. However, it is also possible to use the ratio of the judgment for cases covered by the first proviso to section 149 for A.Y. 2013-14 and 2014-15 where the income chargeable may even be more than Rs. 50 Lakhs.

Referral fee paid to dentists by company in the business of extracting stem cell banking from dental pulp – Disallowance under Explanation 1 to section 37(1)

The assessee company was engaged in the business of extracting stem cell banking from dental pulp. The company paid certain referral fees to dentists for reference of various patients. The same was disallowed by the assessing officer and the order of the assessing officer was confirmed by the CIT(A).

On further appeal by the assessee to Tribunal, the Tribunal held that a company engaged in extraction of stem cells from dental pulp and banking them is part of allied health care industry in the expression 'pharmaceutical and allied healthcare industry' used in Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002. The plea of the assessee company that it is not part of the 'allied healthcare industry' is a hyper technical plea. The expression has to be interpreted in the context in which it appears in the code of conduct for medical practitioners and not on the basis of how this expression has been defined in some other context in a journal or on website guidelines. There is no justification for excluding a medical service provider, like the assessee, from the segment of the "pharmaceutical and allied healthcare industry" in the present context. Given the context in which the expression "allied healthcare industry" appears in rule 6.8.1, an industry that provides, on a commercial basis, a healthcare-related service or product to a client, is part of the allied healthcare industry- more so when it could benefit from the advice given by the medical practitioner to his client. The prohibition of giving freebies and paying referral fees to medical practitioners by "pharmaceutical and allied healthcare industry" applies to assessee company. Therefore, the payment of referral fees to dentists by assessee company is hit by Explanation 1 to section 37(1) and is liable to be disallowed as deduction u/s 37(1).

Stemede Biotech Pvt. Ltd. vs. Dy. CIT [2022] 138 taxmann.com 368 (Mum. Trib.)

Section 56(2)(viib) – Valuation of Shares for the purpose of the section – Relevant facts need to be considered

Assessee company was incorporated on basis of joint venture agreement between a resident company and a non-resident company. Both joint venture partners agreed to contribute project cost in ratio of 40 per cent by non-resident and 60 per cent by resident. Assessee issued shares at Rs. 60 per share to non-resident shareholder while shares to resident company were issued at Rs. 40 per share. The assessing officer rejected said valuation of shares for reason that shares issued to resident company were at much lesser price than shares that were allotted to non-resident company. The assessing officer also observed that there was loss in previous assessment years, therefore, value determined by DCF Method was not correct. Accordingly, he made addition in hands of assessee under section 56(2)(viib). The CIT (A) however deleted the addition considering objectivity of facts and circumstances of the case.

On appeal by the revenue, the Tribunal noted that the assessing officer had fallen in error in not considering objectively facts and circumstances of case as reflected in joint ventures agreement between resident and non-resident entity which showed that project costs of assessee was to be funded in ratio of non-resident entity paying 40 per cent of project cost and resident entity paying 60 per cent of project cost. It was in furtherance of these clauses of joint ventures agreement that there was difference in share price as issued to resident company and to non-resident company. Difference in amount had occurred due to difference in shares of capital contribution to project cost. Therefore, on facts, the assessing officer was unjustified in rejecting valuation of shares and to re-determine value of such shares.

Dy. CIT vs. Mais India Medical Devices Pvt. Ltd. [2022] 139 taxmann.com 94 (Del. Trib.)