DIRECT TAX – RECENT JUDGMENT

CA. Paras Savla, CA. Ketan Vajani

S. 14A Applicability of the New Explanation held to be applicable retrospectively

It was held that Explanation inserted by Finance Act 2022 clarifying disallowance is not restricted to exempt income is retrospectively applicable. The aforesaid explanation does not propose to levy any new taxes upon the assessee but it only purports to clarify the intention of the legislature that actual earning or not earning of the exempt income is not the condition precedent for making the disallowance of the expenditure incurred to earn exempt income *ACIT v. Williamson Financial Services Ltd. [2022] 140 taxmann.com 164 (Guwahati - Trib.)*

Mumbai in case of *ACIT v. Bajaj Capital Ventures (P.) Ltd. [2022] 140 taxmann.com 1 (Mumbai - Trib.)* had a contrary view. It has held that the new Explanation applies prospectively

S. 36(1)(ii) Managerial remuneration paid based on percentage of profits cannot be characterised as dividend

The provision for managerial remuneration cannot be recharacterised as a dividend as it was not a distribution of profit. Merely for the reason that the said provision was made with a view to compensate the whole-time Directors based on profit it cannot be treated as distribution of profit. If that were to be the position, then, incentive bonus, profit bonus, statutory bonus paid to employees with a view to share the profits of the company also will be treated as distribution of profits. Companies Act, 2013 itself permits payment of managerial remuneration as a percentage of net profits of a company. *Sasken Technologies Ltd. v. JCIT [2022] 140 taxmann.com 241 (Bangalore - Trib.)*

S. 56(2)(viib) Provision are applicable in the year convertible instrument is converted in equity shares

Section 56(2)(viib) of the Act envisages a much wider outlook to the "receipt of any consideration" which which encompasses consideration in all forms and cannot be limited to the receipt of money only. Consideration can partake many forms viz. tangible or intangible, pecuniary or non-pecuniary, direct or indirect. The conversion of CCDs into equity shares in entails receipt of consideration by the assessee.

Under explanation (a)(ii) to Section 56(2)(viib) it has been specifically provided that valuation is to be substantiated to the satisfaction of the Assessing Officer. However there is no such provision specified in explanation (a)(i) of Section 56(2)(viib) for substantiating its valuation to the satisfaction of the AO. Under the said explanation valuation required to be carried considering Rules 11U and 11UA. Hence, the AO was not empowered to disregard the DCF valuation as carried out by the valuer under said rules and such action of the authorities below of rejecting such valuation report and adopting the NAV method for the purpose of valuation and thereby making an addition u/s 56(2)(viib) of the Act cannot be upheld.

The DCF method is essentially based on projection (estimates) only and hence, this projection cannot be compared with the actual results to expect the same figures as were projected. The valuer has to make forecast on the basis of some material but to estimate the exact figure is beyond anybody's control.

However it is imperative for the assessee to provide the scientific basis for taking reliable estimates and projections, considering various economic factors, corroborating them supporting evidence for them. *Milk Mantra Dairy (P.) Ltd. v. DCIT [2022] 140 taxmann.com 163 (Kolkata - Trib.)*

S. 132 Authorisation of Search

The sufficiency or inadequacy of the reasons to believe recorded cannot be gone into while considering the validity of an act of authorization to conduct search and seizure. The belief recorded alone is justiciable but only while keeping in view the Wednesbury Principle of Reasonableness. Such reasonableness is not a power to act as an appellate authority over the reasons to believe recorded. The Supreme Court has restated and elaborate the

principles in exercising the writ jurisdiction in the matter of search and seizure under Section 132 of the Act as follows:

(i) The formation of opinion and the reasons to believe recorded is not a judicial or quasi-judicial function but administrative in character;

(ii) The information must be in possession of the authorised official on the basis of the material and that the formation of opinion must be honest and bona fide. It cannot be merely pretence. Consideration of any extraneous or irrelevant material would vitiate the belief/satisfaction;

(iii) The authority must have information in its possession on the basis of which a reasonable belief can be founded that the person concerned has omitted or failed to produce books of accounts or other documents for production of which summons or notice had been issued, or such person will not produce such books of accounts or other documents even if summons or notice is issued to him; or

(iv) Such person is in possession of any money, bullion, jewellery or other valuable article which represents either wholly or partly income or property which has not been or would not be disclosed;

(v) Such reasons may have to be placed before the High Court in the event of a challenge to formation of the belief of the competent authority in which event the Court would be entitled to examine the reasons for the formation of the belief, though not the sufficiency or adequacy thereof. In other words, the Court will examine whether the reasons recorded are actuated by mala fides or on a mere pretence and that no extraneous or irrelevant material has been considered;

(vi) Such reasons forming part of the satisfaction note are to satisfy the judicial consciousness of the Court and any part of such satisfaction note is not to be made part of the order;

(vii) The question as to whether such reasons are adequate or not is not a matter for the Court to review in a writ petition. The sufficiency of the grounds which induced the competent authority to act is not a justiciable issue;

(viii) The relevance of the reasons for the formation of the belief is to be tested by the judicial restraint as in administrative action as the Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made. The Court shall not examine the sufficiency or adequacy thereof;

(ix) In terms of the explanation inserted by the Finance Act, 2017 with retrospective effect from 1.4.1962, such reasons to believe as recorded by income tax authorities are not required to be disclosed to any person or any authority or the Appellate Tribunal.

Based on above principles it was held that the High Court was not justified in setting aside the authorization of search.

Principal Director of Income-tax (Investigation) v. Laljibhai Kanjibhai Mandalia [2022] 140 taxmann.com 282 (SC)

S.148 Reopening after 3 year not justifiable where likely escapement is less than 50 Lacs

The decision in the enquiry as contemplated under Section 148A of the Act needs to be based on material available on record. The words 'material available on record', in its just, fair and logical interpretation would only mean a tangible material and can not be interpreted to mean remote likelihood of availability of material, it being taxing statute, requiring strict construction.

In the present case, undisputedly it is a case where more than three years have elapsed from the end of the relevant assessment year. In that case, in order to initiate proceeding under Sections 148 of the Act, it is not only required to be shown that some income chargeable to tax has escaped assessment, but also that it amounts to or is likely to amount to Rs.50,00,000/- or more than for that year. *Abdul Majeed Son of Shri Ali Mohammed v. ITO [2022] 140 taxmann.com 485 (Rajasthan)*

S. 148 CIRP cannot dilute the right of Revenue to reopen the assessment

Since the proceedings under the Code were initiated by the petitioners few days prior to the initiation of the proceedings under Section 148 of the Income Tax Act, 1961, it was incumbent for the petitioners to have ensured proper notice to the Income Tax Department and obtained appropriate concession in Corporate Insolvency Resolution Plan.

That apart, claims of the Income Tax Department were not considered by the NCLT, Mumbai, while approving the Resolution Plan and therefore the question of abetment of such rights of the Income Tax Department cannot be countenanced.

The provisions of Insolvency and Bankruptcy Code, 2016 (IBC) cannot be interpreted in a manner which is inconsistent with any other law in the time being in force. Therefore, Corporate Insolvency Resolution Plan sanctioned and approved cannot impinge on the rights of the Income Tax Department to pass any fresh Assessment Order under Section 148 read with Sections 143(3) and 147 of the Income Tax Act, 1961.

Therefore, the proceedings under the Insolvency and Bankruptcy Code, 2016 (IBC) cannot be pressed into service to dilute the rights of the Income Tax Department under the Income Tax Act, 1961 to re-open the assessment under Section 148 of the Income Tax Act, 1961.

The Income Tax Department was not precluded from reopening the assessment completed under Section 143(3) of the Income Tax Act,1961 *Dishnet Wireless Ltd. v. ACIT [2022] 139 taxmann.com 493 (Madras)*

S. 194J No TDS on professional fees where predominant nature of contract is of supply of rolling stock

The explanation (2) to Section 9(1)(vii) shows that fee for Technical services does not include construction, assembly and mining operation etc. The dominant purpose of the Contract is for supply of Rolling Stocks and the cost towards service component is almost negligible. It was held that the work taken up is ancilliary to supply of Rolling Stock and does not amount to professional or technical service. CIT v. Bangalore Metro Rail Corporation. Ltd. [2022] 140 taxmann.com 229 (Karnataka)

S. 250 CIT(A) cannot dismiss appeal in ex-parte order without considering material on records by way statement of facts and grounds of appeal

During the course of appellate proceedings, notices for hearing were issued to appellant and all notices were issued through ITBA System through e-Mail ID provided in the ITBA Portal. In response, appellant failed to file any submissions in support of the grounds raised by him nor did appellant seek any adjournment.

Whether an appellant appears before the CIT(A) or not, it is the statutory obligation of the CIT(A) to dispose of an appeal on merits. The scheme of section 250 does not visualize any situation in which an appeal can be summarily dismissed disregarding the material on recorder. Section 250 (6) lays down that the CIT(A)'s order "disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reason for the decision". As for the points of determination, in our considered view, it cannot be open to the learned CIT(A) to disregard what the assessee has placed before him by way of a statement of facts and the grounds of appeal.

While an assessee indeed has, under section 250(2)(a), "the right to be heard at the hearing of the appeal", such a right of the assessee-appellant cannot be put against the assessee inasmuch while the assessee-appellant is to be essentially extended a fair and reasonable opportunity of hearing before an appeal can be disposed of, the non-exercise of this right by the assessee-appellant cannot be a reason enough for the CIT(A)'s not dealing with the points so raised before him on merits. The exercise of the "right to be heard at the hearing of the appeal" by "the appellant, either in person or by an authorized representative condition", under section 250(2)(a), is not a condition precedent for the disposal of appeal on merits in accordance with the scheme of Section 250(6). ITAT held that, irrespective of the non-appearance of the assessee before the CIT(A), the CIT(A) ought to have dealt with the issues so raised by the assessee-appellant on merits and by way of speaking order and in accordance with the law. Matter was remitted to the CIT(A) for adjudication on merits. ITAT also held that when the matter is being remitted to the file of the learned CIT(A), they also deem it appropriate to direct the learned CIT(A) to

provide the assessee yet another fair and reasonable opportunity of hearing. *Marvel Industries Ltd. v. DCIT [2022] 140 taxmann.com 430 (Mumbai - Trib.)*

S. 263 Order issued without mentioning DIN is invalid order

It was observed that the impugned order u/s. 263 of the Act has been issued manually which does not bear the signature of the authority passing the order. Further, from the perusal of the entire order, in its body, there is no reference to the fact of this order issued manually without a DIN for which the written approval of Chief Commissioner/Director General of Income-tax was required to be obtained in the prescribed format in terms of the CBDT circular. In terms of para 4 of the CBDT circular, such a lapse renders this impugned order as invalid and deemed to have never been issued. T*ata Medical Centre Trust v. CIT(E) [2022] 140 taxmann.com 431 (Kolkata - Trib.)*