DIRECT TAX – RECENT JUDGMENT

CA. Paras Savla, CA. Ketan Vajani

1. **S. 40(a)(ii) - Education cess on rate or tax levied on Profits and Gains of Business or Profession is to be disallowed in view of retrospective amendment made to section 40(a)(ii) by Finance Act 2022 with retrospective effect from 1-4-2005**

   The assessee debited total amount of income tax paid to the profit & loss account for the financial year 2007-08. Subsequently, the AO made the disallowance of the total taxes paid by the assessee under section 37 read with 40(a)(ii) of the Income Tax Act, 1961. The assessee then pleaded that only the 'tax' portion of the expense debited should be disallowed and not the 'cess' amount. The assessee was of the view that since education cess is neither levied on the profits or gains of any business or profession nor assessed at a proportion of, the same cannot be termed as 'tax'. Accordingly, the education cess and secondary & higher education cess (collectively called as cess) are not disallowable u/s 40(a)(ii) of the Act.

   The Honourable High Court allowed the plea of the assessee on the ground that education cess cannot be treated at par with any 'rate' or 'tax' within the meaning of section 40(a)(ii) especially when the same is only a 'cess' as may also be seen from the speech of the hon'ble Finance Minister while placing before the Parliament the budget for the year 2004-05.

   On appeal to the Supreme Court, the Hon. Supreme Court referred to the amendment made to section 40(a)(ii) by the Finance Act of 2022 which has inserted a new Explanation 3 which specifically stated that the term tax shall include and shall be deemed to have always included any surcharge or cess, by whatever name called on such tax. Since the amendment has been made with retrospective effect from 1-4-2005, the Supreme Court held that education cess on rate or tax levied on profits and gains of business/profession is to be disallowed in view of the Explanation 3 inserted in section 40(a)(ii)

   Jt. CIT - 2 vs. Chambal Fertilisers & Chemicals Ltd. [2022] 145 taxmann.com 420 (SC)

2. **S. 154. Reassessment - Reassessment proceedings under section 147 or 148 are non-permissible if the proceedings under section 154 are pending**

   The assessee claimed the benefit under Section 80 HHC of the Act for the assessment year 1995-96. However, in the subsequent assessment year, the assessee claimed the bad debt on the ground that, in the earlier year, the export was not materialized and therefore, the proceedings under Section 154 of the Act were initiated by the Department, vide notice dated 23-1-2022. During the pendency of the said proceedings, the Department also initiated the proceedings under Section 147-148 of the Act and reopened the assessment for the assessment year 1996-97. Subsequently, the AO passed the Assessment Order.

   The matter was carried before the ITAT. The Hon' ITAT quashed and set aside the assessment proceedings which were re-opened under Section 148 of the Act by holding that as the proceedings under Section 154 initiated against the assessee were pending, no reassessment proceedings under Section 147/148 of the Act could have been issued/initiated. On appeal by the revenue to the High Court, the said Appeal preferred by the Revenue was allowed and the matter was remanded to the ITAT by observing that as the proceedings under Section 154 were beyond the period of limitation prescribed under Section 154(7) of the Act, the said notice was invalid and therefore, the re-opening proceedings under Section 147/148 would be maintainable. The assessee preferred an appeal to the Supreme Court against this judgment of the High Court.

   The Honourable Supreme court held that it was not permissible on the part of the Revenue to initiate the proceedings under Section 147/148 of the Act pending the proceedings under Section 154 of the Act. Therefore, the Supreme Court quashed the impugned judgment and order passed by the High Court and the order passed by the ITAT was restored.

   S. M. Overseas (P.) Ltd. vs. CIT [2022] 145 taxmann.com 375 (SC)

3. **S. 260A - Time-barred appeal should be allowed to be admitted if it involves a substantial question of law**

   There was a delay of 627 days in filling the appeal to the High Court on the side of Revenue. Even though the explanation offered by the appellant revenue for not preferring the appeal within the period of limitation was not satisfactory, the Honourable High Court of Calcutta condoned the delay in filing the appeal on the basis of section 260A. Section 260A requires the High Court to consider whether any Substantial Question of Law arises for consideration in appeal filed against ITAT's order.

In view of the requirement of section 260A, the Honourable High Court thought it may not go well to reject the appeal on a technical ground especially when the statute stipulates that the requirement is to consider whether any substantial question of law arises for consideration in the appeal.

Pr.CIT - 12 vs. Soorajmul Nagarmull [2022] 145 taxmann.com 245 (Calcutta)

4. S. 148. - Notice u/s 148 issued on account of assessee's failure to truly & fully disclose material facts is to be quashed if AO's reasons do not specify the material fact/s not so disclosed

Where the Assessing Officer (AO) issued the impugned notice dated 29-03-2019 under Section 148 of the Income Tax Act, seeking to re-open the assessment for AY 2012-13. Thus, admittedly, the impugned notice was issued after the expiry of four years from the end of the relevant AY. Upon receipt of the impugned notice, the assessee sought reasons and filed objections after obtaining the reasons. However, the objections were rejected by the AO. The assessee pleaded that the impugned reasons merely mentioned that the assessee failed to disclose material facts without specifically pointing out as to which of the material facts were not disclosed by the assessee. The assessee also submitted that on the facts of the case, all material facts were inter alia disclosed in the annual accounts and tax audit report along with the return of income.

The Honourable High Court of Bombay accepted the contentions of the assessee. The High Court observed that such non-disclosure by the assessing officer denies the assessee an adequate opportunity to lodge its objections to such reasons consistent with the procedure. The High Court followed its earlier judgment in the case of *Hindustan Lever Ltd. V. R. B. Wadkar (2004) 268 ITR 339 (Bom.)* and concluded that reassessment notice issued is liable to be quashed if the recorded reasons as supplied to the assessee merely refers to assessee's failure to fully and truly disclose material facts without mentioning what material fact or facts the assessee failed to fully and truly disclose.

Tumkur Minerals (P.) Ltd. vs. Jt. CIT [2022] 145 taxmann.com 397 (Bombay)

5. Form 15CB - Chartered Accountant cannot be prosecuted under the Prevention of Money Laundering Act for certificate issued in Form 15CB based on non-genuine documents submitted by client

One conspirer opened a bank account in the name of some persons in Indian Bank and presented some import documents to the Branch Manager, requesting him to transfer foreign exchange to certain entities abroad. The Branch Manager felt suspicious and thereby sent those import documents to the Principal Commissioner of Customs for verification. Upon close inspection it was found that most of them were forged ones. Immediately, the Customs officer alerted the Branch Manager and also informed the Enforcement Directorate (ED) about this transaction. Under the Prevention of Money-Laundering Act, 2002, the ED registered a case on 01-04-2017 and took up investigation of the case. During investigation, the ED found out that the conspirers sent an amount of Rs. 8 crores out of India through seven banks to fictitious entities abroad.

Further, the ED stumbled upon some Forms 15CB that were issued by the auditor of the person. The Forms 15CB were used by the conspirers for transferring a sum of Rs. 3.45 crores to various entities in Honk Kong. Upon interrogation, the auditor revealed that one of his clients had approached him for issuance of Form 15CB under Rule 37BB of the Income Tax Rules, 1962, and had submitted documents in support of his request. The auditor had perused those documents and issued certificates to the effect that it is not necessary to issue Form 15CB in respect of overseas payment of imports. However, the ED filed charges against the auditor along with the co-conspirers. The auditor approached the High Court of Madras where the Honourable Court held that a Chartered Accountant is required to only examine the nature of the remittance and nothing more. The Chartered Accountant is not required to go into the genuineness or otherwise of the documents submitted by his clients.

Murali Krishna Chakrala vs. Deputy Director, Directorate of Enforcement [2022] 145 taxmann.com 248 (Madras)

6. Disciplinary action under the ICAI Act - Suo Motu inquiry by ICAI against PNB auditors in Nirav Modi scam can't be quashed as it was merely triggered by news reports & not based solely on them

Where Suo Motu enquiry was initiated by ICAI in Nirav Modi Scam against CAs who were joint Statutory Auditors of Punjab National Bank and had submitted Limited Review Report in which they failed to disclose the Nirav Modi Scam of which they had knowledge at the time of reporting, the enquiry was not to be quashed as: (i) it was not based solely on the news reports (which themselves contained no allegations against the CAs) and (ii) the news reports merely acted as the trigger for the Institute to dive deeper into the massive fraud which had occurred and to examine whether any member had failed to abide by the SAs' which applied and (iii) the inquiry was based on obtaining a response from CAs and after the Directorate scrutinized the Limited Review Report dealing with

the quarterly results of PNB and undertook due examination of whether the CAs' had adhered to the Standards on Auditing (SAs) which applied.

The Honourable High Court of Delhi held that the Institute shall consequently be entitled to proceed further in accordance with law. It shall therefore be open to the Institute to give effect to the final orders which have been kept in a sealed cover. The rights of the CAs to question any final decision that may have been taken is kept open.

CA Sanjay Jain vs. ICAI [2022] 145 taxmann.com 483 (Delhi)

7. Appeal Proceedings before CIT (A) – High Pitched demand stayed by the High Court with direction to dispose the appeal quickly

The appeal of the petitioner was pending before the CIT(A). The petitioner was making attempts for bringing on record some additional evidences in terms of Rule 46A. The CIT (A) however did not pass any order in relation to the same within a reasonable period of time. The appellate authority did not even deem it appropriate to decide the said application even when the Petitioner claimed that a prayer was made for such a decision in that regard and the assessment was high-pitched in as much as against the returned income of Rs. 68.33 crores the income had been assessed at Rs. 461.72 crores.

On writ petition before the High Court, the High Court directed the CIT (A) to decide the appeal within a period of 3 months from the date of the order. The High Court, however, also ordered that the directions passed shall be liable to be vacated, in case it is reported that any deliberate attempt has been made by the assessee before the Appellate Authority to delay the final decision in the appeal.

Humuza Consultants vs. ACIT (2022) 145 taxmann.com 495 (Bom.)

8. S. 201(1A) - For purpose of levy of interest for late deposit of TDS, the payment date would relate back to date of presentation of cheque by the assessee to banker

The Assessee had deposited the payment of TDS of Rs. 3.40 crores along with 5 months interest on late payment amounting to Rs. 23.72 lakhs to its bank branch as on 31-07-2013. However due to the negligence of the branch, the payment was credited on 01-08-2013. Accordingly, a demand u/s 201/201(1A) was generated by the CPC. When the matter came before the CIT(A), the CIT(A) was of the opinion that since there is no provision in law which provide any leniency with regard to the working out of interest and therefore interest u/s 201(1)/201(1A) of the Act is mandatory in nature.

On further appeal to the Tribunal, The Honourable ITAT (Delhi) held that there is only one day delay in debiting the amount from the assessee's bank account which is apparently due to the mistake to the banker. Further by relying on the ratio laid down in the case of Standard Chartered Bank, (ITA No. 2153 to 2156/Mum/2018), the Honourable Tribunal was of the opinion that the payment of TDS by the assessee would relate bank to the date of presentation of the cheque i.e., on 31/07/2013 by the assessee to the banker.

Natma Securities Ltd. vs. ACIT [2022] 145 taxmann.com 291 (Delhi - Trib.)