DIRECT TAX – RECENT JUDGMENT

CA. Paras Savla, CA. Ketan Vajani

S. 12AB Renewal of Registration and imposing conditions

Section 12AB(1)(a) of the Act provides that where an application is made under section 12A(1)(ac)(i) the Principal Commissioner or Commissioner shall pass an order in writing registering the trust or institution for a period of 5 years. However, in the present case, the assessee trust being registered under section 12AA and thus rightly made an application under section 12A(1)(ac)(i) of the Act, was granted Provisional Registration in Form 10 AC subject to certain conditions. It is pertinent to note that section 12AB(1)(c) deals with granting of Provisional Registration to the trust or institution for a period of 3 years from the assessment year from which registration is sought. However, the said section is applicable in cases where application is made under section 12A(1)(ac)(iv) of the Act. It is also not disputed that the Provisional Registration would be granted for a period of 3 years to the charitable institutions which are yet to start their activities. However, in the present case, the assessee trust was already holding certificate dated 30.10.2009 issued under section 12AA of the Act. We noticed that section 12AB(1)(a) of the Act, which deals with grant of Regular Registration for a period of 5 years does not authorise the Principal Commissioner or Commissioner to impose any conditions for grant of such registration. We further noticed that though the impugned order granted Provisional Registration subject to certain conditions, however, same was granted for a period of 5 assessment years i.e. from assessment year 2022-23 to assessment year 2026-27. We also noticed that the impugned order for provisional registration in Form 10AC was issued under section 12A(1)(ac)(i) of the Act, which provision merely deals with making an application for registration.

Thus, in view of the above, we are of the considered opinion that application filed by the assessee trust under section 12A(1)(ac)(i) was not properly considered for grant of registration under section 12AB of the Act. Accordingly, we direct the designated authority under section 12AB to de novo consider the application of the assessee trust under section 12A(1)(ac)(i) of the Act and grant the registration as per law. *Saifee Burhani Upliftment Trust v. CIT(E) [2022] 138 taxmann.com 322 (Mumbai - Trib.)*

S. 36(1)(va) Payment of ESIC/PF before due date of filing return of income

What a tax auditor states in his report are his opinion and his opinion cannot bind the auditee at all. In this light, when one considers what has been reported to be 'due date' in column 20 (b) in respect of contributions received from employees for various funds as referred to in Section 36(1)(va) and the fact that the expression 'due date' has been defined under Explanation (now Explanation 1)to Section 36(1)(va) provides that "For the purposes of this clause, 'due date' means the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise", one cannot find fault in what has been reported in the tax audit report. It is not even an expression of opinion about the allowability of deduction or otherwise; it is just a factual report about the fact of payments and the fact of the due date as per the Explanation to Section 36(1)(va). This due date, however, has not been found to be decisive in the light of the law laid down by Hon'ble Courts, and it cannot, therefore, be said that the reporting of payment beyond this due date in the tax audit report constituted "disallowance of expenditure indicated in the audit report but not taking into account in the computation of total income in the return" as is sine qua non for disallowance of Section 143(1)(a)(iv). When the due date under Explanation to Section 36(1)(va) is judicially held to be not decisive for determining the disallowance in the computation of total income, there is no good reason to proceed on the basis that the payments having been made after this due date is "indicative" of the disallowance of expenditure in question. While preparing the tax audit report, the auditor is expected to report the information as per the provisions of the Act, and the tax auditor has done that, but that information ceases to be relevant because, in terms of the law laid down by Hon'ble Courts, which binds all of us as much as the enacted legislation does, the

said disallowance does not come into play when the payment is made well before the due date of filing the income tax return under section 139(1). The impugned adjustment in the course of processing of return under section 143(1) is vitiated in law. *Kalpesh Synthetics (P.) Ltd. v. DCIT [2022] 137 taxmann.com 475 (Mumbai - Trib.)*

S. 37(1), 43A Deductibility of forex fluctuation

The foreign currency loan amount was utilised by the appellant for financing the existing Indian enterprises for procurement of capital equipment on hire purchase or lease basis. The activity of financing by the appellant to the existing Indian enterprises for procurement or acquisition of plant, machinery and equipment on leasing and hire purchase basis, is an independent transaction or activity being the business of the appellant. Hence forex fluctuation on repayment of foreign currency loans taken to purchase capital equipment for leasing/HP activity, is deductible u/s 37(1). Section 43A has no application. *Wipro Finance Ltd. v. CIT [2022] 137 taxmann.com 230 (SC)*

S. 43(5), 73 Set off of Derivative loss against business income

By virtue of insertion of clause (d) to the proviso to Section 43 (5) of the Income Tax Act, 1961, the transactions in respect of the trading in derivatives as prescribed in clause (d) inserted in proviso to Section 43(5) would not be a speculative transaction. The appellant was thus entitled to claim set off of the loss suffered by the appellant in the said transactions in derivatives against the business income of the appellant from infrastructure business under Section 70 of the Income Tax Act 1961. *Souvenir Developers (I) (P.) Ltd. v. UOI [2022] 138 taxmann.com 187 (Bombay)*

S. 44AB Revision of Tax Audit Report

The burden/duty on tax-auditor is very heavy/onerous under the 1961 Act to certify contents of tax-audit report to be 'true and correct' and not merely 'true and fair'. If there was any inadvertent error on the part of tax-auditor in their tax audit report, they could have always issued addendum/revised tax-audit report to rectify and clarify the correct positions after due verifications/checking from their audit records. *ACIT v. J.P. Yadav [2022] 138 taxmann.com 320 (Allahabad - Trib.)*

S. 148/ 148A Reassessment old provision vis-à-vis new provision

(i) The respective impugned section 148 notices issued to the respective assessees shall be deemed to have been issued under section 148A of the IT Act as substituted by the Finance Act, 2021 and treated to be show-cause notices in terms of section 148A(b). The respective assessing officers shall within thirty days from today provide to the assessees the information and material relied upon by the Revenue so that the assessees can reply to the notices within two weeks thereafter;

(ii) The requirement of conducting any enquiry with the prior approval of the specified authority under section 148A(a) be dispensed with as a one-time measure vis-à-vis those notices which have been issued under section 148 of the unamended Act from 1-4-2021 till date, including those which have been quashed by the High Courts;

(iii) The assessing officers shall thereafter pass an order in terms of section 148A(d) after following the due procedure as required under section 148A(b) in respect of each of the concerned assessees;

(iv) All the defences which may be available to the assessee under section 149 and/or which may be available under the Finance Act, 2021 and in law and whatever rights are available to the Assessing Officer under the Finance Act, 2021 are kept open and/or shall continue to be available and;

(v) The present order shall substitute/modify respective judgments and orders passed by the respective High Courts quashing the similar notices issued under unamended section 148 of the IT Act irrespective of whether they have been assailed before this Court or not.

We are also of the opinion that if the aforesaid order is passed, it will strike a balance between the rights of the Revenue as well as the respective assesses as because of a bonafide belief of the officers of the Revenue in issuing approximately 90000 such notices, the Revenue may not suffer as ultimately it is the public exchequer

which would suffer. We have also proposed to pass the aforesaid order in exercise of our powers under Article 142 of the Constitution of India by holding that the present order shall govern, not only the impugned judgments and orders passed by the High Court of Judicature at Allahabad, but shall also be made applicable in respect of the similar judgments and orders passed by various High Courts across the country and therefore the present order shall be applicable to PAN INDIA- *UOI v. Ashish Agarwal [2022] 138 taxmann.com 64 (SC)*

S. 276C, 278E – Prosecution & Culpable Mental State

If the intention (culpable mental state) of the assessee was to evade tax or attempt to evade tax, they would not have filed the returns in time disclosing the income and the tax liable to be paid. They would not have remitted the tax payable along with interest without waiting for the authorities to make demand or notice for prosecution. Thus, except a delay of 4 ½ months in payment of tax, it is clear that there was no tax evasion or attempt to evade the payment of tax. To invoke the deeming provision, there should be a default in payment of tax in true sense. Nothing can be deemed contrary to the fact borne by record. If such deeming fiction is applied by the authority, is has to be termed as non application of mind over the material records.

A 'culpable mental state' which can be presumed under section 278E of the Act would come into play only in a prosecution for any offence under the Act, when the said offence requires a 'culpable mental state' on the part of the accused. Section 278 E of the Act is really a rule of Evidence regarding existence of mens rea by drawing a presumption though rebuttable. That does not mean that, the presumption would stand applied even in a case wherein the basic requirements constituting the offence are not disclosed. More particularly, when the tax is paid much before the process for prosecution is set into motion. The presumption can be applied only when the basic ingredient which would constitute any offence under the Act is disclosed. Then only, the rule of evidence under section 278 E of the Act regarding rebuttable presumption as to existence of culpable mental state on the part of accused would come into play. *Mrs. Noorjahan v. DCIT [2022] 138 taxmann.com 76 (Madras)*

S. 268A CBDT circular not applicable retrospectively even if the asseessee is involved in organised tax evasion

In the appeals preferred after the date of the Circular dated 23/2019 dated 6th September 2019 involved in organized tax evasion activity can be filed on merits before the ITAT/High Courts/ Supreme Court including the cross objections only if the CBDT passes a special order in those SLPs/appeals/cross objections before the Supreme Court/High Courts/Tribunals if the tax limit is less than the specified monetary reliefs prescribed in the Circulars issued by the CBDT under section 268A of the IT Act, 1961. The said Circular No. 23/2019 dated 6th September 2019 read with Office Memorandum dated 16th September 2019 not applicable with retrospective effect, though appellant-revenue has alleged organized tax evasion activity on the part of the respondent-assessee in those pending appeals as on the date of the said Circular No. 23/2019, the appellant-revenue cannot be allowed to pursue these appeals. Since the tax effect involved in this bunch of appeals is less than the monetary limit prescribed in the earlier circulars referred to aforesaid issued by the Department of Revenue, CBDT, Ministry of Finance, Government of India, the appellant- revenue cannot be allowed to proceed with these appeals on merits. *CIT v. Surendra Shantilal Peety [2022] 138 taxmann.com 75 (Bombay)*

Jurisdiction of High Court when notice is received in one State and return of income is filed under State

Just because a notice under Section 143(2) of the Act, 1961 came to be issued to the writ applicant at his residential address at Ahmedabad, State of Gujarat, by itself, will not confer jurisdiction to Ahmedabad High Court, more particularly, when the writ applicant is being assessed to tax consistently at Cuttack. The writ applicant has a PAN card at such place. The impugned notice under Section 148 of the Act, 1961 was also issued at Cuttack. The return of income was also filed at Cuttack. The final assessment order was also passed at Cuttack. *Bhavendra Hasmukhlal Patadia v. UOI [2022] 138 taxmann.com 139 (Gujarat)*