DIRECT TAX – RECENT JUDGMENT

CA. Paras Savla, CA. Ketan Vajani

Exchange Fluctuation on repayment of Forex Currency Loan which was utilised for financing purchase of capital equipments for leasing / Hire Purchase activity of the assessee is deductible u/s. 37(1) – Section 43A of the Act cannot apply to the situation.

The assessee company borrowed loan from a foreign financer to carry on business of leasing and hire purchase of capital equipment to Indian Enterprises. However due to change in the exchange fluctuation rate, the assessee had to make excess payment in relation to the loan borrowed from foreign financer. While filing the Return of Income, the assessee had not claimed the deduction in respect of the exchange fluctuation arising on this account. However, at the time of appeal proceedings before the Tribunal, the assessee claimed deduction in relation to the exchange fluctuation loss for the first time. The Tribunal admitted the claim of the assessee and also allowed the claim of the assessee for the reason that the loan was borrowed for the purpose of the regular business of the assessee. The revenue filed appeal to the High Court and contended that the expense was a capital expenditure and hence not allowable as deduction. The High Court allowed the appeal of the revenue and held the same to be a capital expenditure.

On appeal by the assessee to the Supreme Court, the Supreme Court noted the fact that the loan was borrowed for with a view to carry on business of leasing and hire purchase of capital equipment to Indian Enterprises. The loan was not acquired for the purchase of any capital asset by the assessee and there was no creation of capital asset. Accordingly, the Supreme Court held the exchange fluctuation as revenue loss and allowed the same u/s. 37(1) of the Act. The revenue also argued that the exchange fluctuation loss was not allowable in view of the provisions of section 43A of the Act. However, the Supreme Court held that the provisions of section 43A cannot be applied on the facts of the case since this was not a case of acquiring any assets from foreign by the assessee. The Supreme Court also upheld the action of the Tribunal in admitting the additional ground raised for the first time at the time of the proceedings before the Tribunal.

Wipro Finance Ltd v. CIT [2022] 137 taxmann.com 230 (SC)

Amalgamation of company does not in all cases per se invalidate an assessment framed on the transferor / amalgamating company

A company MRPL was amalgamated with another company MIPL. The court order confirming the amalgamation was passed on 10-9-2007 but the amalgamation was ordered w.e.f. 1-4-2006. A survey was conducted on the company on 20-3-2007 and a search was also conducted on 27-8-2008. During these action, the directors of the company had never informed about the amalgamation of the company. The Original Return was filed in the name of amalgamating company which was not revised though the time was available to revised the same post amalgamation. The Return of Income in response to notice u/s.153A was also filed in the name of the amalgamating company. The Return of Income suppressed the fact of amalgamation despite of a specific query to that effect. During the course of the search, the directors made a combined statement in the case of MRPL and MIPL. The assessee participated in the assessment proceedings and also filed appeal before the CIT (A) and further to Tribunal in the name of MRPL. However, later on the assessee filed a cross objection before the ITAT and this was the first time where the assessee contended that MRPL had amalgamated into MIPL and therefore the assessment is a void assessment. On this single point, the Tribunal allowed the appeal of the assessee which was also confirmed by the High Court.

On revenue's appeal to the Supreme Court, the Supreme Court took note of the facts of the case that the assessee has never intimated about the fact of amalgamation and had participated in the assessment proceedings wholeheartedly. The Supreme Court held that unlike the winding up of a corporate entity, in the case of amalgamation, though the outer shell of the corporate entity is undoubtedly destroyed; it ceases to exist. Yet, in every other sense of the term, the corporate venture continues – enfolded within the new or the existing transferee entity. In other words, the business and the adventure lives on but within a new corporate residence. On a combined reading of section 394 (2) of the Companies Act, 1956, Section 2(1A) of the Income-tax Act and various other provisions of the Income Tax Act, it was held that despite amalgamation, the business, enterprise and undertaking of the transferee (sic transferor) or amalgamated (sic amalgamating) company- which ceases to exist, after amalgamation, is treated as a continuing one, and any benefits, by way of carry forward of losses (of the transferor company), depreciation, etc., are allowed to the transferee. Therefore, unlike a winding up, there is no end to the enterprise, with the entity. The enterprise in the case of amalgamation, continues. The Supreme Court also distinguished its earlier judgment in the case of Pr. CIT v. Maruti Suzuki India Ltd. (2019) 416 ITR 613 (SC) observing that in that case the assessee had informed the department about the fact of the amalgamation and despite the information of amalgamation, the department had issued statutory notice u/s. 143(2) in the name of the

amalgamating company and had completed the assessment in the name of the amalgamating company. Further in that case the participation in the assessment proceedings was by the amalgamated company. However, in the present case, the assessee has suppressed the information about amalgamation and further the participation in the proceedings was made by the assessee in the name of the amalgamating company only.

Pr. CIT v. Mahagun Realtors P. Ltd. (2022) 137 taxmann.com 91 (SC)

Addition in respect of seized gold jewellery paid through banking channels and recorded in books of accounts – Not permissible u/s.69A of the Act

The assessee was engaged in the business of gold jewellery. The assessee entered into a purchase transaction with one P who consigned the jewellery through courier to the assessee who was to receive the same as a consignee. These goods were however seized by the department and an assessment was made in the case of the consignor. The assesse had already made payment to P against the above jewellery and the purchase was recorded in the books of accounts of the assessee. The assessee filed a writ petition before the High Court and requested for release of the goods to him.

Before the High Court the revenue contended that the assessee is not entitled to get the release of goods in his favour since the addition was made in the case of P the sender of the goods resulting into the demand in his case which was outstanding. However, in the case of the assessee, the addition which was originally made u/s. 69A was deleted by the CIT (A) on the basis of various documents filed and it was held that it was not a case of unaccounted purchases in the case of the assessee. The order of the CIT (A) had attained finality and the department had not filed further appeal to the Tribunal against the same. In view of the fact that the purchase of the assessee was held to be genuine and the payment for the same had also been made through regular banking channels, the High Court held that the jewellery has to be released to the assessee since there is no demand outstanding in the case of the assessee as per the order which has attained finality.

Rakeshkumar Babulal Agarwal v. Pr. CIT 136 taxmann.com 329 (Gujarat HC)

Remuneration from partnership firm not to be considered as Gross Receipts for the purpose of section 44AB of the Act

The assessee was an actor by profession and was also a partner in two firms. For the A.Y. 2017-18, the assessee's income as per the Return was Rs. 1,75,88,360/- which included a sum of Rs. 1,01,20,191/- as remuneration from the two firms. The Return of Income filed was treated as defective by the department for the reason that the assessee had not got her books of accounts audited though it was required under the provisions of section 44AB of the Act. The assessee filed a revision application before the CIT u/s. 264 of the Act which was dismissed by the CIT upholding the decision of the assessing officer. The assessee filed a writ petition before the High Court against the order of the CIT.

Before the High Court it was argued on behalf of the assessee that section 44AB is not applicable in her case since the business was carried on by the firms and not by the assessee and that remuneration from firm cannot be construed as total sales, turnover or gross receipts in the business. The High Court held that income earned by Assessee as remuneration received as working partner or partners' remuneration, cannot be held as carrying on profession as well as business simultaneously in a different field. High Court held that the limits as per section 44AB (a) and 44AB (b) are independent. The High Court referred to a judgment of the Madras High Court in the case of Anandkumar v. ACIT 430 ITR 391 (Mad) which was rendered in the context of section 44AD and relying on the same the High Court held that the remuneration from the firm cannot be treated as gross receipts from profession and therefore the provisions of section 44AB do not apply in the case of the assessee.

Perizad Zorabian Irani v. PCIT – WP No. 1333 of 2021 – Order dated 9-3-2022 (Bom. HC) – itatonline.org

Penalty u/s. 270A – Question of law cannot result into misrepresentation of income - Show-cause Notice u/s. 270A not specifying whether it is case of underreporting or misreporting – Denial of Immunity u/s. 270AA - held Not justified

For assessment year 2018-19, the assessee filed an application u/s. 270AA seeking immunity from levy of penalty u/s. 270A of the Act. The application was rejected by the assessing officer beyond the prescribed time of one month from the end of the month of application of immunity. The assessing officer had rejected the immunity on the ground that the addition in question was a result of misreporting of income and hence the immunity was not available. The assessee filed a writ petition before the High Court challenging the order rejecting immunity.

Before the High Court the assessee argued that the rejection order was time barred. The assessee also argued that the subject matter of addition was a pure question of law and the same was about interpretation of provisions of DTAA. Accordingly, it is not permissible for the assessing officer to treat the same as misreporting of income. The High Court agreed with the contention of the assessee that the subject matter of addition cannot be said to be on account of misreporting of income. It held that to treat the addition as misreporting of income was not only erroneous but also arbitrary. The High Court also noted that the Show-cause notice issued for levy of penalty did not specify whether it is considered to be a case of under-reporting of income or misreporting

of income. In absence of any such reference, mere reference to the word misreporting in the assessment order cannot result in denial of immunity u/s. 270AA. Allowing the petition, the High Court directed the assessing officer to grant immunity to the assessee.

Schneider Electric South East Asia (HQ) PTE Ltd. vs. Asst CIT (IT), - WP No. 5111 of 2022 – Order dated 18-3-2022 – Del. HC

Deemed Dividend – Repayment of Loan with Interest – Section 2(22)(e) is not applicable - Revision u/s.263 not permissible where the assessing officer has taken a conscious decision.

The assessee had availed unsecured loan from one of its group companies. The assessing officer completed the assessment which was later on subjected to revision u/s. 263 by the CIT. The CIT set as side the assessment on the ground that the provisions of section 2(22)(e) would be applicable in relation to the loan obtained by the assessee. On appeal to the Tribunal, the order u/s. 263 was set-a-side by the Tribunal taking cognisance of the fact that the assessee repaid the loan in the same year with interest. Tribunal also noted that during the original assessment proceedings, the assessee had provided the details of shareholders holding more than 10% of the shares and the assessing officer, has consciously after taking a note of the same not made any addition. Accordingly, the Tribunal held that there was no reason for the CIT to invoke the provisions of section 263 of the Act in the case of the assessee. On revenue's appeal against the order of the Tribunal, the Hon. High Court upheld the action of the Tribunal and affirmed that the provisions of section 263 of the Act cannot be invoked as the order of the assessing officer cannot be said to be erroneous.

Pr. CIT v. Suparabha Industries Ltd. (2022) 136 taxmann.com 259 (Calcutta)

Reassessment not justified beyond the period of four years from the end of the assessment year in absence of fresh tangible material even where the original assessment was made u/s. 143(1) and not a regular assessment u/s. 143(3) of the Act

Assessee filed the Return Income for A.Y. 2012-13 claiming exemption in respect of interest /bonus from Insurance policy under the provisions of section 10(10D) of the Act. The Return was processed u/s. 143(1) of the Act. Reassessment notice was issued in the case of the assessee after the end of the four years from the end of the assessment year on the ground that the amount was received by the assessee on premature surrender of pension plan / annuity policies of LIC and the same was actually not exempt in view of the provisions of section 80CCC (2) of the Act. It was noted that from reasons assigned by revenue, it was not clear as to how benefit of section 10(10D) was not available to assessee. Only thing which seemed to have weighed heavily with revenue, for issuing said reopening notice was that assessee had not offered said amount in question received by it to tax. Further, this amount was bonus which was otherwise exempt under section 10(10D).

On petition filed by the assessee before the High Court, the High Court held that there was no new /fresh tangible material which came into possession of Assessing Officer subsequent to intimation under section 143(1) and therefore, the impugned reopening notice issued against assessee after four years was unjustified. The High Court referred to the Circular No. 549 dated 31-10-1989 for the proposition that where the original assessment is without scrutiny i.e. under section 143(1), even in such cases tangible material is necessary to reopen the assessment. The High Court also referred to various judicial pronouncement in support of this view and held that reassessment was not valid.

Ami Ashish Shah v. ITO (2022) 440 ITR 417 (Guj)

Bad Debts Written off – Deposits / advances to sister concern in earlier year – waived off during the year – Principal amount and Interest accrued claimed as bad debt – Held allowable – Section 36(1)(vii) of the Act

The assessee had given deposits/advances with its sister-concern in the assessment year 2001-02. In the assessment year 2005-06, the assessee waived off principal amount and the interest accrued on the same considering the financial condition of the sister concern. The assessee claimed the same as bad debts. The assessing officer disallowed assessee's claim on the ground that assessee was not in business of lending money and non-recovery of deposit made to sister-concern would be a capital loss. The claim of the assessee was however allowed by the Tribunal.

On revenue's appeal to the High Court it was held that in the initial assessment year interest income accrued on deposits made by assessee was taxed as business income and therefore the deposits would be assumed to be done in ordinary course of business. Considering the same the High Court affirmed the order of the Tribunal and upheld the claim of the assessee.

Pr. CIT v. Mahindra Engineering and Chemical Products Ltd. (2022) 136 taxmann.com 183 (Bom. HC)

Prima-facie belief that income has escaped assessment on the basis of the information in possession of the assessing officer – sufficient to initiate reassessment u/s. 147 of the Act

The assessee's reply to summons issued u/s 131 of the Act were unsatisfactory. Considering the same, the assessing officer issued notice u/s. 148 after verifying PAN details of the assessee and recording reasons for reassessment. The assessee filed a writ petition before the High Court challenging the validity of the reassessment.

The High Court held that the notice was issued after verifying PAN details of assessee and recording reasons. On the facts of the case, it cannot be said that at the stage of the issue of the notice there was no prima facie material for reasons to believe that income escaped. The court is to see only whether the material in assessing officer's possession provides a prima facie basis for reassessment notice, not its sufficiency or correctness.

Bharat Krishi Kendra v. Union of India (2022) 136 taxmann.com 245 (Chhattisgarh HC)