DIRECT TAX – RECENT JUDGMENT

CA. Paras Savla, CA. Ketan Vajani

1. Revision of the orders prejudicial to revenue - Section 263 of the Act - Time limit for the same

For the A.Y. 2008-09, the Assessing Officer passed assessment order u/s. 143(3) of the Act on 30-12-2010. The CIT initiated revision proceeding u/s. 263 of the Act in respect of the same and issued a notice to the assessee on 1-2-2012. The assessee filed his submissions on 7-3-2012 and 12-3-2012. The CIT passed the order u/s. 263 on 26-3-2012 holding that the Assessing Officer had failed to make relevant and necessary enquiries and to make correct assessment of income after due application of mind. The CIT accordingly set aside the assessment order with a direction to Assessing Officer to make necessary enquiries on the aspects mentioned in the order u/s. 263. The said order was dispatched by the office of the CIT on 28-3-2012. The revision order passed u/s. 263 was challenged by the assessee before the Tribunal. The assessee contended before the Tribunal that it had come to know about the revision order only when he received notice dated 6-8-2012 under section 143 (2) read with section 263 of the Act from the office of the Assessing Officer and thereafter requested for copy of the order from the CIT which was supplied to him on 29-11-2012. Accordingly, the assessee contended that the order passed was beyond the limitation prescribed u/s. 263(2) of the Act. The Tribunal accepted the contention of the assessee and held the order to be time barred. The revenue appealed to the High Court. The High Court held that the date on which the order was received by the assessee - respondent herein is the relevant date for the purpose of determining the period of limitation under section 263 (2) of the Act.

On further appeal by the revenue to the Hon. Supreme Court, the Supreme Court held that on a fair reading of sub-section (2) of section 263 it can be seen that no order under section 263 of the Act shall be "made" after the expiry of two years from the end of the financial year in which the order sought to be revised was passed. The word used is "made" and not the order "received" by the assessee. Therefore, once it is established that the order under section 263 was made/passed within the period of two years from the end of the financial year in which the order sought to be revised was passed, such an order cannot be said to be beyond the period of limitation prescribed under section 263 (2) of the Act. Receipt of the order passed under section 263 by the assessee has no relevance for the purpose of counting the period of limitation provided under section 263 of the Income Tax Act. As per the cardinal principle of law the provision of the statue/act is to be read as it is and nothing is to be added or taken away from the provision of the statue. Therefore, the High Court has erred in holding that the order under section 263 of the Act passed by the learned Commissioner was barred by period of limitation, as provided under sub-section (2) of section 263 of the Act.

CIT v. Mohammed Meeran Shahul Hameed (2021) 131 taxmann.com 94 (SC)

2. Interest for non-payment of Advance Tax u/s. 234B – Effect of insertion of Proviso to section 209 (1) of the Act by Finance Act, 2012 – Proviso held to be prospective in nature

The assessee was a company incorporated in Japan. While passing the assessment order for the assessment years 1998-99 to 2004-05, it was held by the Department that a portion of the assessee's income was attributable to its activities in India and was therefore liable to be taxed in India, under Articles 4, 5 and 6 of the DTAA between India and Japan. The assessee filed appeals against the assessment orders before the CIT (A) only with respect to levy of interest under section 234B of the Act. The CIT(A) dismissed the appeals by a common order, aggrieved by which the assessee filed appeals before the Tribunal. The Tribunal allowed the appeals and held that the assessee was not liable for payment of interest under section 234B considering the fact that the payer company was liable to tax at source while making payment to the assessee. Accordingly, since the tax was deductible from payment made to the assessee, the assessee's case was covered by clause (d) of section 209(1) of the Act. The judgement of the Tribunal was challenged by the department before the High Court. The High Court dismissed the appeal of the department and upheld the judgement of the ITAT.

On further appeal by the revenue, the Hon. Supreme Court dealt with the dispute relating to the interpretation of the words 'would be deductible or collectible' in section 209(1)(d) and held that the proviso inserted therein, which makes it clear that the assessee cannot reduce the amounts of income-tax paid to it by the payer without deduction, while computing liability for advance tax, is inserted by the Finance Act 2012. To give the intended effect to the proviso, section 209(1)(d) has to be understood to entitle the assessee, for all assessments prior to the financial year 2012-13, to reduce the amount of income-tax which would be deductible or collectible, in computation of its advance tax liability, notwithstanding the fact that the assessee has received the full amount without deduction.

Further it was held that section 209 which relates to the computation of advance tax payable by the assessee cannot be ignored while construing the contents of section 234B. As it is already held that prior to the financial year 2012-13, the amount of income-tax which is deductible or collectible at source can be reduced by the assessee while calculating advance tax, the assessee cannot be held to have defaulted in payment of its advance tax liability.

Director of Income tax, New Delhi v. Mitsubishi Corporation (2021) 130 taxmann.com 276 (SC)

3. Assessment in search cases – Notice u/s. 153C issued on deceased – Dismissal of SLP by SC against the judgment of the Gujarat High Court quashing the assessment

Original assessee, namely 'B', passed away on 23-4-2017. The assessing officer had issued a notice u/s. 153C in name of 'B' on 29-3-2019. The legal heir of the assessee informed Assessing Officer that his father, B had passed away and requested to drop proceedings as notice was issued to a dead person. However, the assessing Officer rejected objections raised by legal heir on ground that no information was provided about demise of B and even after his death income tax returns were filed in name of B for relevant assessment years. On this facts, the Gujarat High Court held that impugned notice under section 153C issued against dead person, is unenforceable in law. The High Court held that it is not permitted to the revenue to contend that they had no knowledge about death of assessee and therefore, the notice was not defective. The High Court accordingly quashed the notice and all proceedings in pursuance of the defective notice. – See Bhupendra Bhikhalal Desai v. ITO (2021) 130 taxmann.com 196 (Guj)

The revenue filed an SLP before the Hon. Supreme Court against the decision of the Gujarat High Court. The Supreme Court held that they are not inclined to interfere with the impugned order and accordingly the SLP is dismissed. The judgment of the Supreme Court is very short but in clear terms it has been said that the Hon. Court is not inclined to interfere with the order of the Gujarat High Court. Considering this, the ratio of the judgment can be said to have a binding precedence on the issue.

Income-tax Officer v. Bhupendra Bhikhalal Desai (2021) 131 taxmann.com 40 (SC)

4. Allowance of security deposit in relation to a discontinued business written off as deduction

Assessee-company was engaged in the business of manufacturing Dash Board instruments, sensors accessories, auto components, etc. The company had deposited a sum of Rs. 6 Crores with another company for leave and license operations to take over its operations for a period of 24 months. The assessee could however carry on the said business only for six months. The business could not be continued thereafter due to losses suffered in the said business. The assessee wrote off the amount of deposit paid as irrecoverable security deposit. The same was disallowed by the assessing officer on the ground that it was not incurred in the course of the assessee's business and also that it was a capital expenditure. The CIT (A) also did not allow the claim. However, the Tribunal allowed the relief to the assessee.

On appeal by the revenue to the High Court, the High Court upheld the order of the Tribunal taking note of the fact that as per the terms of the agreement, the assessee was to continue the operations for at least 24 months but the operations were discontinued before the expiry of the terms of the agreement. The discontinuance of the operations would disentitle the assessee for claiming the security deposit made and the deposit became non recoverable and stood forfeited. The non- recovery of security deposit and forfeiture thereof would be a business loss allowable u/s. 37 of the Act.

CIT v. Pricol Ltd. (2021) 130 taxmann.com 459 (Mad.)

5. Order passed without recourse to section 144C in the case of an eligible assessee liable to be quashed.

Where Tribunal remitted case of assessee to Assessing Officer in respect of certain issue, it was incumbent on part of Assessing Officer to first pass a draft assessment order as required u/s. 144C of the Act before passing a final assessment order. Since the impugned assessment order was passed by him without first passing a draft assessment order, the same was held as unjustified and same was to be set aside.

Durr India Pvt. Ltd v. Asst. CIT (2021) 130 taxmann.com 491 (Madras)

6. Benami Property Transactions Act, 1998 - Purchase of property by a company with share capital

The company purchased a property with the share capital contribution by the shareholders of the company. The IO invoked provisions of the Benami Property Transactions Act,1998 on the ground that such purchase is a benami transaction by the share holders of the company.

On Appeal to the High Court held that purchase of property by a company in its own name out of the share capital cannot be said to be a benami transaction as per the Benami Property Transactions Act, 1998. It cannot be said that it is a case of purchase of property in company's name with consideration provided by others i.e. shareholders in this case. Share capital contributions received by a company from its shareholders are company's own funds and assets. Accordingly the company cannot be said to be benamidar of its shareholders in respect of the property held by it.

Kalyan Buildmart Pvt. Ltd v. Initiating Officer (2021) 131 taxmann.com 99 (Rajasthan)

7. Addition in respect of Share Capital and Unsecured Loans – Section 68 of the Act

During the year the assessee had raised share capital and had also borrowed certain amount as unsecured loans. During the course of the assessment confirmation letters were filed. For the share capital raised by the company the confirmation letters did not mention clearly as to whether the share application money was paid by cash or cheque. Further there was no evidence as regards the creditworthiness of the share applicants. As regards the unsecured loans however, the assessee had filed the confirmation letters, bank statements of the lenders and the copies of the Return of the lenders. The assessing officer had made addition in relation to both share capital and unsecured loans. The addition in relation to unsecured loans was made on the ground that the lenders income was not much and do not support the loan given to the assessee. The CIT (a) did not allow any relief to the assessee.

On further appeal to the Tribunal, the Tribunal confirmed the addition in relation to the share application money since the assessee could not prove the creditworthiness of the share applicants. However, as far as the unsecured loans were concerned the Tribunal allowed the relief to the assessee. The Tribunal held that once the bank statements of the lender reflected sufficient balance to give loans to the assessee, the same cannot be considered as unexplained merely because low income was shown by the creditors.

Garima Polymers P. Ltd v. ACIT (2021) 131 taxmann.com 4 (Del. Trib.)

8. Setting off of refunds against outstanding demand – Prerequisites of Section 245 of the Act

The revenue sought to adjust refund granted to assessee for assessment year 2019-20 against demands for assessment years 2015-16 and 2016-17. However, the mandatory prior requirement of intimation under section 245 before making adjustment was not followed. Further as a matter of fact, there was stay for recovery of outstanding demand for said assessment years 2015-16 and 2016-17.

On writ petition before the High Court, it was held that it was mandatory for the assessing officer to issue the intimation u/s. 245 of the Act prior to adjustment of the refunds against the outstanding demand. This is a pre-requisite condition of section 245 and without such intimation the adjustment of the refund is not permissible.

Jet Privilege P. Ltd v. DCIT (2021) 131 taxmann.com 119 (Bombay)