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DIRECT TAX REVIEW
MARCH 2018

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Supreme Court Rulings of the month

Receipts received in excess of the limits prescribed by the state government does not mean that the society has rendered services for profit attracting an element of commerciality and thus was taxable

Apex court disallowed the appeals preferred by the revenue and provide relief to the society and held that "Transfer charges are payable by the outgoing member. If for convenience, part of it is paid by the transferee, it would not **partake the nature of profit or commerciality as the amount is appropriated only after the transferee is inducted as a member.** In the event of non admission, the amount is returned. The moment the transferee is inducted as a member the principles of mutuality apply. Likewise, non-occupancy charges are levied by the society and is payable by a member who does not himself occupy the premises but lets it out to a third person. **The charges are again utilised only for the common benefit of facilities and amenities to the member.** Contribution to the common amenity fund taken from a member disposing property is similarly utilised for meeting sudden and regular heavy repairs to ensure continuous and proper hazard free maintenance of the properties of the society which ultimately enures to the enjoyment, benefit and safety of the member. These charges are levied on the basis of resolutions passed by the society and in consonance with its byelaws. The receipts in the present cases have indisputably been used for mutual benefit towards maintenance of the premises, repairs, infrastructure and provision of common amenities"

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Source: SC of India in the case of ITO Vs Venkatesh premises Co-op society Pvt Ltd

Civil Appeal nos. 2706 of 2018, date of publication March 14, 2018

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SLP granted against HC ruling that date of service of order wasn't relevant for maintainability of Set Com application

SLP granted against High Court's ruling that application for settlement would be maintainable as long as order of assessment is not passed and date of dispatch or service of order on assessee would not be material for such purpose.

Source: SC of India in the case of Shalibhadra Developers Vs Secretary, Income-tax Settlement Commission

SPL no.s. 15267 of 2017, date of publication March 26, 2018

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SC upheld proportionate disallowance of exp. u/s 14A as exempt income was incidental

SC held that "The first and foremost issue that falls for consideration is as to whether the dominant purpose test, which is pressed into service by the assessees would apply while interpreting Section 14A of the Act or we have to go by the theory of apportionment. **We are of the opinion that the dominant purpose for which the investment into shares is made by an assessee may not be relevant.** No doubt, the assessee like Maxopp Investment Limited may have made the investment in order to gain control of the investee company. However, that does not appear to be a relevant factor in

determining the issue at hand. Fact remains that such dividend **income is non-taxable. In this scenario, if expenditure is incurred on earning the dividend income, that much of the expenditure which is attributable to the dividend income has to be disallowed and cannot be treated as business expenditure**. Keeping this objective behind Section14A of the Act in mind, the said provision has to be interpreted, particularly, the word 'in relation to the income' that does not form part of total income. Considered in this hue, **the principle of apportionment of expenses comes into play as that is the principle which is engrained in Section 14A of the Act and** also held that Rule 8D is prospective in nature and could not have been made applicable in respect of assessment years prior to 2007 when this rule was inserted.

Source: SC of India in the case of Maxopp Investment Ltd Vs Commissioner of Income Tax, New Delhi

Civil Appeal No. 104-109 of 2017, date of publication March 14, 2018

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High Court Rulings of the month

Voluntary surrender of income does not save the assessee from levy of penalty for concealment of income if there is no explanation as to the nature of income or its source

Delhi High Court held in favour of the revenue and held by contending that the assessee merely made a voluntary surrender, she did not offer any explanation as to the nature of income or its source. The observations in *MAK Data* (*supra*) are that the authorities are not really concerned with the statement- whether voluntarily or otherwise and have to see whether there was any non disclosure of material facts, or income. **The complete failure to furnish any details with respect to the income, which if given could have been the only reasonable basis for deletion of penalty**, in the opinion of the court, reinforced the views of the AO and CIT (A) that the revised return was an afterthought, based on the subsequent event of disclosure of Rs 2,00,00,000. **The mere offer therefore, of the amount during the search in the absence of any explanation for the source of income, renders the assessee's argument insubstantial in the totality of circumstances".**

Source: High Court of Delhi in the case of Pr. Commissioner of Income Tax Vs Dr Vandana Gupta

IT Appeal nos. 219 of 2017, date of publication March 03, 2018

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No need to prove occasion for receiving gift from relative

HC deleted section 68 additions and held that unexplained credit addition under section 68 with respect to gift of INR 73 lakh received by assessee from his maternal aunt was to be deleted as in view of section 56(2)(v), for accepting a gift from a relative, no occasion needs to be proved. **When the Act itself does not envisage any occasion for a relative to give a gift, it is well-nigh impermissible for any authority and even for that matter for the Court to import the concept of occasion and develop a theory based on such concept**. The donor in instant case being no other than the assessee's own maternal aunt, is a 'relative' as defined under explanation to section 56(2)(v) and in the light of the plea of the assessee that she was brought up by assessee's parents, and her daughters having already

been married off and in a well-to-do position, it cannot be said that such a gift falls beyond 'human probability' test as quite often applied by the Courts .

Source: High Court of Hyderabad in the case of Pendurthi Chandrasekhar Vs Deputy Commissioner of Income tax

IT Appeal nos. 701-702 of 2016, date of publication March 20, 2018

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Society engaged in preparing & supplying midday meals is eligible for sec. 12AA registration

Assessee-society was engaged in preparing and supplying mid-day-meals to students at primary schools in various villages, against a contract awarded by State Government. Assessee-society received food preparation and distribution charges, on per child, per month basis from State Government. It filed an application u/s 12AA for grant of registration. CIT rejected assessee's application , taking view that activity of assessee could not be treated as charitable in nature.

Tribunal provided relief to the assessee.

High Court dismissed appeal of the revenue and held that merely because the State had itself not been able to cook and supply cooked food by way of mid-day-meals at its schools and further because it outsourced that part of the work against consideration, it cannot be said that it transformed the activity into one in the nature of trade, commerce or business etc. **Execution of a contract between two parties, in these facts cannot be decisive whether the activity itself was one purely in the nature of trade, commerce or business**. What was more important is to examine whether assessee had engaged in an activity that was inseparably linked to and performed in continuation of the charitable scheme of the Government.

Therefore, on the basis of findings recorded by the Tribunal and the material examined by the Commissioner it would be wrong to conclude that because there existed a contract between the assessee and the Government therefore the assessee was not pursuing a "charitable purpose". On the other hand the activity performed by the assessee clearly appears to be inseparably linked to the 'charitable purpose' of providing mid-day meals at village schools. Also, admittedly, the total receipts of the assessee were below the limit of Rs. 10,00,000/- as stipulated under the second proviso to section 2(15) of the Act.

Source: High Court of Allahabad in the case of CIT Vs Shri Balaji Samaj Vikas Samiti

IT Appeal nos. 49 of 2014, date of publication March 8, 2018

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ITAT Rulings of the month

Family settlements entered into bona fide to maintain peace and harmony in the family are valid and binding on the authorities

Assessee declared 30% of consideration received in respect of sale of property, amounting to 3.15 crores as LTCG. The assessee claimed that the poperty devolved on him in view of Memorandum of family arrangement to the extent as mentioned above. The remaining share belongs to his brother and father. According to AO, since no cost is incurred by the assessee to acquire the asset and the mode of

acquisition is other than that mentioned in section 49 of the ITAct,cost of previous owner cannot be allowed as cost in the hands of the assessee and hence treated entire share of Rs. 3.15 crore as LTCG and deduction u/s 54 claimed by the assessee and assessed the balance as LTCG income of the assessee.

Aggrieved assessee preferred the appeal before CIT(A).

The CIT(A) rejected the claim of the assessee and treated the entire sale consideration of Rs 3.15 crores as income from other sources on the basis that normally, a dispute is a prelude to a family arrangement. It was held as in the case of the present assessee no such pre-existing dispute has been shown to exist and no claim had been made by the assessee before any court of law or before any other authority in this context, there was no valid settlement.

The Tribunal had to consider whether the property acquired by assessee through memorandum of family arrangement cum compromise deed dated 03-6-2004 is to be accepted as genuine, so as to adopt the cost of acquisition as on 01-04-1981 for the purpose of computation of long term capital gain and consequently the income is to be assessed under long term capital gain or to be taxed under the head of income from other sources.

Tribunal allowed the appeal and held that "*though conflict of legal claims in present or in future is generally a condition for the validity of a family arrangement, it is not necessarily so. Even bona fide disputes, present or possible, which may not involve legal claims will suffice. Members of a joint Hindu family may, to maintain peace or to bring about harmony in the family, enter into such a family arrangement. If such an arrangement is entered into bona fide and the terms thereof are fair in the circumstances of a particular case, Courts will more readily give assent to such an arrangement than to avoid it*"

Source: ITAT Mumbai Bench in the case of Kunal R. Gupta Vs ITO IT. Appeal no. 5768/Mum/2017, date of publication March 29, 2018

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Transaction cannot be treated as sham transaction merely on the basis of some economic detriment or it may be prejudicial to the interest of the revenue

AO and the CIT(A) disallowed the set off of loss on account of long term capital loss suffered by assessee on sale of shares against the profit of long term capital gain earned on sale of immovable property. The disallowance was made by the AO as assessee has sold shares to her son only after the assessee has gain on sale of flat. Tribunal allowed the appeal of the assessee and held that "the sale of shares in a Pvt ltd co by the assessee to a relative (son) in order to book losses so as to set-off the capital gains from on sale of property **cannot be rejected as a sham transaction / colourable device if the transaction is within the four corners of law and valid**.The transactions being genuine, merely because the assessee has claimed set-off of capital loss against the capital gain earned during the same period, cannot be said to be a colourable device or method adopted by assessee to avoid the tax. The shares were transferred by executing share transfer Form and after paying the requisite Stamp duty. The company NTPL also passed a Board Resolution for transfer of those shares. The consideration of share was effected to through banking channel. The fair market value arrived by assessee, as furnished before Commissioner (Appeals). In our view the transactions of sale of share were genuine and transacted at a proper valuation. The lower authority has not

disputed the genuinity of transaction. The transactions carried by assessee are valid in law, cannot be treated as non-est merely on the basis of some economic detriment or it may be prejudicial to the interest of revenue.

Source: ITAT Mumbai in the case of Mrs Madhu Sarda Vs ITO, Mumbai

IT. Appeal no. 7410/Mum/2012, date of publication March 09, 2018

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Sec. 80-IAC relief couldn't be denied merely because deduction was claimed in revised return

Assessee was engaged in business of development of software and sale and import of computer hardware. Assessee filed its return u/s 139(1) wherein deduction was not claimed under section 80-IC. Subsequently, assessee filed revised return under section 139(5) wherein claim for deduction was raised. AO allowed assessee's claim but subsequently, AO took a view that since assessee did not raise claim for deduction under section 139(1), same could not be allowed keeping in view of provisions of section 80AC and thus passed an order under section 143(3), read with section 147 withdrawing deduction allowed to assessee.

The assessee filed appeal before CIT(A) which was allowed. Revenue further filed appeal before ITAT.

The Tribunal dismissed the appeal of the revenue and held that the provisions of section 80AC did **not lay down condition that deduction under section 80-IC to be allowed must be claimed in the return of income filed under section 139(1) rather it stipulates that return of income is required in these cases to be filed under section 139(1) and** if the assessee filed belated return under section 139(4) or did not file any return at all, will disentitle assessee for the claim of deduction under section 80-IC as was applicable for the year under consideration.

On going through Finance Bill, 2006 and relevant notes on clauses and memorandum to Finance Bill, 2006 which introduced section 80AC and, no indication was found that the deductions under section 80-IC will only and only be allowed if and only if the same is claimed in the return of income filed under section 139(1).

Section 139(5) allows assessee to file revised return of income wherein the assessee finds some bona fide mistake and error in the return of income filed under section 139(1) which return of income is an extension of the return of income filed under section 139(1).

The Supreme Court has held in **Goetze India Ltd. v. CIT [2016] 157 Taxman 1 that claim for the deduction can be raised for the first time before the appellate authorities** while in the instant case the assessee did raise its claim of deduction under section 80-IC by filing revised return of income under section 139(5) within time stipulated under the statute and the same was filed before completion of assessment.

Source: ITAT Mumbai in the case of ACIT Vs Monarch Innovative Technologies (P.) Ltd, Mumbai

IT. Appeal no. 4815/Mum/2016, date of publication March 24, 2018

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Notice u/s 133(6) not served upon the vendors does not falsify the claim of the party

Tribunal allowed appeal of the assessee and held that " In the present case sale has not been disputed and the books of account have not

been rejected. In the instant case, whne the assessee has adduced the sufficient evidence on record which has been discussed about therefore in the said circumstances, we are of the view that no addition is required to be made on account of bogus purchase. Non-service of notice is not a ground to raise the addition of bogus purchase to the income of the assessee in view of the law settled in CIT Vs. M/s Nikunj Eximp Enterprises P. Ltd. 2016 taxman.com 171 (Bombay High Court)"

Source: ITAT Mumbai in the case of Prabhat Gupta Vs ITO, Circle-27(2)(5)

IT. Appeal no. 277/M/2017 & 797/M/2017, date of publication March 09, 2018

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Press release/Notifications/Instructions/Letters of the month

CBDT extends due date for linking Aadhaar with PAN till June 30, 2018

Upon consideration of the matter, the CBDT, further extends the time for linking PAN with Aadhaar till 30th June, 2018.

Source: CBDT ORDER [F.NO.225/270/2017/ITA.II], DATED 27-3-2018

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AO to process ITRs manually u/s 143(1) in case of technical difficulties in processing those electronically

From assessment Year 2017-18, discretion of Assessing Officer *{referred to as 'AO'}* in processing returns under scrutiny has been completely removed and therefore, all returns have to be processed as per provisions of section 143(1) of the Act. This is irrespective of the fact whether in cases under scrutiny, AO is contemplating taking recourse under section 241A of the Act to withhold the refund so arising on ground of concern for recovery of revenue.

The returns pushed to the AO for processing by the CPC are required to be processed electronically on the ITBA. However, in exceptional circumstances, whenever returns cannot be processed because of technical difficulties in functioning of ITBA, in order to provide an uninterrupted taxpayer service, the AO can also manually process the return that is pushed to them by the CPC with prior administrative approval of Pr. CIT. However, before taking up the return for processing manually, the difficulty being faced in processing the return electronically on ITBA on a case to case basis would be referred to the Pr. DGIT (System,) who shall satisfy himself that due to technical difficulties the return cannot be processed electronically on ITBA within a reasonable period & thereafter, permit manual processing in that case. However, in all such cases, the AO have to mandatorily upload the same in the system.

Source: LETTER NO.F.NO.225/53/2018/ITA.II], Dated 28-3-2018

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