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CHARTERED ACCOUNTANTS

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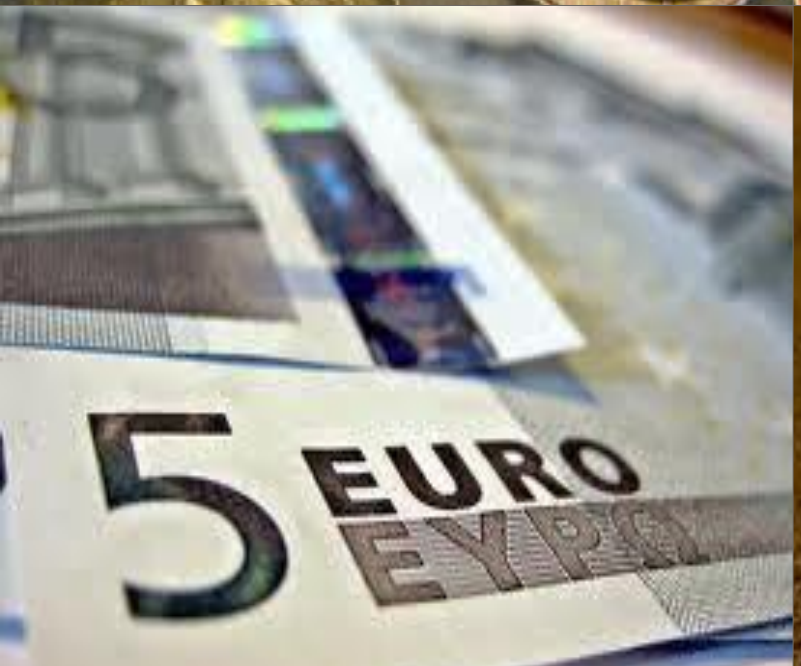
DIRECT TAX REVIEW
NOVEMBER 2016



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Twin conditions of order being erroneous & prejudicial to interests of revenue to be satisfied for revisionary proceedings u/s 263

ITAT quashed the order of Pr. CIT on ground of twin conditions-of the order sought to be revised not having been erroneous as well as prejudicial to interests of Revenue. Also holds that it is not mandatory for the AO to details, elaborate or discuss all issues dealt with during course of assessment proceedings in the order. AO had in this case, accepted assessee's claim of depreciation on goodwill on reduced WDV as after making such enquiries and proper verification which proved application of mind on his part and the Pr.CIT had accordingly wrongly assumed jurisdiction u/s 263, which was uncalled for and unwarranted. Order of AO u/s 143(3) restored.

Source: ITAT Ahmedabad in Adani Gas Ltd. vs. Pr. CIT
(ITA No. 1252/Ahd/2016) dated December 02, 2016

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Revisionary proceedings u/s 263 uncalled for when AO did not examine creditors in absence of any incriminating material unearthed against creditors during search proceedings and when no addition could have been made during assessment.

The ITAT quashed the order of the Pr. CIT u/s 263 holding that for invoking the revisionary proceeding, the twin conditions of the order being erroneous so as to prejudicial to the interests of the Revenue need to be satisfied. The AO did not examine the two creditors since no assessment was pending in the case and addition could have been made only on the basis of incriminating material found during the course of search. The action of the AO in not examining the creditor was thus, in accordance with law. Accordingly, the order passed by the AO u/s 153A could not be said to be erroneous so as to be prejudicial to the interest of Revenue.

Source: ITAT Delhi in Amit Katyal vs. Pr. CIT
ITA Nos. 2697/Del/2016 dated November 30, 2016

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Mere realignment of income from one head (Capital Gains) to another (Business Income) by AO is beyond the scope of authority vested u/s 153A in absence of any incriminating material or evidence detected as a result of search.

The assessee had sold various properties and income was offered as income from Long Term Capital Gains (LTCG) and Short Term Capital Gain (STCG). The AO concluded that intention of the assessee was to deal in the land and constructed properties with a profit motive and was thus in the nature of trade. The AO accordingly brought the income arising on sale of land and properties to charge under the head "business income" which is chargeable to tax at higher rate of taxation. Exemption u/s54B was also denied to the assessee. The ITAT noted:

- The ITR was filed prior to search in normal course, suo motu disclosing impugned capital gain on sale of land/properties.
- The returns so filed in the ordinary course were accepted u/s 143(1) of the Act and as such no assessment was pending on date of initiation of search which would abate in consequence of search.

- The averment made on behalf of the assessee that no incriminating material/document has been found in the course of the search proceedings which exhibits intention contrary to what is declared in the books of accounts maintained by the assessee.
- The assertions made by assessee to the effect that income arising on sale of capital asset was treated as business income without reference to any incriminating material had remained unrebutted.
- As a corollary, its manifest that impugned realignment of income from one head to another had been made without reference to any incriminating material found during search proceedings.

The tribunal accordingly held that mere realignment of income from one head to another made by the AO was clearly beyond the scope of authority vested u/s 153A of the Act in the absence of any incriminating material or evidence detected as a result of search. There is need for Revenue to unearth the material as a result of search to justify the assessment sought to be made.

Source: ITAT Ahmedabad in Anil Bholabhai Patel vs. ACIT
ITA No. 70/Ahd/2016 dated November 02, 2016

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Section 43B inapplicable to Bonus not covered under the Payment of Bonus Act, 1965

Expenditure debited under head 'Bonus', was paid to family members, who were working in proprietary concern of assessee. AO holding that the assessee had not made actual payment of amount shown as bonus but had merely credited bonus amount, concluded that this was in contravention of provisions of section 43B and hence, same was not to be allowed as deduction in hands of assessee. CIT(A) upheld the order of the AO. The ITAT held that the amount of incentive was being paid to extent of salary. In such circumstances, where said payment had been made in majority as equivalent to salary due, could not be termed as bonus. This was incentive which had been paid by assessee out of his business consideration and would not partake nature of bonus, merely because nomenclature applied by assessee was bonus. Nature of payment made by assessee to employees was not bonus and was not covered under Bonus Act and hence, no merit in disallowance of expenditure.

Source: ITAT Pune in Chandrashekhar D. Shende vs. DCIT
ITA No. 150/PN/2016 dated November 18, 2016

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No disallowance u/s 40A(3) if consideration paid towards investment had been duly brought to tax as unexplained income and such income not had been claimed as expenditure in computation of income

During the course of search proceedings, loose sheets of paper were seized indicating unaccounted purchase of gold jewels which was voluntarily offered to tax as unexplained investment. Accepting the declaration, the AO further proceeded to address same issue of investment in gold jewelry yet again on ground that offer made by assessee led to conclusion that consideration was paid in cash. AO thus invoked provisions of section 40A(3). The High Court held that consideration paid in this case, towards investment had been duly brought to tax as unexplained income but such income not had been claimed as expenditure in computation of income. Provisions of section

40A(3) were wholly inapplicable to facts and circumstances of this case.

Source: High Court of Madras in K.R. Ganesh Kumar vs. ACIT
ITA No. 2408 of 2006 dated November 1, 2016

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50C inapplicable on unregistered agreements executed before 01-10-09, i.e prior to the prospective amendment by Finance (No. 2) Act, 2009

Assessee sold 4 flats via unregistered sale agreements. AO referred valuation of these flats to District Valuation Officer (DVO), for determination of Fair Value of property sold. Difference in valuation was added by AO in assessee's income u/s 50C. CIT(A) confirmed action of AO. The Tribunal held that since unregistered property was sold before clarification was issued under Circular No.5/2010 (Finance No. 2 Act, 2009), where it clearly stated that scope of provisions did not include transactions which were not registered with stamp duty valuation authority, and executed through agreement to sell or power of attorney prior to 01-10-09. Section 50C was amended prospectively to cover such transactions and hence provisions of Section 50C would not be attracted in the present case since sale was before 01/10/2009, which was the date on which circular became applicable.

Source: ITAT Bombay in Krishna Enterprises vs. Add.CIT
ITA No. 5402/Mum/2014 dated November 23, 2016

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Addition of agricultural income as 'income from other sources' under section 68/69 of the Act without detailing as to what income is earned by assessee from "other sources" since assessee has no other source of income except the agriculture income unjustified

During assessment proceedings, agricultural income of the assessee was brought to tax as 'income from other sources' u/s 68. The ITAT observed that there was no finding that material sought to be relied upon by the assessee was lacking in credibility:

- Certificate of village Patwari indicating average income per acre of land was held on record.
- Certificate from Halka Patwari explaining safeda trees planted on boundaries of the field, are not recorded in the revenue record, was also supported by certificate of the Tehsildar that no entry of safeda trees is noted in the revenue record, if planted on boundaries.
- An affidavit was also filed in support of the sowing of the safeda trees
- The assessee had merely small interest income on savings. The interest is from specified source and ascertained.
- The assessee had no other income except agriculture income.
- There was no material on record to show any vested interest or motive with the assessee to declare agriculture income higher than the actual amount.
- The authorities had made and confirmed the addition of agricultural income on account of 'income from other sources' under section 68/69 of the Act but failed to point out as to what income is earned

by assessee from "other sources" because assessee has no other source of income except the agriculture income.

- Even in earlier years, assessee has shown the agriculture income.

Therefore, in the absence of any material on record that what is the 'other income' of the assessee except that of agriculture income, the addition was wholly unjustified.

Source: ITAT Chandigarh in Madam Mohan Singh vs. ITO
ITA No. 459/CHD/2016 dated November 29, 2016

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Immunity from penalty u/s 271AA if taxes paid before framing of assessment and initiation of penalty proceedings

During search operation, voluntary disclosure ₹ 13 crores of the entire group u/s 132(4) was made. The assessee substantiated the manner in which additional income was earned and mentioned amount of taxes paid on additional undisclosed income, assuring that taxes would be paid during the FY. The AO held that assessee had not paid full taxes on surrendered income at time of filing of return of income. He levied penalty u/s 271AAA on the surrendered income. The tribunal held that since all due taxes on undisclosed income had been paid before framing of assessment and initiation of penalty proceedings u/s 271AA, penalty could not be levied. Followed the Apex Court in case of M/s Gebilal Kanhaiyalal HUF wherein it had been categorically held that only condition required for getting immunity from penalty, as per Explanation-5 to section 271(1)(c), was that assessee had to pay taxes together with interest in respect of such undisclosed income up to date of payment and that not in limit was prescribed u/s 271AAA within which assessee ought to pay taxes on income disclosed in statement u/s 132(4). Since assessee paid all due taxes on income disclosed in statement u/s 132(4), assessee was entitled to immunity from penalty.

Source: ITAT Chandigarh in Manohar Infrastructure & Cons. Pvt. Ltd. vs. DCIT; ITA No. 729/Chd/2016 dated November 09, 2016

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Where substantial agricultural land held and copies of records evidencing cultivation of land filed on record, addition of agricultural income on account of non-submission of books/vouchers unjustified.

Addition on account of agricultural income was deleted by the Tribunal since it noted that:

- The assessee had purchased the agricultural land situated at an area vicinity of which indicated agricultural income from Rabi and Kharif crops.
- Agricultural income had also been shown in the return of income.
- Copies of records establishing the growing of crops from the lands owned by the assessee were on record.
- The assessee had good piece of land i.e. 23 bigha and 3 biswas on which crops are grown by the assessee.
- The agricultural income is exempt from tax and there is no need to maintain books of account or bills/ vouchers.

Source: ITAT Jaipur in Parmeshwari Devi vs. ITO
ITA No. 315/JP/2016 dated December 06, 2016

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Examination of the validity of the search proceedings is well within the jurisdiction of the CIT(A) u/s 246A

The Apex Court upheld Bombay High Courts judgment in Revenue's favour, holding that CIT(A) is empowered to examine the validity of search operations carried out u/s 132.The Hon'ble SC opined that if the assessment order which is based on the search operations is under challenge, the validity of the search proceedings can also be gone into by the Commissioner of Income Tax (Appeals). Disposing assessee's SLP, the matter was ruled in favor of the revenue.

Source: Supreme Court of India in Eee Dee Aluminium Ltd. vs DDIT TS-625-SC 2016 dated November 17, 2016

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Deduction u/s 37 against donation to ICAI buildings satisfies 'commercial expediency' test since if the claim is allowable u/s 37(1) itself there is no case for proceeding to Chapter VIA which applies to all assessees whether or not they are carrying on business or profession

The assessee, (a CA firm) made donations to Pune branch of Institute of Chartered Accountants of India ('ICAI') towards construction of administrative building of said branch during AY 2009-10 and claimed it as an expenditure incurred wholly and exclusively for the purposes of the profession and not as a donation deductible u/s 80G. However, AO denied deduction u/s 37 concluding that being in the nature of a donation, provisions of section 80G were specific and would override section 37(1) which is general in nature. Mumbai ITAT allowed the business expenditure deduction u/s 37(1) holding that by donating the amount to ICAI for better infrastructural facilities, assessee was also able to attract good articled clerks and other professional persons who are backbone of any professional practice. Thus the said payment satisfied the commercial expediency test as the contribution had a direct nexus with the carrying on of the profession by the firm. If the claim is allowable u/s 37(1) itself there is no case for proceeding to Chapter VIA which applies to all assessees whether or not they are carrying on business or profession. Thus, ruling in favor of assessee, ITAT allowed the contribution made by assessee u/s 37(1) of the Act.

Source: ITAT Mumbai in B. K. Khare & Company vs. ACIT ITA No. 4500/Mum/2014 dated November 1, 2016

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43B applicable on Service Tax though not routed through Profit & Loss Account

ITAT in this case of an Electricity transmission company, observed that assessee had charged service tax from its customers on the services rendered and tax so charged was not paid to the credit of government. Assessee came away with the mere plea that it is a collecting agent and service tax is not reflected in the profit and loss account so as to keep service tax payable out of the ambit of provisions of section 43B sub-sec.(a) of the Act. The tribunal, ruling in favor of the revenue, held that the provisions of section 43B do not have a direct link of the amount of tax to be passed through P&L account. Further, there was no bifurcation or proof of whether service tax payable was in relation to those services on which service tax are payable only when the due amount from customers is received and whether the particular

provisions of service tax was applicable to assessee for the year under appeal. Therefore, disallowance was justified. Order of AO upheld.

Source: Ahmedabad ITAT in Madhya Gujarat Viz. Co. Ltd.

ITA No. 2583/Ahd/2010 dated November 9, 2016

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Section 40(a)(ia) disallowance inapplicable to owners'-association covered under mutuality ambit in absence of business activity, though trust unregistered u/s 12A

An association, a trust registered under the Societies Act but not u/s 12/12A of the Income Tax Act filed a return claiming exemption on the 'principle of mutuality'. In the assessment order, the claim of mutuality was neither discussed nor rejected. The AO merely added AMC charges u/s 40(a)(ia) for non-deduction of TDS. Further, an amount received by the assessee towards 'Capital Repairs Fund' and shown in the Balance Sheet, was added as 'revenue receipt' on the ground that assessee had claimed repairs and maintenance expenses. The tribunal noted given that no business activity was involved ITAT held that provisions of Sec 40(a)(ia), which are meant for computing the business, becomes inapplicable in assessee's case. Since the assessee was not registered u/s. 12/12A, provisions of Sec 11 to 13 did not apply to it. ITAT accepted assessee's contention that receipt towards the corpus fund was accumulated exclusively for future capital works. Considering the facts, ITAT held that the corpus fund was not taxable as 'revenue receipt'.

Source: Astral Height Owners Association vs. ADIT

I.T.A. No. 08/HYD/2016 dated November 11, 2016

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TDS applicable on year-end provisions

The assessee, following Mercantile system of accounting, created a "provision for commission payable" on March 31, 2009 and reversed it on 1st day of FY i.e on April 1st, 2009. The liability thus had not crystallized in this year and while filing return for AY 2009-10, assessee claimed deduction for such contingent liability. Assessee claimed that making a provision on estimate basis on the sales effected by assessee, becomes an ascertained liability and thus was allowable as business expenditure. The AO denied the deduction observing that TDS had not been deducted on this expense. The AO further observed that the accounting practice of the assessee of debiting the amount of Rs 26 lakhs at the end of the year and crediting the same amount back on the first day of the next F.Y by passing reverse entry shows that the assessee diverted his income which should have been taxed in the year under consideration. The AO thus invoked the provisions of Section 40(a)(ia) for disallowing the commission expenses. On appeal CIT(A) upheld AO's order and denied expense allowance invoking section 40(a)(ia). The Tribunal held that the provision of commission payment claim by the assessee is totally unascertainable, uncrystallized and fanciful and could not assume the character of ascertained mercantile liability. Even in case of mercantile liability, Section 40(a)(ia) clearly mandates that the expenditure cannot be allowed in the absence of corresponding TDS payment in Government treasury and dismissed the appeal of the assessee.

Source: Hardik Jigishbhai Desai vs. DCIT

ITA No 1084/Ahd/2013 dated November 5, 2016

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For assessment u/s 147 r/w Sec 143(3), issuance of statutory notice u/s 143(2) is a mandatory requirement

Post survey proceedings, notice u/s 148 was issued to the assessee company and assessment concluded u/s 143(3) r/w sec. 148. The High Court noted that the revenue had virtually admitted that no notice u/s 143(2) was issued. It opined that section 292BB did not grant any privilege to AO in dispensing with the issuance of a notice u/s 143(2). Since jurisdiction u/s 143 was founded on the issuance of a notice u/s 143(2), AO could have assumed jurisdiction only after issuing a notice u/s 143(2). Even the fact that assessee had participated in the assessment proceedings and complied with notice u/s 148, would not provide benefit u/s 292BB to Revenue. Further, notice u/s 148 was not issued recording a reason that it is not possible to generate notice under Section 143(2) through an AST, since the assessee has not filed the return electronically. It was further noticed that assessee was also required to file return in response to section 148 electronically and the assessee could not be forced and coerced to file its return electronically so as to then enable the Assessing Officer to issue a notice u/s 143(2) of the Act. Since there were no evident reasons to omission to issue a notice, proceedings for the year under review were quashed.

Source: Travancore Diagnostics (P) Ltd. vs. ACIT
ITA.No. 221 of 2015 dated November 19, 2016

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50C applicable on property transferred by un-possessory sale-cum-GPA; Claim for exemption u/s 54 valid if construction commenced before the date of transfer; Investment of actual sale-proceeds, not deemed consideration u/s 50C, relevant for exemption u/s 54

The tribunal in this case held that 50C was applicable on sale-cum-GPA, which was registered with SRO and the stamp duty authority had determined market value a higher value and had collected stamp duty thereon. Undoubtedly, transfer had taken place within the meaning of section 2(47)(v)and section 50C was applicable. Rejecting revenue's stance of not allowing exemption u/s 54 since construction in new property had commenced before transfer of asset, the tribunal held that the only condition is that construction of property should be completed within 3 years from date of transfer. Relying on the decision of ITAT Jaipur in the case of Gyan Chand Batra, the deeming fiction as provided in 50C is applicable only to section 48 and therefore meaning of full value of consideration as referred to in explanation to section 54F(1) of the Act, is not governed by the meaning of the words full value of consideration as mentioned in Section 50C. The assessee was therefore, eligible for exemption u/s 54 if the net sale consideration is invested in construction or purchase of new residential house. ITAT thus held that whole of the capital gain was not taxable even if the capital gain was computed by taking the value as per the provision of section 50C. The AO was accordingly directed to allow exemption u/s 54F to the assessee.

Source: ITAT Vishakhapatnam in DCIT vs. Dr. Chalasani Mallikarjuna Rao; I.T.A.No. 206/Vizag/2013 dated November 21, 2016

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CBDT expands AIR reporting norms to encompass cash deposits from 9th Nov to 30th Dec as a result of the demonetization scheme

To align the cash deposits in bank accounts, post announcement of demonetization and to monitor heavy deposits, CBDT has amended Rule 114E via Income-tax (30th Amendment) Rules, 2016, requiring the banks to report cash deposits exceeding prescribed limits in AIR. The prescribed limits are detailed hereunder:

Nature & Value of Transaction	Reporting person
Cash deposits during the period 09th November, 2016 to 30th December, 2016 aggregating to– Current Accounts: ₹ 12,50,000/- or more Savings Accounts: ₹ 2,50,000/- or more	A banking company or a co-operative bank to which the Banking Regulation Act, 1949 (10 of 1949) applies (including any bank or banking institution referred to in section 51 of that Act) Post Master General as referred to in clause (j) of section 2 of the Indian Post Office Act, 1898 (6 of 1898)

Pertinent to note that cash deposits in one, or more accounts of the assessee. Meaning thereby that disclosure of cash deposits in aggregate in all accounts being maintained by the assessee will be made by the reporting persons.

Source: Notification No. 104/2016 dated November 15, 2016

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Quoting of PAN made mandatory for certain cash transactions

The Income Tax Department prescribes a list of transactions for which quoting of Permanent Account Number (PAN) is mandatory. These are listed in Rule 114B of the Income Tax Rules, 1962 which were first inserted with effect from 1st November, 1998 and have been amended from time to time. The list under Rule 114B as on date requiring PAN to be quoted includes the following banking transactions:

i) Deposit with a banking company or a co-operative bank in cash exceeding fifty thousand rupees during any one day.
ii) Purchase of bank drafts or pay orders or banker's cheques from a banking company or a co-operative bank in cash for an amount exceeding fifty thousand rupees during any one day.
iii) A time deposit with a banking company or a co-operative bank or a Post Office
iv) Opening an account [other than a time-deposit referred to above or a Jandhan/Basic Bank Deposit Account] with a banking company or a co-operative bank.

In addition to the existing requirement of quoting of PAN, in respect of cash deposits in excess of Rupees fifty thousand in a day, quoting of PAN will now also be mandatory in respect of cash deposits aggregating to Rupees two lakh fifty thousand or more during the period 9 Nov, 2016 to 30 Dec, 2016 as per an amendment notified by CBDT on 15-11-2016.

Source: Press release dated November 17, 2016

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Deduction under chapter VI-A admissible on enhanced profits

CBDT has accepted that disallowances made under sections 32, 40(a)(ia), 40A(3), 43B etc. along with other specific disallowances, related to business activities against which the deduction under Chapter VI-A has been claimed, result in enhancement of the profits of the eligible business, and that deduction under Chapter VI-A is admissible on such enhanced profits. Decisions of the Gujarat High Court (ITO vs. Keval Construction ITA 443 of 2012), the Bombay High Court (CIT vs. Sunil Vishwambharnath Tiwari (ITA 2 of 2011) and Allahabad High Court (Pr. CIT vs. Surya Merchants Ltd.) were accepted by the Board. Giving illustrations, the Board explained, if an expenditure incurred by assessee for the purpose of developing a housing project was not allowable on account of non-deduction of TDS under law, such disallowance would ultimately increase assessee's profits from business of developing housing project. The ultimate profits of assessee after adjusting disallowance under section 40(a)(ia) of the Act would qualify for deduction under section 80-IB of the Act. Further, if deduction under section 40A(3) of the Act is not allowed, the same would have to be added to the profits of the undertaking on which the assessee would be entitled for deduction under section 80-IB of the Act. The Board also directed the Department not to file appeals on this ground and existing appeals pending for disposal stand withdrawn or not pressed upon.

Source: Circular No. 37/2016 dated November 2, 2016

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Transport, Power and Interest subsidies received by an Industrial Undertaking, eligibility for deduction under sections 80-IB, 80-IC etc., of the Income Tax Act, 1961

CBDT, considering the issue whether revenue receipts such as transport, power and interest subsidies received by an Industrial Undertaking/ eligible business are part of profits and gains of business derived from its business activities within the meaning of sections 80-IB/ 80-IC of the Income-tax Act, 1961, held that such subsidies are part of profits and gains of business derived from the Industrial Undertaking and are not to be included under the head 'Income from other sources'. Therefore, deduction is admissible under section 80-IB/80-IC of the Act on such revenue receipts derived from the Industrial Undertaking. The Board placed reliance on the decision of the Apex Court in its judgment in the case of Meghalaya Steels Ltd (CA No. 7622 of 2014 dated 09.03.2016) and other cases, wherein it was held that the subsidies of transport, power and interest given by the Government to the Industrial Undertaking are receipts which have been reimbursed for elements of cost relating to manufacture of sale of the products. Thus, there is a direct nexus between profit of the undertaking and reimbursement of such business subsidies. Therefore, revenue subsidies received from the Government towards reimbursement of cost of production/manufacture or for sale of the manufactured goods are part of profits and gains of business, and are admissible for applicable deduction under Chapter VI-A of the Act. The Board also directed the Department not to file appeals on this ground and existing appeals pending for disposal stand withdrawn or not pressed upon.

Source: Circular No. 37/2016 dated November 2, 2016

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