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DOMESTIC TAX REVIEW
JUNE 2022

Inside this edition

- Assessment as a trust and not as "AOP", where cancelled registration granted u/s 12AA was restored later.
- Revenue to mandatorily consider the material produced on record before reopening of assessment.
- Impugned order to be set aside on ground of violation of principles of natural justice; non affording personal hearing.
- ITSC's Order of rejection of settlement application quashed where mandatory personal hearing was not granted.
- No TDS u/s 194J where dominant purpose of contract is supply and service component is negligible.

& more...

DOMESTIC TAX

HIGH COURT RULINGS

Assessment as a trust and not as “AOP”, where registration granted under section 12AA was cancelled by CIT-A but later was set aside by Tribunal

Ruling

The revenue was in appeal as against the order passed by the CIT (A), Kolkata before the Ld. Tribunal. The Tribunal while considering the correctness of the said order noted that the only reason why the assessing officer assessed the income of the assessee as an "AOP" was on the ground that registration granted to the assessee under section 12AA of the Act was cancelled by the Commissioner of Income Tax. The Tribunal further noted the order of cancellation of registration dated 31-12-2008 was set aside by the Tribunal by an order dated 20-3-2009 and, therefore, direction was issued to the assessing officer to assess the assessee as a trust and not as "AOP". The Tribunal passed the order in favour of the assessee stating that we find that there is no error in the order passed by the Tribunal directing the assessee to be assessed as a trust and not as "AOP". Therefore, the appeal filed by the revenue is dismissed and the question of law is answered against the revenue.

Source: HC, Calcutta in CIT vs Guru Nanak Educational Trust dated June 06, 2022, vide [2022] 140 taxmann.com 104 (Calcutta)

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Mandatory responsibility of the Revenue to consider the material produced on record before passing impugned order for reopening of assessment of assessee under section 148A(d)

Facts

The assessee is the ex-partner of a partnership firm to carry on the business in the name and style of "Studio Virtues" consisting of two individuals namely Ashish Suresh Parikh and Viral Ashish Parikh. The firm was allotted PAN Number being ACGFS9667P and was dissolved on 31-3-2013 and the entire business lock, stock and barrel was taken over by one of its partners namely Ashish Sureshbhai Parikh having a different PAN Number being ABCPP5324R. Since the firm was dissolved and was not carrying the business, there was no taxable income during the AY 2018-19 and had not filed its return of income for the said year. A show-cause notice under section 148A(b) was issued by the respondent asking the assessee to show cause as to why a notice under section 148 should not be issued to which the assessee responded within the time limit with all the facts of the case. The respondent, thereafter, passed impugned order under section 148A(d) proceeding with reopening of the case for the AY 2018-19. The assessee thereafter proceeded with this petition.

Ruling

HC, on perusal of the provisions of section 148, held that the AO before issuing the notice under section 148 is required to conduct an inquiry and thereafter provide an opportunity of being heard to the assessee by serving upon him a show-cause notice to show cause as to why the notice under section 148 should not be issued based on the information with the

Assessing Officer as per clause A(a). Further, the Assessing Officer has to consider the reply furnished by the assessee, if any, in response to the show-cause notice and thereafter decide on the basis of the material available on record including the reply of the assessee, whether or not it is a fit case to issue a notice under section 148 by passing an order under clause (d) of section 148A within one month from the end of the month in which the reply referred to in clause (c) is received by him or otherwise. HC held, going by the law, we are of the opinion that that the assessee ought to have been given an opportunity of hearing and the respondent Authority thereafter ought to have considered the material produced on record by the assessee.

Hence, we are of the opinion that the matter requires consideration, and the appeal of the assessee is therefore allowed. The impugned order dated 31-3-2022 is hereby quashed and set aside remitting back the matter to the respondent. HC also stated that the respondent shall proceed further with the case under the provisions of section 148A(b) and (c) and shall afford an opportunity of hearing to the assessee and thereafter pass a detailed order in accordance with law under section 148A(d).

Source: HC, Gujarat in Studio Virtues vs ITO dated June 06, 2022 vide [2022] 140 taxmann.com 73 (Gujarat)

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Impugned order was set aside on ground of violation of principles of natural justice; non affording an opportunity of being heard via personal hearing

Facts

It is the case of the assessee that on 22-4-2021 a show cause notice was issued seeking a response from the assessee as to why the assessment should not be completed as per the draft assessment order. The assessee was called upon to submit her response by 25-4-2021 either by accepting

the proposed modifications or by filing written reply objecting to the same or making a request for personal hearing. In response thereto, the assessee contends that on 23-4-2021 a request was made for grant of personal hearing after submission of the written reply. Despite this request, it is the grievance of the assessee that without granting any opportunity of personal hearing, the assessment order has been passed which is unjustified. The assessee held that the option of grant of personal hearing having been exercised prior to the due date of submission, the assessee should have heard the assessee before passing the assessment order.

Ruling

HC held that despite receipt of this request by the respondent, the impugned order has been passed after a period of almost two months but without granting any such opportunity. Further, the impugned order does not indicate the reason for not granting such opportunity despite request for the same having been made within time and received by the respondent. HC considering the facts of the case, held that, the failure to grant such opportunity to the assessee has definitely caused prejudice to the assessee and on the basis of principles of natural justice having being violated, the impugned order of assessment is liable to be set aside.

Source: HC, Bombay in Premlata Ramakant Fatehpuria vs PCIT dated June 08, 2022, vide [2022] 140 taxmann.com 97 (Bombay)

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Reopening after 4 years on account of expenses under section 37(1) correctly reported during original scrutiny assessment is unjustified

Facts

The assessee 's return was selected for scrutiny during which specific details pertaining to sales and advertisement expenditure were called and the same were submitted. An assessment order dated 26 December 2016 under section 143(3) was passed with addition of INR 1.01 Crores towards Product Development Charges. Thereafter, on 26 March 2021, impugned notice under section 148 was issued to the assessee stating that there are reasons to believe that the assessee 's income chargeable to tax for AY 2014-15 has escaped assessment within the meaning of section 147. The Ld. Counsel of the assessee replied that the notice for reopening assessment must be based on new information or material, however, in the present case, the Assessing Officer is seeking to reopen the reassessment proceedings based on the same material facts which were before him when he concluded the original assessment proceedings. He also stated that reassessment without any additional information amounts to change of opinion and the same is not permissible. The ld. Counsel also placed reliance on the proviso to section 147 which provides that where an assessment under section 143(3) has been made for relevant assessment year and four years from the end of the relevant assessment year has expired, then no reassessment proceedings can be initiated under section 147 unless any income chargeable to tax has escaped assessment for such AY by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment for that assessment year.

The assessee also placed reliance on CBDT circular No. 5/2012 and held that the reasons raised for reopening are very much in existence when original assessment order was passed and therefore, it cannot be considered as new tangible materials. Further, the assessee submitted that even otherwise the said Circular is not applicable as the assessee has not given any freebies to the Doctors governed by the Indian Medical Council but has given items for business promotion to the veterinary Doctors governed by Veterinary Council of India and therefore the impugned order needs to be quashed and set aside.

Ruling

HC held that in the present case, the assessee had truly and fully disclosed all material facts necessary for the purpose of assessment. They were scrutinized and figures of income as well as deduction were carefully reworked by the Assessing Officer at the time of original assessment. In fact, in the reasons for reopening, there is not even a whisper as to what was not disclosed. HC stated that in our view, this is not a case where the assessment is sought to be reopened on the reasonable belief that income had escaped assessment on account of failure of assessee to disclose truly and fully all material facts that were necessary for computation of income but this is a case wherein the assessment sought to be reopened on account of change of opinion of the Assessing Officer about the manner of computation of income. The same is not permissible, in view of proviso to section 147 of the Act. Consequently, Petition is allowed, and order passed is quashed and set aside.

Source: HC, Bombay in Virbac Animal Health India (P.) Ltd. vs ACIT dated June 14, 2022, vide [2022] 139 taxmann.com 574 (Bombay)

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HC declines to quash prosecution against habitual tax-evader who had huge income despite him clearing tax dues

Facts

The assessee is engaged in the business as a dealer in antibiotics, chemicals, prawn feeds and derives income thereof, besides having income from other sources. There was survey operation under Section 133(A) on the business premises of the assessee. It was detected during the survey that the accused despite having huge taxable income, has not been in the habit of filing return on or before the due date and pay the tax. He was not discharging his statutory obligation in compulsory maintenance of accounts and auditing under section 44AB within the stipulated time limit. During survey operation under Section 133(A), it was found that the accused had concealed income and admitted the undisclosed income of INR 37 lacs for the AY 1999-00. A statutory notice under section 143 was issued calling upon the assessee to furnish his return of income within 30 days from the date of receipt of notice. In response, assessee furnished his return admitting the income of INR 33 lacs. The assessee is under statutory obligation to furnish the Income Tax Return for the AY 1999-20 voluntarily on or before 31-10-1999, under section 139(1) whereas he filed the return only, after the survey that too the delay of 68 months. The assessment was completed at a total income of INR 33 lacs with tax payable of INR 21 lacs. Penalty under Section 279(1)(C) to the tune of INR 9.70 lacs was imposed and was confirmed by the ITAT.

Ruling

HC held that in the judgment referred above, the concealment of income came to light only after the survey. If the survey was not conducted, the concealment of income would not have come to light at all. Only after the statutory notice under section 148 was issued, assessee filed return of income and then, it was assessed. The willful and deliberate concealment of true and correct income by not filing the return of income within the time stipulated is clearly and plainly evident from the facts of this case. HC stated that this Court is of the view that the judgments relied by the learned counsel for the assessee are not applicable to the facts and circumstances of this case and this Court is of the considered view that this case must go to trial, and the trial Court has to take informed decision by recording the evidence of the parties. In this view of the matter, this Court finds no merit in all these petitions and all these six Criminal Original Petitions are dismissed.

Source: HC, Madras in Dharampal R. vs ACIT dated June 16, 2022, vide [2022] 139 taxmann.com 441 (Madras)

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ITSC's Order of rejection of settlement application is to be quashed where mandatory Personal Hearing under section 245D(4) was not granted to applicant

Facts

The assessee is the Managing Director of MRF Limited, dealing in tyre and rubber industry, finance, and investment business as also consultancy and advisory services. A summons was issued calling upon the assessee to produce documents mentioned therein. The assessee submitted reply and also appeared before the officials of the Income Tax Department in connection with the enquiry conducted during which the assessee's were questioned about the transactions through the company called Moon Mist Enterprises, the reason for the closure of the said company during 2011 etc. Thereafter, the assessee's filed a revised return for the assessment years

2005-06 to 2012-13. Thereafter, a notice under section 148 was issued and the assessee's again submitted their return. In the above context, the assessee filed applications under Section 245C of the Act in Form 34B before Settlement Commission for settlement of all the pending cases by making a full and true disclosure of the facts in relation to the income earned by them for the AYs 2005-06 to 2014-15, as, at that time, the assessment for the said assessment years was pending. The assessee also paid a sum of INR 18.30 crores towards income tax together with interest. However, the first respondent, without taking note of the disclosure of income of the assessee's, rejected the Applications on the ground that the first respondent has no jurisdiction to accept the applications in view of the notification dated 27-05-15 issued under the provisions of Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (in short, Black Money Act). It is further stated that by virtue of the notification, all the undisclosed income will be dealt with under the said statute i.e., Black Money Act, 2015.

Pursuant to the order, the assessee's sent a letter clarifying that the Black Money Act, 2015 would come into force only from 01-07-15 and it has no application to the applications dated 02-06-15 filed by the assessee's. The assessee's also filed a fresh application under Section 245C of the Act specifically stating that the applications are maintainable and the first respondent has jurisdiction to entertain it without reference to the Black Money Act. However, the applications were dismissed by the second respondent against which WP Nos. 22216, 22217, 22218 and 22219 of 2015 were filed by the assessee's. By order, the Court allowed the writ petitions, by setting aside the rejection orders of the second respondent with a direction to entertain the applications submitted by the assessee's.

The Ld. AR in the present case of the assessee held that only one and half working days was granted despite there being time till 31-03-18 the commission to pass final orders. Further, it has been contended that more than 3 days were granted. It is relevant to note that the report under 245D(3) had to be filed within 90 days. However, the same has not been filed in time and the same was also taken on record. In the present case, even if we go by the date on which the earlier order was set aside by this Court remanding back the application to be decided afresh, the time to pass orders would expire on 31-12-17. The commission had sufficient time to grant a reasonable opportunity after the report was served on 23-11-17. There are no provision in the rules by which any time is fixed for the assessee to submit his objections to the report under section 245D(3). When no time is prescribed a reasonable time must be granted to the assessee. To a report under Rule 9, the assessee is granted 15 days' time under Rule 9A to submit his objections, which in the opinion of this court is a reasonable period. The period of 3 days granted by the commission is not a reasonable period, more particularly when the commissioner has been allowed to file a report after the statutory period. Further, as per Section 245D (4), it is mandatory grant a personal hearing after receipt of the report under sub-section 3, which in the present case was not granted. Hence, the procedure contemplated under the Act is violated.

Ruling

HC held that we have no hesitation to hold that the order has been passed without granting personal hearing is in violation of the principles of natural justice and against the procedures as prescribed under the Income Tax Act and and hence, the order is liable to be set aside and the matter is

remanded back for fresh consideration after giving opportunity to both the parties.

Source: HC, Madras in Kandathil M. Mammen vs Income Tax Settlement Commission dated June 27, 2022, vide [2022] 140 taxmann.com 283 (Madras)

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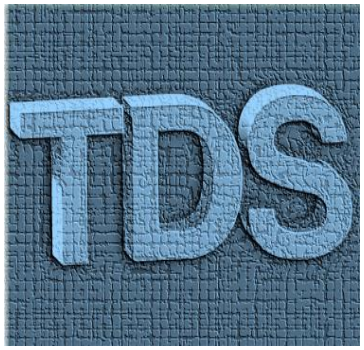
No TDS is deductible under section 194J where dominant purpose of contract is supply of rolling stock and service component is negligible

Facts



The BMRCL entered a Contract with BEML Ltd., being the consortium leader, for design manufacture, supply, testing and commissioning of passenger Rolling Stock, including training of Personnel and Supply of spares and operation. The total cost of the Contract was INR 1672.50 Crores. The Income Tax Department conducted a survey under Section 133A and observed that a sum of INR 182 Crores had been paid by BMRCL to the consortium. The Department was of the view that assessee ought to have deducted tax at source before making the payment. Accordingly, a show cause notice was issued calling upon the assessee to show cause as to why it should not be treated 'as an assessee in default' under Section 201(1) of Income Tax Act for not deducting tax at source and remitting to the Government. Assessee submitted its reply contending inter alia that Contract was one for supply of Coaches and other activities such as design, testing, commissioning, and training are only incidental to achieve the dominant object and therefore, it would constitute a sale of goods and hence, the provisions of Section 194C or 194J would not apply. It was also contended that assessee was not aware as to how the consortium partners had utilized the 10% of the Contract amount given as 'Mobilization Amount'. The Assessing Officer, not being satisfied with BMRCL's reply, treated it as 'an assessee in default' and levied tax and interest thereon under Section 201(1A). An appeal filed before the CIT(A), Bengaluru, by the assessee challenging the said order also stood dismissed. Feeling aggrieved, assessee filed appeals before the ITAT, Bengaluru who allowed assessee's appeals. The Revenue thereafter presented these appeals raising the questions of law recorded hereinabove.

Ruling

HC held that the total project cost is INR 1672.50 Crores out of which, the service part in the form of training accounts for about INR 19 Crores. Thus, the dominant purpose is supply of Rolling Stock and therefore the questions raised by the Revenue are not substantial questions for consideration for more than one reason which are as under:

- Firstly because, the Revenue has taken a specific stand before the ITAT that the Contract is a composite Contract.
- Secondly because, the dominant purpose of the Contract is for supply of Rolling Stocks and the cost towards service component is almost negligible.
- Thirdly because, the word 'assembly' must include the manufacture/assembly of the Rolling Stocks by BEML Ltd., being the Consortium leader.
- Fourthly because, the entire payment has been made in favor of BEML Ltd.
- Fifthly because, Revenue has not raised any objection about payment of 90% of the Project costs, so far as deduction under Section 194J is concerned.

HC stated that in view of the above, questions No. 1 and 2 were answered in favor of the assessee. For Question No. 3 it was held that the work taken up is ancillary to supply of Rolling Stock and does not amount to professional or technical service. Resultantly, this appeal was dismissed, and order passed in favor of the assessee.

Source: HC, Karnataka in CIT vs Bangalore Metro Rail Corporation. Ltd. dated June 30, 2022 vide [2022] 140 taxmann.com 229 (Karnataka)

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ITAT Rulings

No disallowance under section 143(1) of the set off brought forward capital loss where return has been filed within the due date

Facts

The impugned disallowance was made in the course of processing of return

143(1) for AY 2019-20 by the Assessing Officer (CPC) on the short ground "Disallowance of loss claimed, as the Income Tax Return for the AY 2010-11 for which set off loss is claimed was furnished beyond the due date specified under sub-section (1) of section 139. The assessee by making a submission through the e-portal mentioned that the return of Income was filed in time and requested the CPC to correct their database. The plea of the assessee was summarily dismissed by the Assessing Officer (CPC) by observing that "disagreed". The Assessing Officer (CPC) thus proceeded ahead with declining set off the loss carried forward. Aggrieved by the adjustment so made by the Assessing Officer (CPC), assessee carriedthe matter in appeal before the learned CIT(A) but without any success. The assessee is not satisfied and has preferred present appeal before ITAT.

Ruling

ITAT held that as evident from a copy of the income tax return for the AY 2010-11, the assessee had duly filed the income tax return well within the time permitted under section 139(1) i.e., on 31st July 2011. In this view of the matter, the very foundation of impugned adjustment under section 143(1) is wholly unsustainable in law. ITAT, therefore, vacated the impugned action of the Assessing Officer and allowed the set off loss brought forward from the AY 2010-11. The assessee, accordingly, get the relief for set off long-term capital loss of INR 1.53 lacs.

Source: ITAT, Ahmedabad in Kantibhai Ugarbhai Patel vs Commissioner of Income-tax (Appeals) dated June 03, 2022, vide [2022] 139 taxmann.com 229 (Ahmedabad-Trib.)

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New explanation inserted by FA 2022 i.e., Disallowance under 14A even if no tax-free income does not apply to AYs prior to 2022-23

Facts

These cross appeals are directed against the order dated 29th November 2021 passed by the learned CIT(A) in the matter of assessment under section 143(3). Grievances raised by the parties are as follows:

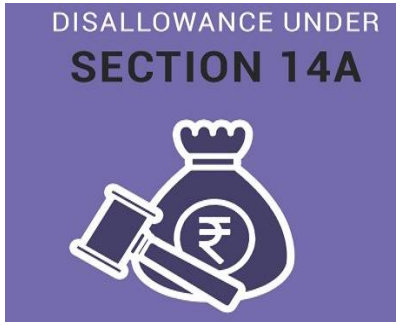
Grievances raised by the assessee

- On the facts and in the circumstances of the case and in law, the respondent prays that no disallowance ought to be made in absence of earning of any exempt income.
- Without prejudiced to ground 1 above, on the facts and in the circumstances of the case and in law, the respondent prays that in case the disallowance under section 14A is to be made in accordance with

Rule 8D as prayed by the Department, then the disallowance under section Rule 8D(3) ought to be restricted to INR 9.87 lacs basis the working of disallowance accepted by the Department in the past assessment year.

Grievance raised by the Assessing Officer

On the facts the circumstances of the case and in law, whether the Ld. CIT(A) was justified in deleting the disallowance made by the Assessing Officer on account of expenditure (incurred in relation to exempt income) under section 14 r.w. Rule 8D of the Income Tax Act, 1961, without considering the decision of the Hon'ble ITAT, Special Bench, Mumbai in the case of Daga Capital Management Pvt. Ltd, decision of the Hon'ble Bombay High Court in Writ Petition No. 785 of 2010 in ITA 626/10 in the case of Maxopp Investment Ltd, 91 Taxmann.com 154 in the Civil Appeal no 1423 of 2015 filed by Avon Cycles Ltd, Ludhiana.



During scrutiny assessment proceedings, it was noticed that the assessee is holding investments in shares, which are for the purpose of earning dividend income, but no disallowance is made under section 14A for expenses incurred to earn this tax-exempt income. The Assessing Officer, accordingly, proceeded to make the disallowance under rule 8D read with section 14A which worked out to INR 11.87 crores. Aggrieved, assessee carried the matter in appeal before the CIT(A) who restricted the disallowance to INR 9.87 lacs admitting the fact that no dividend income or any other exempt income has been earned during the year under consideration.

Ruling

ITAT held that there is no dispute about the fact that the assessee did not have any tax-exempt income during the relevant previous year and that the period before us pertains to the period prior to insertion of explanation to section 14A. In this view of the matter, and in the light of consistent stand by co-ordinate benches, ITAT placed reliance on the ruling of the Hon'ble Delhi High Court's judgment in the case of Cheminvest Ltd v. CIT [(2015) 61 taxmann.com 118 (Del)] and upheld that no disallowance under section 14A is called for. The plea of the Assessing Officer is thus rejected. As regards the disallowance of INR 9.87 lacs, it was sustained on the basis of computation given in the alternative plea of the assessee but given the fact that the basic plea of non-disallowance itself was to be upheld, there was no occasion to consider the computation given in the alternative plea. This disallowance of INR 9.87 lacs must also be deleted. The appeal of the Assessing Officer was therefore dismissed.

Source: ITAT, Mumbai in ACIT vs Bajaj Capital Ventures (P.) Ltd. dated June 29, 2022 vide [2022] 140 taxmann.com 1 (Mumbai-Trib.)

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VERENDRA KALRA & CO
CHARTERED ACCOUNTANTS

CONTACT DETAILS:

Head Office
3rd Floor MJ Tower,55 Rajpur Road, Dehradun
T +91.135.2743283, 2747084, 2742026
E info@vkalra.com
W www.vkalra.com

Branch Office
80/28 Malviya Nagar, New Delhi
E info@vkalra.com
W www.vkalra.com

For any further assistance contact our team at
kmt@vkalra.com