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CHARTERED ACCOUNTANTS

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DOMESTIC TAX REVIEW

MAY 2022

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DOMESTIC TAX

SUPREME COURT RULINGS

Reassessment notice if issued on or after 1-4-2021 under erstwhile section 148 not to be set aside if it is a bonafide mistake

Facts

The AO had issued reassessment notices on or after 1-4-2021 under the erstwhile sections 148 to 151 by relying on Explanations in the Notification No. 20/2021, dated 31-3-2021 and Notification No.38/2021, dated 27-4-2021 which extended applicability of aforesaid provision as they stood on 31-3-2021, before commencement of Finance Act, 2021, beyond period of 31-3-2021.The said reassessment notices were the subject matter of writ petitions before High Courts. The High Court set aside all the reassessment notices on ground that reassessment notices issued after 01-4-2021 would be governed by substituted and amended sections 147 to 151 which came into effect vide Finance Act, 2021 and no notice u/s 148 can be issued without following the procedure prescribed u/s 148A which is in the nature of a condition precedent. By way of section 148A, the procedure has now been streamlined and simplified and the new provisions being remedial and benevolent in nature and substituted with a specific aim and object to protect the rights and interest of the assessee as well as and the same being in public interest, the respective High Courts have rightly held that the benefit of new provisions shall be made available even in respect of the proceedings relating to past assessment years, provided section148 notice has been issued on or after 01-4-2021. The view taken by the various High Courts in holding so is completely agreed with.

Ruling

On revenue's appeal, SC after analyzing the fact that several High Courts judgments would result in no reassessment proceedings at all, even if the same are permissible under substituted sections 147 to 151. SC stated that the revenue cannot be made remediless, and the object and purpose of reassessment proceedings cannot be frustrated. To remedy the same, SC held that there appears to be genuine non-application of the amendments as they may have been under a bonafide belief that the amendments may not yet have been enforced. Therefore, it is opined that some leeway must be shown in that regard which the High Courts could have done so. Therefore, instead of quashing and setting aside the reassessment notices issued under the unamended provision of IT Act, the High Court's ought to have passed an order construing the notices issued under unamended provision as those deemed to have been issued u/s 148A as per the new provision section 148A and the revenue ought to have been permitted to proceed further with the reassessment proceedings as per the substituted provisions of sections 147 to 151 as per the Finance Act, 2021, subject to compliance of all the procedural requirements and the defences, which may be available to the assessee under the substituted provisions of sections 147 to 151 and which may be available under the Finance Act, 2021 and in law. Therefore, the judgments are proposed to be modified and orders passed by the respective High Courts as under:

- The respective impugned section 148 notices issued to the respective assessee shall be deemed to have been issued u/s 148A as substituted by the Finance Act, 2021 and treated to be show-cause

notices in terms of section 148A(b). The respective AO's shall within thirty days from today provide to the assessee's the information and material relied upon by the revenue so that the assessees can reply to the notices within two weeks thereafter;

- The requirement of conducting any enquiry with the prior approval of the specified authority u/s 148A(a) be dispensed with as a one-time measure vis-a-vis those notices which have been issued u/s 148 of the unamended Act from 1-4-2021 till date, including those which have been quashed by the High Courts.

The present order would be applicable PAN INDIA on all judgments and orders passed by different High Courts on the issue under which similar notices issued after 01-4-2021 u/s 148 are set aside and shall be governed by the present order and shall stand modified to the aforesaid extent. The present order is passed in exercise of powers under article 142 of the Constitution of India so as to avoid any further appeals by the revenue on the very issue by challenging similar judgments and orders.

Source: SC in Union of India vs Ashish Agarwal dated May 04, 2022 vide [2022] 138 taxmann.com 64 (SC)

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HIGH COURT RULINGS

Setoff of loss suffered in derivatives transactions can be claimed and set off against business income u/s 70

Facts

The appellant is dealing in collection of Toll fees in the name and style M/s Souvenir Developer (India), Pvt. Ltd., is also carrying business of shares and derivatives has filed return of income declaring total income of INR 85,43,220. Subsequently the case of the appellant was picked up for scrutiny wherein the AO refused to consider the loss suffered by the assessee on transaction in derivatives while computing net taxable income. The AO while passing the order did not consider the effect of insertion of proviso to Section 43(5). The application for rectification u/s 154 made by the appellant was rejected against which the assessee preferred an appeal before the CIT-A who by an order refused to consider the loss suffered by the appellant on transaction in derivatives while computing the net income of the appellant u/s 73. Being aggrieved by the said order, the appellant preferred an appeal before the Tribunal who dismissed the said appeal with a similar view and held that the entire transaction carried out by the appellant was speculative and thus loss suffered on such speculative transaction could not be claimed as set off against other heads of income. Being aggrieved, assessee preferred the present appeal.

Ruling

HC placed reliance on several SC rulings wherein it was held that the transactions in respect of trading in derivatives referred to in Clause (ac) of Section 2 of Securities Contracts (Regulation) Act, 1956 carried in a recognized stock exchange are excluded from the definition of speculation transaction described u/s 43(5). HC further placed reliance on Section 73(1) as well as the explanation inserted by Taxation Laws (Amendment) Act, 1975 with effect from 01-04-1977 thus would not apply to the loss having arisen in the trading in derivatives being not speculative transaction which is excluded from the definition of speculation transaction described u/s 43(5). HC finally held that Tribunal could not have confirmed any addition on transaction in derivatives on

recognized stock exchange as defined in Section 43(5)(d) with reference to explanation given to Section 73 which is applicable to speculative transaction. By virtue of insertion of clause (d) to the proviso to Section 43(5), the transactions in respect of the trading in derivatives as prescribed in clause (d) inserted in proviso to Section 43(5) would not be a speculative transaction. The appellant was thus entitled to claim set off of the loss suffered by the appellant in the said transactions in derivatives against the business income of the appellant from infrastructure business u/s 70.

Source: HC, Bombay in Souvenir Developers (I) Pvt. Ltd. vs Union of India dated May 06,2022 vide ITA no. 79 of 2018

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HC imposes costs of INR 50,000 on Income-Tax Department for high-handed action of illegal recovery of disputed demand pending appeal

Facts

The Income Tax Return for the AY 2018-19 processed by the CPC Wing of the Department and a refund of INR 70,86,950 due in favor of the petitioner-assessee was adjusted against the balance demand of AY 2017-18. The petitioner assessee filed a Stay Application in response to intimation u/s 245 and contended that he has preferred an appeal against the said order of AY 2017-18 but in spite of the same CPC adjusted a refund of INR 32,35,662 against the balance demand of Assessment Year 2017-18. The assessee submitted that giving go-bye to the departmental circulars, settled position of law, principles of natural justice, statutory mandate and the provisions of Section 245, set up of refund was made Suo-motu and the act of the department was high handed and autocratic without authority of law and as such, he has filed the present writ petition for violation of his fundamental rights, principles of natural justice and recovery being violative of Article 265 of the Constitution of India. The assessee further held that Revenue for its own default of not considering the appeal in time even after lapse of one and half year has initiated recovery from the assessee that too merely at the verge of expiry of 30 days dehors not only the statutory provisions and the judgments of the higher forums but even contrary to its own office memorandum which permits recovery only to the extent of 20%.

Ruling

HC held that that the action of recovery on the part of the respondents was de-hors the statutory provisions specified u/s 220(6) & 245 and was without jurisdiction in terms of Sections 222 and 223. The respondents have also failed to honor the series of judgments, referred to above which for them are merely pieces of papers. They have completely given go-bye to the principles of judicial discipline, majesty of law and even their action is contrary to their own circulars. This high-handed action of the respondents is against Article 14, 19 and 265 of the Constitution of India. HC considered that in the present case, the respondents have totally ignored the provisions of law, the judicial pronouncements of higher forum and the action of the respondents in not considering the appeal in time and even till date, is against the principles of natural justice, the requirement of law, fair play and therefore, the action of the respondents and the Revenue Authorities is violative of Article 265 of the Constitution of India. Accordingly, on perusal of the case in hand, apart from allowing the writ petition, this court further deems it appropriate to issue strictures to the effect that appropriate departmental action be initiated against the officers and authority concerned of the respondent-

Revenue who are involved in non-consideration of appeal of the petitioner in time as well as for not obeying and considering the judgments of the Apex Court, referred to above as well as the provisions of Section 220(6), 245 and the circulars of the department. HC further imposed a cost of INR 50,000 upon the respondent-department who shall pay itself or if it so chooses, the same may be recovered equally from respondents Department and the assessee in half and half within two months of passing of this order and be deposited with the Rajasthan State Legal Services Authority, Jaipur.

Source: HC, Rajasthan in Rajendra Kumar vs ACIT, Central Circle dated May 25, 2022 vide [2022] 138 taxmann.com 490 (Rajasthan)

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Prosecution cannot be quashed where appeal was decided by ITAT not on merits, but only on technical ground of limitation

Facts

The Petitioner is a cine actor and Director deriving income from remuneration for acting in movies and also directing movies who did not filed his return within time limit prescribed u/s 139(1). The survey operations u/s 133 A were conducted on 04-09-2003 and a search was conducted on 26-10-2005 wherein unaccounted receipt of money by the petitioner towards remuneration for directing movies was revealed. A statutory notice u/s 148 was issued to the petitioner to prepare a true and correct return of total income including the undisclosed income assessable for the AY 2002-03. The petitioner admitted total income of INR 40 lacs in his return. Apart from these, a sum of INR 30 lacs was added as unexplained deposit in his bank account and assessment was completed with total income at INR 1.68 Crores with net demand of INR 72.83 lacs against which the assessee preferred an appeal before CIT-A. Petitioner filed petition before the JCIT requesting for stay of collection of demand till the disposal of appeal by the Commissioner. Since, the petitioner has not paid the amount as per demand notice u/s 156 served along with the assessment order, agricultural lands and the flats belonging petitioner were placed under provisional attachment u/s 281 B. CIT-A upheld the additions made by the AO. Thereafter the Petitioner filed stay petition before Tribunal, Chennai which was also dismissed stating that there is gross disobedience in complying with the statutory requirements u/s 139 (1), 148 and 153 A, which amounts to an offence punishable u/s 276 CC against which the assessee has filed the present appeal.

Ruling

HC in the present case is of the opinion that when the matter was not decided on merits, but only on technical ground of limitation, the principles settled in (2011) 3 SCC 581 Radheshyam Kejriwal Vs. State of West Bengal and another, that petitioner cannot seek to quash the proceedings in E.O.C.C. Nos. 101, 102, 103, 104, 105 of 2015 on the ground that Income Tax Appellate Tribunal had set aside the assessment orders. HC further quashed the present case stating that it is very well settled that uncontroverted averments in the complaint without any addition or subtraction should be looked into to examine whether an offence can be made out are not. If that yardstick is applied in this case, this Court is of the considered view that respondent/complainant made out prima-facie case to proceed against the petitioner for the offences alleged in the complaint. Section 278 (e) empowers the Court to presume

culpable mental state of the accused, unless the accused shows that he had no such mental state with respect to the act charged as an offence in the prosecution.

Source: HC, Madras in S. J. Surya vs DCIT, Central Circle dated May 26, 2022 vide [2022] 139 taxmann.com 3 (Madras)

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ITAT Rulings

Revenue cannot set off any 'taxable loss' u/s 70 to 80 against tax-exempt incomes covered by Chapter III

Facts

The assessee is engaged in the business of real estate. Search operations were conducted by Revenue u/s 132(1). During the course of assessment proceedings, the AO observed that the assessee has shown sundry creditors to the tune of INR 2.50 crore in the name of Shri Ajeya Singh, which the assessee was not able to explain satisfactorily. Thus, the AO held that the amount shown as sundry creditor of INR 2.50 crore be treated as unexplained and added the same to be the income of the assessee u/s 68. Aggrieved by the assessment order, assessee filed first appeal with ld. CIT(A) both on legal ground as to validity of search and also on merits of additions. The assessee during the appeal proceedings before Ld. CIT(A) submitted copy of bank statement was enclosed along with confirmation letter. The ld. CIT(A) observed that the advance of INR 2.50 crore received by assessee form Shri Ajeya Singh is a trade advance received for purchase of land through banking channel which is appearing in the books of accounts of the assessee. It was further observed by ld. CIT(A) that no incriminating document was found during the course of search (as none has been referred to in the assessment order) which has any bearing on the addition made by the AO. The ld. CIT(A) held that in the absence of any 'incriminating documents' the AO could not have made the impugned additions and therefore the action of the AO cannot be sustained in view of judgment of Hon'ble Delhi HC in the case of CIT v. Kabul Chawla(supra) and hence, the ld. CIT(A) deleted the entire addition of INR 2.50 crores.

Ruling

The Revenue, against the order passed by Ld. CIT-A preferred an appeal before the Ld. Tribunal stating that there is no evidence in the Balance Sheet as for from whom the said amount was Received and relied upon decision of Hon'ble Allahabad HC in the case of CIT, Kanpur v. Raj Kumar Arora, reported in (2014) 52 taxmann.com 172(Alld. HC) wherein it was held that even if no incriminating material was found during search operations conducted by Revenue u/s 132(1) of the 1961 Act, then also AO can assess total income of the taxpayer. ITAT in the present case held that one more opportunity be provided to assessee to bring on record complete details/evidence in support of its contentions therefore the appellate order passed by ld. CIT(A) cannot be sustained and is liable to be set aside to the file of the AO for fresh adjudication of the issue on merits. The appeal therefore filed by the Revenue is allowed for statistical purpose.

Source: ITAT, Allahabad in ACIT vs Sunshine Infraestate (P.) Ltd. dated May 04, 2022 vide [2022] 136 taxmann.com 60 (Allahabad -Trib.)

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Amount of deduction u/s 80-IC to be restricted to the extent of gross total income

Facts

The assessee is engaged in manufacture of Auto Electrical and Electronics components for two and three wheelers. Return of income was filed on 30-11-2013 declaring total income under normal computation at Nil. In such computation, the assessee claimed deduction u/s 80-IC amounting to INR 3.11 crores from the gross total income of INR 3.11 crores. The AO observed that the assessee was having two plants located at Pune and Roorkee in Uttarakhand. There was profit of INR 7.57 crore in the eligible Roorkee unit and loss of INR 4.26 crore in Shirwal, non-eligible unit. The assessee claimed that the entire profit from Shirwal unit was eligible for deduction u/s 80IC. The AO noticed that the gross total income of the assessee was only to the tune of INR 3.11 crores and hence, the amount of deduction u/s 80IC r.w.s. 80A(2) was to be restricted to that level. The ld. CIT(A) countenanced the decision of the AO, against which the assessee has approached the Tribunal.

Ruling

ITAT stated that on a conjoint reading of sections 80A(2) and 80B(5), it emerges that the total amount of deductions under the Chapter VIA cannot breach the amount of gross total income, which, in turn, means the total income computed in accordance with the provisions of the Act immediately before making any deductions under this Chapter. Thus, the procedure is to compute head-wise income under Chapter IV; club incomes of other persons in the assessee's total income as per Chapter V; then apply the provisions of set off and carry forward as per Chapter VI, so as to reach the amount of gross total income. To support its stance, ITAT placed reliance on Hon'ble SC ruling in M/s Synco Industries Ltd. Vs. AO and another (2008) 299 ITR 444 (SC) and held that the authorities have rightly restricted the amount of deduction u/s 80-IC to the extent of gross total income computed. ITAT stated that the ld. AR was fair enough to accept this position against the assessee and dismissed the appeal.

Source: ITAT, Pune in Chheda Electricals and Electronics (P.) Ltd vs DCIT dated May 04, 2022 vide [2022] 138 taxmann.com 221 (Pune)

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Revised tax audit report/addendum to be issued by the tax auditor if there is inadvertent error in Form No. 3CD

Facts

The assessee being a partnership firm has filed its return of income declaring total income of INR 4,24,420. The case of the assessee was selected for framing scrutiny assessment u/s 143(3) and assessment was concluded at INR 10,29,460. The additions were made on account of interest income being shortly offered to tax and non-deduction of TDS on contractual payments. The assessee against the additions made preferred an appeal before the Ld. CIT-A who observed that the assessee filed written submissions, ledger accounts, bank statements along with other documents, during the course of reassessment proceedings, and thus, the AO was not justified in framing assessment u/s 144 of the 1961 Act, as the reassessment order was framed by the AO on the basis of material submitted during the course of reassessment proceedings. The Ld. CIT-A

allowed the appeal on the assessee on one ground stating that hire charges have been separately shown as income in the Profit and Loss account, thus no income has escaped assessment and the addition made by the A.O. cannot be sustained merely because of some technical mistakes in Part-B of Form 3CD. In reference to the second aspect, ld. CIT(A) deleted the additions made by the AO by holding that the payment has been made to the employees of the assessee for the purposes of the assessee's business and these payments were not made by the assessee to the contractors attracting provisions of TDS u/s 194C, therefore no disallowance is called for. Revenue thereafter preferred an appeal before the Ld. Tribunal against the order passed by Ld. CIT-A.

Ruling

ITAT held that if there was any inadvertent error on the part of tax-auditor in their tax audit report, they could have always issued addendum/revised tax-audit report to rectify and clarify the correct positions after due verifications/checking from their audit records. The AO in remand proceedings specifically asked for the said revised tax-audit report, but the assessee chose not to bring on record addendum/revised tax-audit report from the tax-auditors. The 1961 Act has made provisions of tax-audit u/s 44AB, wherein the onus is now put on the tax-auditors who are qualified CAs to certify financial details of the tax-payers in the prescribed form no. 3CB and 3CD as part of tax-audit under the provisions of Section 44AB, with a view that such certification by a qualified CA would assist the Revenue in framing assessments/processing of returns and computing the correct income chargeable to tax as well as at the same time easing the burden on the Revenue officials, that is why the certification called from tax auditor's in Form No. 3CB/3CD under the aegis of Section 44AB is that the financial data's as contained therein is certified to be true and correct which is an onerous/heavy burden cast on tax-auditors, and the said certification does not merely called the tax auditor to certify that the affairs are 'true and fair' as is envisaged while auditing under Companies Act. Thus, certainly the burden/duty on tax-auditor is very heavy/onerous under the 1961 Act to certify contents of tax-audit report to be 'true and correct' and not merely 'true and fair'. Thus, if there was an inadvertent error committed by tax-auditor as is averred by the assessee, the assessee could have always approached tax-auditor to issue addendum/revised tax-audit report to certify correct figures after due checking's /verifications by the tax-auditors , as the qualified Chartered Accountants who are appointed as tax auditors being responsible officer/qualified professional, are expected to issue any addendum/revised tax-audit report with due care and caution with full responsibility , after thorough checking/verifications, otherwise it would call for disciplinary action from the ICAI and other consequences as provided under law. The assessee never produced the aforesaid addendum/revised tax-audit report from tax-auditor. The ld. CIT(A) deleted the additions without calling for such information from the tax-auditors and then reconciling/verifying from the books of accounts, but merely deleted the additions. Thus, keeping in view of our above discussions and totality of facts and circumstances, it will be just, fair and in the interest of justice that the appellate order of ld. CIT(A) be set aside and the matter be restored to the file of the AO for fresh determination of the issue and the matter was directed to file revised tax-audit report/addendum to the tax-audit report and the AO to verify the same with books of accounts and other relevant evidences, to arrive at the correct income chargeable to tax.

Source: ITAT, Allahabad in ACIT vs J.P.Yadav dated May 11, 2022 vide [2022] 138 taxmann.com 320 (Allahabad -Trib.)

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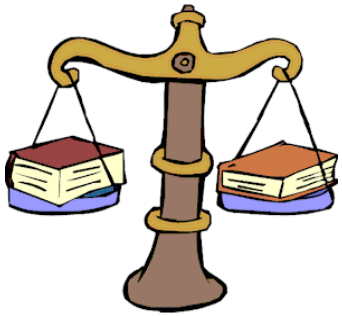
Appeal lies to CIT(A) against AO's order imposing penalty u/s 270A and not to ITAT

Facts

This appeal is filed against the penalty order u/s 270A, passed by the Assessing Officer, directly before Ld. ITAT whereas the assessee ought to have approached the learned CIT-A first. Learned counsel for the assessee, on the other hand, submits that Section 246A, which lists out the appealable orders before the CIT(A) does not refer to an order passed by the AO u/s 270A, whereas Section 253(1)(a), which sets out provisions for appeals before the Income Tax Appellate Tribunal, does specifically refer to the orders passed u/s 270A. Learned counsel thus submits that in his humble understanding the appeal has been rightly filed before the Tribunal. He, however, prays for our guidance to make any amends, if so necessary. Ld. DR stated before the Tribunal that Section 246A(1)(q) specifically includes, in orders appealable before the Ld. CIT-A, "an order imposing a penalty under chapter XXI", and chapter XXI covers Sections 270 to 275. The DR also mentioned that the appeal against an order imposing penalty u/s 270A, as passed by the AO, is appealable before the CIT-A. Further, ld. DR also added that understanding of the legal position, even if bonafide particularly considering his young age and limited experience, is clearly incorrect and therefore the appeal filed before us is thus indeed not maintainable in law.



Ruling

Ld. ITAT stated that considering the above legal position, sought liberty to file the appeal before the CIT(A) and submitted that the error was in good faith, and it should not prejudice the legitimate interests of the assessee concerned. Tribunal directed the learned counsel to file the appeal, along with condonation petition setting out the requisite details resulting in the delay in filing of appeal before the CIT(A), as soon as possible, and it is for the learned CIT(A) to take a call thereon in accordance with the law, by way of a speaking order and after giving a due and reasonable opportunity to the assessee. The appeal was therefore dismissed as non-maintainable.

Source: ITAT, Mumbai in Desmond Savio Theodore Fernandes vs ITO dated May 17, 2022 vide [2022] 138 taxmann.com 352 (Mumbai -Trib.)

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