VERENDRA KALRA & CO
CHARTERED ACCOUNTANTS

Communiqué

Direct Tax

May 2023

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Facts

The assessee is a partnership firm consisting of four partners having profit sharing ratio of the assessee firm as 10%, 10%, 10% and 17% respectively, carrying on the business of real estate on the lands purchased by the first three partners. The entire fund required for carrying on the business of real estate was to be made available by the fourth partner. In the balance-sheets of the assessee for the years ending 2006 and 2007, the cost of land was shown as stock-in-trade. The said land & building was revalued and converted to fixed asset from 'inventory' which resulted in enhancing the value of the assets to INR 370.34 crores and parallelly the partners of the assessee firm had withdrawn substantial amount from its capital. The enhanced value after revaluation were entered in a separate account created as partner's current account. This according to the department that on the enhanced value of the asset at the instance of the partners, was without paying any tax on such transaction. With effect from 29-09-08, the assessee firm was converted into a Limited Company and the partners' current account was converted into loan and shown as liability in the books of the company. According to the department on account of such conversion into loan the partners could and would withdraw these amounts as and when required and thus as against the exemption clause provided u/s 47(xiii) and consequently, the amount so appreciated on revaluation should have to be treated as capital gains in the hands of the assessee firm. There was change of opinion involved in the reopening the case of the assessee overlooking Explanation 1 of Section 147 which postulates that production before the Assessing of accounts books or other evidence will not necessarily amount to disclosure within the meaning of the proviso. The contention of the assessee that revaluation is a notional profit was rejected and it was held that the capital gains arising out of revaluation of land and building is taxable in the hands of the assessee and accordingly, the AO passed reassessment orders u/s 147 r.w.s. 143(3). Aggrieved by such reassessment orders, the assessee preferred two appeals before the CIT(A). The appeals were allowed in favour of the assessee deleting the additions made by the AO. However, the challenge to the reopening of the assessment was rejected. Being aggrieved by the orders the revenue preferred appeals before the Tribunal. The Tribunal by the impugned order allowed the assessee's appeal and dismissed the revenue's appeal. Thereafter, this appeal was filed by the Revenue u/s 260A against the common order passed by the Tribunal.

Ruling

HC held as under:

- The ld. Tribunal rightly rejected the contention raised by the revenue and also rightly noted the decision of the Hon'ble Supreme Court in Sanjeev Woolen Mills vs CIT wherein it was held that valuation of the assessee at market value, which was higher than the cost, resulted in the imaginary or notional potential profit out of itself and not any real profit or income which can be taxed. The provisions of Section 45(4) would apply when there is a distribution of assets to the partners so that its application can be justified and it can apply only when there is a transfer and secondly only when there is a distribution of assets to the partners.
- HC upheld the decision of the Tribunal on the second aspect wherein the mere revaluation amount being credited to the partner's current account and upon conversion of the firm as a company, the partners did not get any extra right to withdraw any sum out of the said revalued amount and accordingly rejected the revenue's appeal.
- With regard to the correctness of the reopening, HC upheld the Tribunal's conclusion that the assessing officer has sought to review the assessment made during the original assessment and arrived at a different opinion upon reassessment/reconsideration of the very same material which was considered during the original assessment proceedings.
- Next, regarding the reasons for reopening, HC stated that the Tribunal rightly held that the reasons recorded are not independent and the assessing officer had failed to note that each assessment year, is a separate unit and reasons are to be recorded separately year wise and it is evident from the reasons recorded that it depends upon outcome of the assessment year 2008-09 to tax the income escaped for the assessment year 2009-2010 and therefore the assessing officer is merely suspecting that income for the assessment year 2009-2010 may or may not escape assessment. This being guess work was held to be unsustainable placing reliance on the decision of the Hon'ble SC in ITO vs Lakhmani Mewal Das

Source: HC, Calcutta in PCIT vs Salapuria Soft Zone vide [2023] 150 taxmann.com 106 (Calcutta) on May 02, 2023

Where during assessment proceedings which had culminated into order of assessment, complete scrutiny was made with respect to transaction relating to sale of land and issue relating to large cash deposits in bank account of assessee had also been gone into and fact that assessee purchased/sold one or more property during year had been dealt with and no addition was made, it would not be open for Respondent authority to re-open assessment on same said issue

Facts

The assessee is an individual and citizen who filed his original return of income for AY 2017-18 which was later on revised declaring total income at INR 4.50 crores. The return of income was taken up for scrutiny and notices were issued specifically to verify computation of gain/loss on sale of property and the deduction from the capital gains. The main basis upon which the impugned action is tried to be initiated is that assessee sold his share of the land to another co-owner for INR 5.14 crores crores (i.e. rate of INR 5450 per sq. mtr. x 40,974 per area x 23% share) and according to the AO, rate should not be of INR 5450 per sq. mtr., but the rate of INR 12,250 per sq. mtr., which is applicable on open land, same be applied and thereby an attempt is made by assessee to sold the land by lower rate than which was prevailing and based upon such brief, the assessee is dealt with by the Respondent authority. It has been contended that this entire exercise which has been undertaken is based upon a change of opinion which is impermissible. After considering all the details and documents submitted during the course of original assessment proceedings, the AO assumed assessment on 04-12-19 u/s 143(3) accepting return of income as assessed income without making any addition. Despite such detailed assessment, almost a period of two years, the AO exercised the power u/s 148 asking the assessee to submit return of income for AY 2017-18 and in response thereto, the assessee, submitted return of income in due compliance. The Respondent authority provided the reasons on 27-07-21 for re-opening and against the same, specific objection as well re-joinder to objection was submitted for challenging the validity of notice u/s 148 which were disposed of by the Respondent against which the present appeal was filed.

Ruling

HC held that re-opening of the case on the basis of factual error pointed out by the audit party is permissible, placing reliance on the decision delivered by the Hon'ble Apex Court in the case of Reckitt Bencksier Healthcare India (P.) Ltd., wherein it has been propounded that it is settled position of law that reason to believe need to be of the AO alone and same cannot be substituted based upon receiving objection from the Audit Department and as such, considering the aforesaid situation which is prevailing on record, and having found this fundamental error as indicated above, we are of the opinion that a case is made out by the assessee. Accordingly, the present petition was allowed.

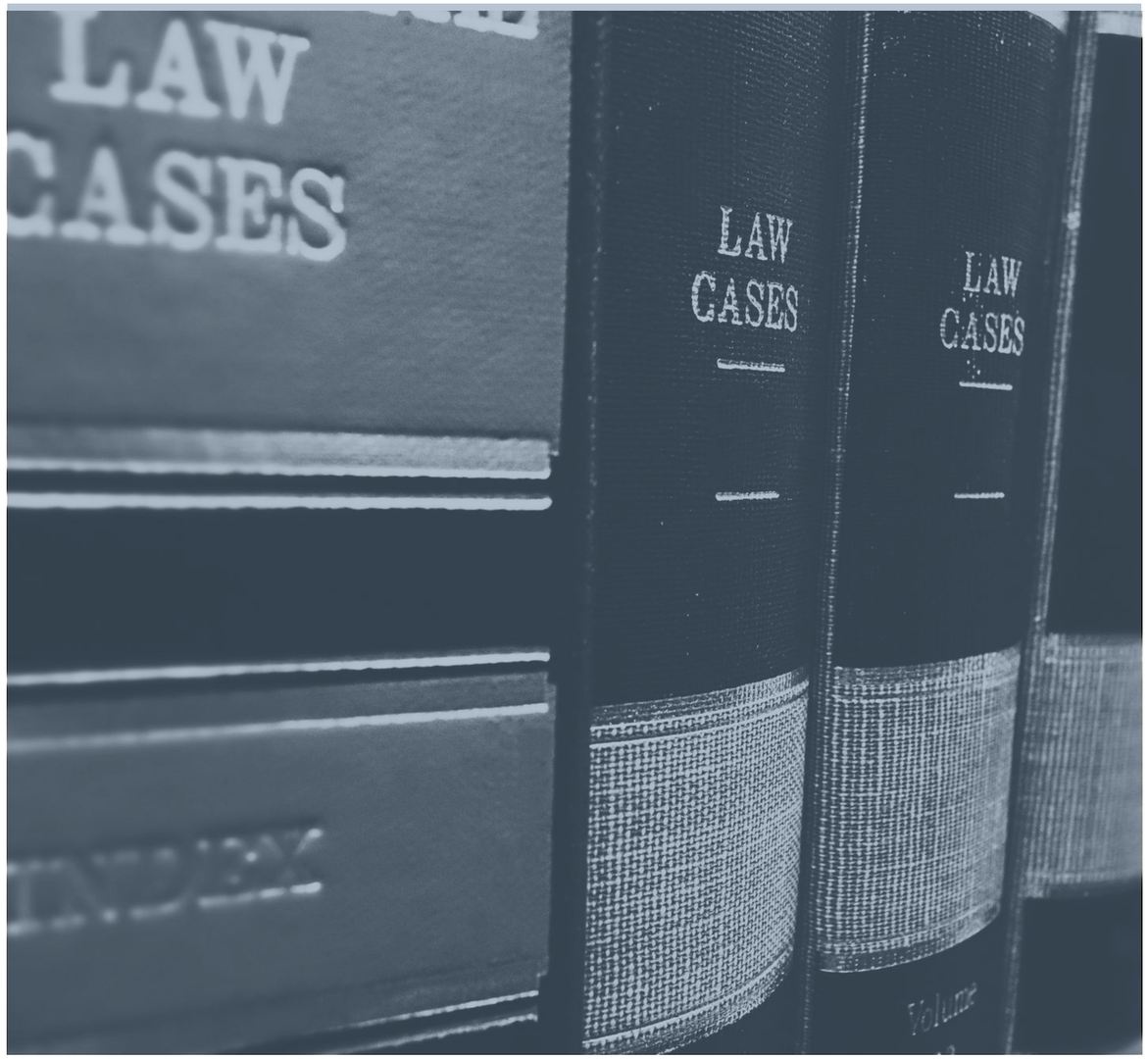
Source: HC, Gujarat in Limbabhai Ishwarbhai Jodhani vs ACIT vide [2023] 150 taxmann.com 291 (Gujarat) on May 03, 2023

Transfer of a case u/s 127 continues to exist even after introduction of E-assessment Scheme/Faceless Assessment Scheme, thus, transfer of assessments of assessee's to Central Circle was in accordance with law, hence, justified

Facts

The present batch of writ petitions has been preferred by five Charitable trusts as well as three individuals wherein the assessee's have challenged the transfer orders passed u/s 127, whereby the jurisdiction of the assessee's have been transferred from Exemption Circle (in cases of Trusts) and ACIT Circle 52(1) (in cases of individuals) to DCIT, Central Circle-27 and in the case of Aam Aadmi Party from Exemption Circle to DCIT, Central Circle -03. All the Income Tax Officers i.e. both transferor and transferee are located within the same city, namely, Delhi. The assessee is registered as a charitable institution u/s 12A and assessments have been completed u/s 143(3)/143(1) till the AY 2017-18. Charitable purpose of the assessee has never been doubted by the Revenue till the said AY. By way of Finance Act, 2018, the concept of E-assessment was introduced in the Act by insertion of sub-Sections (3A), (3B) and (3C) to Section 143 and the Central Government was delegated with the power to make and notify a Scheme for conducting of E-assessments.

The assessee received notices from National e-Assessment Centre u/s 142(1), calling upon to submit certain documents/details for the ongoing assessment proceedings for the AY 2018-19, which according to the assessee-Trust were duly complied with. During the pending of ongoing E-assessment, CIT (Exemption), New Delhi passed the impugned order u/s 127, transferring jurisdiction of the assessee from DCIT (Exemption), New Delhi to Respondent. Later on, on 13-01-21 & 25-01-21, by way of notices u/s 142(1), the National e-Assessment Centre called upon the assessee to submit certain additional information for the ongoing E-assessment proceedings for the AY 2018-19. On 03-02-21, Respondent issued impugned notice u/s 142(1) to the assessee for AY 2018-19. By way of the present petition, the assessee has challenged the impugned order dated 08-01-21 passed u/s 127 and the impugned notice dated 03-02-21 issued by Respondent u/s 142(1).



Ruling

HC is of the view that the present cases involve the interpretation of Notification's dated 12-09-19 and 13-08-20 and not Section 144B, as at the time of passing of the impugned orders. It is pertinent to mention that the Faceless Assessment Scheme was incorporated vide the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 with effect from 01-04-21. Consequently, HC held that it is necessary to examine the scope, ambit as well as interpretation of Section 127 and whether in view of the two Notifications, the power of transfer u/s 127 has been denuded.

Further, HC also stated that, neither the E-assessment nor the Faceless Assessment Scheme in any manner modifies the power to transfer cases from one AO under a PCIT to another AO under another PCIT who are holding non-concurrent charges. The aforesaid Schemes only authorize transfer back of the case to the Jurisdictional AO holding original jurisdiction which he never loses as only the function of assessment is carried out by the Faceless AO holding concurrent jurisdiction. But, when a 'case' is transferred u/s 127, "all proceedings under this Act" gets transferred. The power u/s 127 to transfer the "case" or "all proceedings under the Act" is nowhere provided for under the aforesaid schemes. Moreover, the submission that the Notifications dated 12-09-19 and 13-08-20 permits transfer in the first instance only from National e-Assessment Centre to the Jurisdictional AO is untenable in law as there may be cases where no assessment is pending before the Faceless Assessing Officer, yet the case of the Assessee is transferred to Central Circle. Consequently, Section 127 to the extent it permits transfer from one AO under a PCIT to another AO under another PCIT who are holding non-concurrent charges remains untouched and continues to apply in its pristine form. Accordingly, the present writ petitions along with pending applications were dismissed.

Source: HC, Delhi in Sanjay Gandhi Memorial Trust vs CIT (Exemption) vide [2023] 150 taxmann.com 459 (Delhi) on May 26, 2023

Reopening based on general information from Investigation Wing without recording any specific reasons on how deposits in HSBC account was from income earned in India; Reopening proceedings were quashed

Facts

The aforesaid appeals have been filed by the assessee against separate impugned order of even date 30-06-2016 for the quantum of assessment passed u/s. 143(3) r.w.s. 147 for AYs 2006-07 and 2007-08. In both the years, the common issue relates to validity of reopening u/s.147 r.w.s. 148; and addition of INR 2.27 crores on the ground of balance appearing in HSBC Bank Account, Geneva of USD 5,05,262 in AY 2006-07 which has not been disclosed; and similar balance of USD 6,07,950 in AY 2007-08. The assessee is an individual who is married to a British citizen and is settled in London. Undisputedly, she has been outside India since FY 1999-00 to till date and had status of NR/RNOR. Even prior to that, from FY 1989-90 to 1998-99, she was a NR/RNOR. As a NR, the assessee was maintaining NRE account & NRO account in India. However, the assessee was filing the return of income in India in the status of NR in respect of income chargeable to tax in India in accordance with the provisions of Income Tax Act, which generally comprises of capital gains and income from other sources like dividend, interest, etc. For the AY 2006-07 assessee had filed return of income in India declaring income of INR 15.86 lacs in the return of income filed on 30-03-07 in the status of NR and in the AY 2007-08, return of income was filed on 31-03-08 in the same status of NR declaring total income of INR 4.61 crores.

Prior to the issuance of notice u/s 148 and recording of the reasons, ADIT (Investigation), Mumbai had issued summons u/s 131 to the assessee on the basis of certain information received from Government of India in the form of Base Note from French Government from which it was gathered that, assessee was the beneficial owner of HSBC bank account in Geneva for amount of 5,05,262 USD as on 31-12-05 in the code of account opened on 17-08-05 in the name of Amaya Ltd; and USD 6,07,950 as on 31-12-06 in the same account. The ADIT asked to file all the financial statements, profit and loss account, balance sheet, audit report alongwith annexure, return of income, bank book and cash book, all bank statements whether inside India or outside India and copy of passport. In response, assessee filed a letter dated 08-12-11 giving all the requisite details. It was categorically submitted that she is a non-resident Indian and she had visited India on a very short visits for business and personal purposes. She had also given duration of stay in India and her residential status for the purpose of income tax. Apart from that, all the requisite details were filed. Thereafter, assessee again furnished all the information as was required from the ADIT which was submitted before him.

Ruling

ITAT held that at the time of hearing, we had also called for the entire statement of bank accounts from the period 17-08-05 to 31-03-06 for all the three bank accounts in US currency, Euro currency and GBP currency and all of the entries are by way of clearance and nowhere it can be inferred that any amount has been deposited from Income earned from India. The entries of these bank statements have already been incorporated in the ld. CIT(A)'s order also and nowhere any finding has been given that any credit in the said bank account pertains to any income earned from India even in terms of Section 9. ITAT also held that all the findings of the ld. AO as well as ld. CIT(A) are based on certain

hypothesis. ITAT stated that in our opinion, the reasons recorded by the ld. AO itself does not confer any jurisdiction to the AO to reopen the case of a non-resident u/s 147 based on some vague and general information as noted in the reasons recorded and without ascribing how income chargeable to tax has escaped assessment in India. Therefore, on legal issue alone, the entire proceedings is quashed and consequentially entire re-assessment order is held as “null and void”. Accordingly, on the legal issue both the appeals of the assessee were allowed.

Source: ITAT, Mumbai in Ms. Amrita Jhaveri vs DCIT vide [2023] 150 taxmann.com 371 (Mumbai - Trib.) on May 09, 2023

Penalty u/s 271B is justified for failure to get books audited in a case where no books of account were maintained

Facts

The assessee has been running the business of imparting tuition classes. The assessment was made for the year under consideration on estimation basis on account of non-maintenance of books of accounts applying provisions of Section 145(3). The ITAT, Ranchi Bench vide order passed in ITA No. 209/Ran/2019 dated 07-06-19 has estimated the income of the assessee at INR 7.61 lacs being 8% of gross receipts u/s 145(3) on account of non-maintenance of books of accounts and on estimation of net profit. The assessee, admittedly, was required to get his books of account audited as required u/s 44AB and on account of failure to do so, the AO levied penalty u/s 271B of the Act which has been confirmed by the CIT(A). Now, the contention of the ld. Counsel for the assessee is that where the assessee did not maintain books of account, the penalty u/s 271B could not be levied for failure of the assessee to get books of account audited as the question of audit of books of account does not arise where the books of accounts have not been maintained at all. The ld. Counsel for the assessee in this respect has relied upon the decision of the **Hon'ble Allahabad High Court in the case of CIT vs. Bisauli Tractors reported in (2007) 165 taxman 0001.**

Ruling

ITAT held that the object of requiring the assessee to get his books of accounts audited u/s 44AB is to get a clear picture of the assessee's accounts so as to enable the Income Tax Authorities to assess true and correct income of the assessee. The penalty u/s 271B is attracted for failure of the assessee to get the books of account audited. Since, in this case, the assessee did not get his books of account audited, therefore, as per the provisions of section 44AB r.w.s. 271B, the AO had rightly levied the penalty u/s 271B. ITAT, therefore, did not find any merit in the appeal of the assessee and accordingly dismissed the same.

Source: ITAT, Ranchi in Rakesh Kumar Jha vs ITO vide [2023] 150 taxmann.com 298 (Ranchi-Trib.) on May 15, 2023

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