LEGAL DECISIONS

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DIRECT TAXES

1. Are proceedings under section 147 open only qua items of under-assessment or can they be initiated even on other issues?

Amrinder Singh Dhiman v. Income-tax Officer (2005) 142 Taxman 322 (P&H)

Relevant sections: 147 & 148

Decision: *The proceedings under section 147 are open only qua items of under-assessment. The finality of assessment proceedings on other issues remains undisturbed.*

The petitioner was engaged in the business of exporting goods outside the country. He filed his return of income for the relevant assessment year which also included an audit report prescribed under section 80HHC. The reassessment was in respect of the claim of the petitioner under section 80HHC. But the department had sought information in respect of various other issues in respect of which, the proceedings under section 148 had not been initiated.

The High Court observed that when proceedings under section 147 are initiated, the proceedings are open only *qua* items of under-assessment. The finality of assessment proceedings on other issues remains undisturbed. The High Court observed that it does not make a difference whether the assessment proceedings have become final on account of framing an assessment under section 143(3) or on account of non-issue of a notice under section 143(2) within the stipulated period. A general inquiry could only be made by the Assessing Officer by issuing a notice under section 143(2) within the stipulated period. After the expiry of the stipulated period, the Assessing Officer cannot seek material unconnected for the reasons of reassessing the income. The High Court held that the Assessing Officer could not be allowed to make fishing inquiry to probe if any other income had escaped assessment or not.

Note *– The power of the Assessing Officer to reconsider the material and evidence at the time of reassessment cannot be untrammeled but should be laced with reasonable restrictions. This decision makes it clear that the Assessing Officer cannot make fishing inquiries on concluded matters.*

2. Is it open for the revenue to retain jewellery of an assessee till payment of fees of special auditor appointed under section 142(2A), where the assessee had made payment of all taxes and interest as per the direction of Settlement Commission?

Pradeep Mishra v. CIT (2005) 142 Taxman 425 (Delhi)

Relevant sections: 142

Decision: *The revenue can retain jewellery of the assessee till payment of auditor's fee*

In this case, the assessee had made payment of all taxes and interest as per direction of Settlement Commission. However, fees of special auditor appointed under section 142(2A) was due. The issue under consideration is whether it would be open for the revenue to retain jewellery of assessee till payment of auditor's fee.

The High Court held that the revenue can retain jewellery of the assessee till payment of auditor's fee. However, the High Court took into consideration the petitioner's request for release of articles other than jewellery (in order to make the payment of auditor's fees), and directed release of assets other than jewellery.

3. Is the CBDT competent to admit an application for refund even after the expiry of period prescribed under section 239 for avoiding genuine hardship in any case or class of cases?

Jaswant Singh Bambha v. CBDT (2005) 142 Taxman 528 (P&H) (FB)

Relevant sections: Sections 119(2) and 239 of the Income-tax Act, 1961 and sections 5 and 29(2) of the Limitation Act, 1963.

Decision: *By virtue of power conferred on the CBDT under section 119(2), it is fully competent to admit an application for refund even after the expiry of the period prescribed under section 239 for avoiding genuine hardship in any case or class of cases.*

The assessee filed a refund claim under section 237. Since the claim was made after the period of limitation prescribed under section 239, he moved an application for condonation of delay under section 119(2)(b) which was rejected by the Board without assigning any reasons. The assessee filed a writ petition challenging the said order. When the matter came up for hearing before the Division Bench, a decision of another Division Bench of the High Court in *Niranjan Dass v. CBDT (2004) 266 ITR 489* was relied upon to contend that the mandatory provisions of section 239 were not

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amenable to relaxation by the Board through instruction under section 119. The Division Bench raised doubt about the correctness of the views expressed in said decision and referred the matter to the Full Bench.

The High Court observed that under section 239, no power has been conferred on the Assessing Officer to entertain a claim for refund after the period prescribed thereunder. However, section 5 of the Limitation Act, 1963 permits the admission of an application beyond the period of limitation, if the applicant satisfies the Court that he had sufficient cause for not making the application within such period. This provision has general application.

Section 29(2) of the Limitation Act provides that section 5 of the Limitation Act shall apply in cases of special or local laws to the extent to which it is not expressly excluded by such special or local laws. In other words, section 5 of the Limitation Act cannot be resorted to only when it is expressly excluded by such special or local law.

Section 239 has not expressly excluded the application of section 5 of the Limitation Act, 1963. In fact, a conjoint reading of sections 239 and 119(2) clearly shows that the application of section 5 of the Limitation Act, 1963 to the claims of refund has been specifically included in the Act. Thus, the power given to the Board under section 119(2) to entertain a belated claim is nothing but incorporation of the provisions of section 5 of the Limitation Act. Therefore, by virtue of power conferred on the CBDT under section 119(2), it is fully competent to admit an application for refund even after the expiry of the period prescribed under section 239 for avoiding genuine hardship in any case or class of cases.

Note- *This case is a pointer as to why the Income-tax Act, 1961 should not be read in isolation, but other laws which have a bearing on the Income-tax Act have to be considered and a holistic view has to be taken on certain issues.*

4. Can the amount of duty drawback be treated as income derived from an industrial undertaking so as to entitle assessee a deduction under section 80-I ?

CIT v. Ritesh Industries Ltd. (2005) 142 Taxman 551 (Delhi)

Relevant sections: 28 and 80-I

Decision: *Merely because under the scheme to encourage exports the duty is refunded subsequently by way of 'duty drawback', it cannot be regarded as the profit or gain 'derived' from the industrial undertaking.*

The assessee-manufacturer received 'duty drawback' for export of garments made by him and claimed the same as 'profits and gains derived from an industrial undertaking' for purpose of deduction under section 80-I.

The High Court observed that the assessee pays duty on the raw materials utilized as inputs and adds his profit component on the total component of costs to arrive at the sale price. It is this profit which is included in the expression 'profits and gains derived from an industrial undertaking'. Merely because under the scheme to encourage exports the duty is refunded subsequently by way of 'duty drawback', it cannot be regarded as the profit or gain 'derived' from the industrial undertaking. It may constitute profits or gains of the business by virtue of section 28, but, it cannot be construed as profits or gains 'derived' from the industrial undertaking since its immediate and proximate source is not the industrial undertaking but the scheme of duty drawback. Irrespective of whether duty drawback is allowed, the profit 'derived' from the industrial undertaking remains to be the profit. On account of the duty drawback, business profit may be increased, but so far as the profits and gains 'derived' from an industrial undertaking is concerned, it will not increase. It will remain the same.

Note *– Even though this decision is in respect of section 80-I, it would be relevant in respect of sections 80-IA and 80-IB, since both these sections also refer to profits and gains "derived from" an undertaking/industrial undertaking, respectively.*

5. Can deduction under section 80P(2)(d) be allowed on gross income?

CIT vs. Dugdh Utpadak Sahkari Sangh Ltd. (2005) 142 Taxman 611 (All.)

Relevant sections: 80AB & 80P(2)(d)

Decision: *Even though section 80P(2)(d) provides deduction of the whole of interest income, it is subject to the provisions of section 80AB. Therefore, the deduction under section 80P(2)(d) is allowable only on the net income.*

The respondent co-operative society claimed deduction under section 80P(2)(d) on the gross amount of interest received during the relevant assessment years. The ITO found that the payment of interest on loan taken by the society exceeded the receipts and therefore, no separate deduction under section 80P(2)(d) could be given. In appeal before the Commissioner(Appeals), the deduction was allowed on the gross amount. The revenue's appeal before the Tribunal failed.

The High Court observed that even though section 80P(2)(d) provides deduction of the whole of interest income, it is subject to the provisions of section 80AB, which was inserted by the Finance (No.2) Act, 1980 w.e.f. 1.4.81. Therefore, the High Court held that the Tribunal was not legally correct in holding that the deduction under section 80P(2)(d) was allowable on the gross amount of income from interest.

Note *– Section 80AB provides that the deduction to be made or allowed under any section in Chapter VI-A under the heading "C. – Deductions in respect of certain incomes" shall be allowed only to the extent to which such income is included in the gross total income*

of the assessee. Therefore, section 80P(2)(d), being part of Chapter VI-A, is subject to section 80AB, and hence deduction under section 80P(2)(d) has to be allowed only on net income.

6. Is the High Court empowered to decide an appeal under section 260A without adhering to the procedure prescribed under section 260A i.e. without insisting on statement of substantial question of law in memorandum of appeal and formulation of the same at the time of admission?

M. Janardhana Rao v. Jt. CIT (2005) 142 Taxman 722 (SC)

Decision: *Without insisting on the statement of substantial question of law in the memorandum of appeal and formulating the same at the time of admission, the High Court is not empowered to generally decide the appeal under section 260A.*

The assessees were partners of a firm, which was dissolved and the erstwhile partners continued the business as members of an AOP. This entity continued till the assets of the firm were sold. The revenue authorities held that the amount received by way of consideration after statutory adjustments amounted to receipt from a slump sale and was, therefore, taxable under the head "Capital Gains". The conclusions of the revenue authorities were challenged by the assessees before the Tribunal. The cross appeals before the High Court were disposed of by the common judgment.

In the instant appeal to the Supreme Court, the assessee submitted that the arguments raised by them relating to non-applicability of the principle of slump sale were not considered by the High Court and that the questions were formulated by the High Court for adjudicating the appeals after the arguments were concluded for the purpose of rendering the judgment and not when the appeals were admitted.

The Supreme Court observed that an appeal to the High Court lies only when a substantial question of law is involved. It is essential for the High Court to first formulate question of law and thereafter, proceed in the matter. Without insisting on the statement of substantial question of law in the memorandum of appeal and formulating the same at the time of admission, the High Court is not empowered to generally decide the appeal under section 260A without adhering to the procedure prescribed in that section. Further, the High Court must make every effort to distinguish between a question of law and a substantial question of law. An appeal under section 260A can be only in respect of a 'substantial question of law'. The expression 'substantial question of law' has not been defined anywhere in the statute. But it has acquired a definite connotation through various judicial pronouncements. There is no scope for interference by the High Court with a finding recorded when such finding could be treated to be a finding of fact.

The Apex Court observed that from the judgment of the High Court in the instant case, it was clear that no substantial question of law was formulated at the time of admission of the appeal. The High Courts had obviously formulated questions subsequently after conclusion of arguments for the purpose of adjudication, which was clearly against the scheme of section 260A. The Apex Court therefore set aside the judgment of the High Court and remitted the matter back to the High Court to deal with the same afresh keeping in view the prescriptions of section 260A.

***Note** – In order to determine whether there is a substantial question law, the Apex Court laid down the following tests in Sir Chunilal v. Mehta & Sons Ltd v. Century Spinning & Mfg. Co. Ltd. AIR 1962 SC 1314 –*

(1) whether directly or indirectly it affects substantial rights of the parties; or
(2) the question is of general public importance; or
(3) whether it is an open question in the sense that issue is not settled by pronouncement of the Supreme Court or Privy Council or by the Federal Court; or
(4) the issue is not free from difficulty, and
(5) it calls for a discussion for alternative view.

The Apex Court has reiterated that it is necessary for a substantial question of law to be formulated at the time of admission of appeal itself, in the absence of which the High Court is not empowered to decide an appeal under section 260A.

INDIRECT TAXES

7. Whether the benefit of SSI exemption would be available if some other traders have used the trade mark earlier which is now being used by the assessee on his goods?

CCEx, Chandigarh v. Bhalla Enterprises 2004 (173) E.L.T. 225 (S.C.)

Decision: *Exemption cannot be denied merely because some traders, even in a remote area of country, have used the trade mark earlier.*

As per the provisions of the notification governing SSI exemption, the exemption is not available in respect of goods bearing a brand name or trade name (registered or not) of another person. The question, which had been raised in this case before the Apex court, was that whether the benefit of exemption would be available to the assessee if the brand name used by such assessee had been used earlier by some other trader in some remote part of the country.

The Supreme Court clarified that an assessee would not be entitled to SSI exemption if it uses same/similar brand name with the intention of indicating a connection between the goods (in respect of which exemption is

sought) and owner of such brand name or uses the name in such a manner that it would indicate such connection. Therefore, it was held by the Apex Court that if the assessee is able to satisfy the assessing authorities that there is no such intention or that the use of the brand name is entirely fortuitous and could not on a fair appraisal of the marks indicate any such connection, the assessee would be entitled to the benefit of exemption.

Note: This decision of the Apex Court emphasises the necessity of a connection between the owner of the trade mark and the assessee's goods for denying the benefit of SSI exemption. In other words an assessee would not be entitled to the benefit of SSI exemption only if he uses the brand name belonging to some other person with an intention of indicating a connection with the owner of the trade mark/brand name and his goods.

8. Does the Appellate Tribunal has unrestrained powers?

Coats Viyella India Ltd. v. Commissioner of Central Excise 2004 (173) E.L.T. 229 (S.C.)

Decision: *Tribunals do not have unbridled powers to differ from the view expressed by the first appellate authority.*

In this case the CESTAT reversed a reasoned order of the lower authority without indicating the reasons thereof. In this regard it was held by the Supreme Court that Tribunals do not have unbridled powers to differ from the view expressed by the first appellate authority. The Appellate Tribunal while reversing a reasoned order of the lower authority must indicate reasons as to how the conclusion of the lower authority were erroneous. It was held by the Supreme Court that when a view different from that of the lower authority is taken by the Tribunal, reasons to support such view must be indicated clearly expressing as to why lower authority's view is wrong.

9. Can duty be demanded when the show cause notice is issued only for confiscation of goods and imposition of penalty?

Commissioner of Customs, Ahmedabad v. Chandarkant T.Shah 2004 (173) E.L.T. 420 (Tri.- Mumbai)

Decision: *When there is no demand for duty in the show cause notice, the adjudicating authority cannot demand any duty, since the proceedings before him pursuant to the show cause notice, are restricted to determining confiscation and penalty.*

In this case the Revenue had sought a modification of the order of the Assistant Commissioner of Customs so as to include the requirement for the assessee to make payment of duty due on the seized goods. In the order of the Assistant Commissioner, the goods seized from the premises of the assessee were subjected to confiscation and were permitted to be redeemed on payment of redemption fine. Besides, a penalty was also imposed on the assessee.

The Tribunal observed that show cause notice issued to the assessee contained only two proposals namely:

(1) Proposal for confiscation of goods under section 111(d) of the Customs Act.

(2) Proposal for penalty

There was no demand of duty in the show cause notice. On that basis the adjudicating authority could not have demanded any duty, since the proceedings before him pursuant to the show cause notice, were restricted to determining confiscation and penalty. Therefore, it was held by the Tribunal that no fault could be found in the order of the Assistant Commissioner of Customs and accordingly demand of duty from the assessee was not proper.

Note: The scope of show cause notice has been made clear by this decision. The Tribunal has pointed out that the adjudicating authority cannot go beyond the proposals specified in show cause notice. Only the matters specified in the show cause notice can be adjudicated by the adjudicating authority.

10. Can unaccounted goods be confiscated only when there is an attempt to remove them from the factory premises?

K-Three Electronics Pvt. Ltd. Commissioner of Central Excise, Noida 2004 (173) E.L.T. 432 (Tri. – Del.)

Decision: *For the purpose of confiscation of unaccounted goods, it is not a pre-requisite that there should be an attempt to remove the same from the factory premises.*

The assessee manufactured colour television sets. As per the provisions of Central Excise Rules, 2002 every assessee has to maintain proper records on a daily basis, indicating the particulars regarding description of the goods manufactured, opening balance, quantity manufactured, quantity removed etc. However, the assessee did not record the production in daily production records but had a practice of recording the same in RG-1 register (production records) only at the time of dispatch. As a result, the goods were confiscated on the ground of contravention of the rules. The assessee contended that the contravention was not correct in law as the goods in question had not been removed clandestinely from the factory premises.

The Tribunal reiterated that Rule 25 of the Central Excise Rules, 2002 provides for confiscation of the goods which are not accounted for by the manufacturer. Confiscation of the goods which are not accounted for is permissible under the law. The Tribunal held that for the purpose of confiscation of unaccounted goods, it is not a pre-requisite that there should be an attempt to remove the same from the factory premises. Therefore, the confiscation of the goods was held to be correct in law.

Note: CESTAT has clarified that goods can be confiscated even if they had not been removed clandestinely from the factory premises. Unaccountal of the goods in the excise records is in itself a contravention of the Central Excise Rules for the goods to be confiscated. The daily stock record was required to be maintained in prescribed form termed as RG-1 Register, which was scrapped w.e.f. 30.6.2000. However, production records are still required to be maintained.

11. Can a refund claim be made where prices were reduced through negotiations but only after the assessment of Bill of Entry?

Ashok Leyland Ltd. v. CC, Chennai 2004 (173) ELT 518 (Tri. – Chennai)

Decision: *Without filing any appeal against the assessment of bill of entry, the same cannot be challenged by filing a refund claim.*

The appellants had imported certain goods. The goods were assessed on the basis of the invoice price and duty paid accordingly. Subsequent to clearance of the goods against such payment of duty, the appellant negotiated with their supplier and obtained reduction of price of such goods and the latter issued credit to the former for the differential price (difference between the price indicated in the invoice and the reduced price). The appellant filed a refund claim for the differential duty on the differential value of the goods.

The Tribunal asserted that the assessment of bill of entry had not been appealed against by the appellant and the same became final and binding on them. It was not open to them under the Customs Act to challenge the assessment through refund claim filed under section 27. The Tribunal observed that the appellants' claim in the refund application for revaluation of the goods on the basis of post-importation reduction of price was not tenable in law as it was contrary to the provisions of section 14 of the Customs Act. The lower price which was arrived at in negotiations between the appellants and their supplier *subsequent to the clearance of the goods* could not be the transaction value under section 14. Hence, the refund claim filed by the appellant was rejected.

Note: This case shows that after a bill of entry has been assessed and duty being paid, the assessee cannot seek a refund under section 27. In other words assessment of a bill of entry is an appealable proceeding and the same cannot be challenged through refund claim under section 27 of the Customs Act..

In case of Shyam Oil Cake Ltd. V. CCEx., Jaipur, 2004 (174) ELT 145 [reported in April, 2005 issue of Journal "The Chartered Accountant"] the Hon'ble Supreme Court has held that refining/processing of edible vegetable oil does not amount to manufacture. However, this no longer holds good in view of clause 87 of the Finance Bill, 2005. The said Bill seeks to insert a Chapter note in Chapter 15 of the First Schedule to the Central Excise Tariff Act, 1985 with retrospective effect from 1.3.1986 to provide that in respect of refined edible oils the process of refining shall amount to manufacture. ■

Update on Tax Information Network

Income Tax Department (ITD) has embarked on a modernization drive of Income Tax Administration with a view to make tax administration more effective, furnishing of returns convenient, reduce compliance cost and bring about greater transparency. Towards this objective ITD is establishing a nationwide Tax Information Network (TIN) with the support of National Securities Depository Ltd. Following is a brief overview of the key procedures for filing various returns and information on services provided under TIN.

e-TDS/e-TCS

Prepararation of e-TDS/e-TCS return: The e-TDS/e-TCS return file should be prepared in clean text ASCII format with txt as filename extension in accordance with ITD prescribed file formats. The deductor/collector can prepare e-TDS/e-TCS return using NSDL Return Preparation Utility, freely downloadable at www.tin-nsdl.com. This utility can be used to prepare returns having up to 20,000 records. The e-TDS/e-TCS returns can also be prepared using software/services provided by any other entity.

Verification of e-TDS/e-TCS return: Verify the e-TDS/e-TCS return file through NSDL File Validation Utility (FVU) freely downloadable at www.tin-nsdl.com.

Furnishing e-TDS/e-TCS return: Furnishing e-TDS/e-TCS return CD/floppy with any TIN-Facilitation Centre (TIN-FC) managed by NSDL (list available at www.tin-nsdl.com). You will receive Provisional Receipt as proof of filing. Separate Form 27A/27B in physical form duly filled and signed by an authorized signatory to be furnished with each e-TDS/e-TCS return (in case furnished with a TIN-FC). Do not use more than one CD/floppy for furnishing one return. Ensure that control totals, TAN and name stated in return file matches with what is stated on Form 27A/27B.

In case of change in name of the company, attach a letter stating the same or copy of RoC Certificate. In case you are furnishing revised return on account of rectification of missing PAN, do so within seven days from the date of Provisional Receipt. In case different branches are furnishing separate returns, each branch should have a separate TAN. A digitally signed e-TDS return can also be directly uploaded to NSDL at www.tin-nsdl.com.

Maximum fee payable per return furnished: Up to 100 records Rs. 25, for 101 to 1000 records Rs. 150, for more than 1000 records Rs. 500.

The e-TDS returns will be filed quarterly for financial year 2005-06. Once the forms and file formats are notified by the ITD the same will then be displayed on the website (www.tin-nsdl.com and www.incometaxindia.gov.in) and NSDL Return Preparation will then be made available on the website.

Details about procedures pertaining to TAN and PAN besides other related issues are available at http://tin.nsdl.com.