

Legal Decisions with Notes

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1. *CIT v. Sarabhai Pvt. Ltd. [2003] 263 ITR 197 (Guj)*

Facts/Issues

The assessee company let out various properties to the tenants. It entered into agreements to give the properties on lease as well as to provide certain services, amenities and facilities by the assessee landlord to its tenants. The assessee company contended that the service charges should be assessed under the head 'income from business'. It also began to file the returns of income under the head 'business'. Where there was composite letting i.e., rental income as well as income from service charges the same was shown under the head 'Income from business'. In cases where there was simple letting the rental income was shown under "Property income". The Commissioner (Appeals) accepted this and held that in respect of building no depreciation was allowable under 22 of the Act, and the same was allowed under section 57 of the Act. The Tribunal held that the income from services was assessable as income from other sources, but depreciation was not allowable under section 57 of the Act.

Decision

Held that the income which the assessee had received towards rent from the property leased by it should be treated as "income from house property" whereas income received by the assessee towards different services rendered to the tenants should be treated as "profits and gains of business or profession" and accordingly the allowable expenditure shall be deducted from the respective heads of the said income. The Tribunal was right in allowing collection charges amounting to 6 per cent of the annual letting value under the head "House property income". However, as regards the balance amount the assessee was entitled to claim deduction under section 28. The Tribunal was not right in law in allowing the claim of the assessee regarding depreciation amounting to Rs.50,486 on other assets. The assessee was entitled to depreciation treating income under the head "Income from business" under section 28. The

Tribunal was justified in accepting the income from composite letting as income from business and the Tribunal was justified in allowing 1/6th repairs of the properties in question in place of repairs to building claimed as business expenses.

2. *CIT v. Juhi Metal Works [2003] 263 ITR 287 (All.)*

Facts/Issues

If there is information regarding the law and not its interpretation by the audit party, and if the assessing authority applies his mind to the said legal position and finds that it is a case for reopening, is the reopening valid under section 147(b) of the Income-tax Act, 1961?

Decision

In the instant case, the audit party had pointed out for the assessment year 1976-77 that the assessee was not manufacturing the goods by itself. It was getting them manufactured through some other party. It had also been pointed out in the assessment year 1977-78 by the report of the audit party that the accounts had not been audited as required under section 80J(6A). The assessee was not entitled for the benefit under section 80J of the Act as the audit report in both the cases furnished information regarding the law and communicated it to the assessing authority. The reassessment proceedings for 1976-77 and 1977-78 were valid.

Note

The Direct Tax Laws (Amendment) Act, 1987 substituted a new section 147 dealing with income escaping assessment with effect from A.Y. 1989-90. Prior to that, clause (b) of section 147 provided that notwithstanding that there has been no omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, if the Assessing Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year, he could re-open the assessment. It was held by the Supreme Court that an opinion by the internal audit party could not constitute

“information” under clause (b) and hence the Assessing Officer could not re-open the assessment. The case digested above is distinguishable.

3. *CIT v. Holiday Travels Pvt. Ltd. [2003] 263 ITR 307 (Mad.)*

Facts/Issues

The important issue is where the income of a company is determined under the provisions of section 115J, is the company liable to pay interest under section 234A and 234B?

Decision

Regarding the levy of interest under section 234A of the Act, the same is levied for the default of the assessee to furnish the return of income before the due date or the failure of the assessee to file the return of income. Hence, the question whether the provisions of section 115J of the Act are invoked or not at the time of regular assessment does not assume any importance when there is a statutory obligation on the part of the assessee to file the return before the due date for filing return which it failed and the interest under section 234A of the Act is levied at the prescribed rate of interest on the amount of tax as determined under section 143(1) of the Act or on regular assessment as reduced by the advance tax, if any, paid and any tax deducted or collected at source. Hence the question that the Income-tax Officer has applied the provisions of section 115J at the time of completion of regular assessment is immaterial in considering the question of levy of interest under section 234A of the Act for the delayed filing of the return or the non-filing of the return. In our view the Appellate Tribunal has committed an error in holding that the interest is not leviable under section 234A of the Act where the provisions of section 115J of the Act are applied. Interest is levied for the delayed or non-filing of the return and the invocation of section 115J of the Act at the time of regular assessment has no relevance in considering the question of failure on the part of the assessee to file the return before the due date.

So far as interest leviable under section 234B of the Act is concerned, the section is clear that it applies to all assessee including a company. The pre-requisite condition for the applicability of section 234B of the Act is that the assessee is liable to pay tax under section 208 of the Act and the expression, “assessed tax” is defined to mean the tax on the total income determined under section 143(1) or on regular assessment as reduced by the amount of tax deducted or collected at source. As observed by the Madhya Pradesh High Court in the case of Itarsi Oils &

Flours P. Ltd. v CIT [2001] 250 ITR 686, there is no exclusion of section 115J in the levy of interest under section 234B of the Act. The expression “assessed tax” is defined to mean the tax assessed on regular assessment which means the tax determined on the application of section 115J of the Act in the regular assessment. The view of the Karnataka High Court is that till the accounts are finalized and the profit and loss accounts are drawn up in the manner provided in the Companies Act, it is not possible to invoke the provisions of section 115J of the Act. It is true that for the applicability of section 115J of the Act, the starting point is the profit and loss account for the relevant previous year which should be drawn in accordance with the provisions of the Companies Act and to the net profit as shown in the profit and loss account, certain amounts which are found in the Explanation to section 115J are added to arrive at the book profit. There is no doubt that the entire exercise under section 115J of the Act is required to be made and can be made only on the basis of the net profit arrived at on the basis of the profit and loss account. However, the question remains whether it is not possible for the assessee to estimate the profit of the current year. It is axiomatic that all assessee who are chargeable to income-tax are required to estimate current income and pay advance tax on the current income. The companies have all along been estimating current income prior to the insertion of section 115J of the Act and paying the advance tax on the current income. It is significant that company assessee have been estimating the total income after providing for the deductions admissible under the Income-tax Act. The shift now is that a company has to estimate its profit and pay advance tax on the basis of the estimate of the profits of the company. It cannot be regarded that it would be an impossible exercise or an insurmountable difficulty for company assessee to estimate the profits of the company during the current year itself and there would no difficulty at all for a company maintaining its account on the mercantile basis to estimate the profits during the current year itself and pay the advance tax on the estimated current profits. There is no logic in the view that if the company can estimate the current income after providing for all deductions that may be available under the Income-tax Act, it is not possible for the company to estimate the profits of the company of the current year.

4. *CIT v. Shree Mahasastha Pictures [2003] 263 ITR 304 (Mad.)*

Facts/Issues

Whether the Commissioner has jurisdiction to

revise summary assessment order under section 236.

Decision

The view of the Tribunal that the Commissioner has no jurisdiction to invoking the statutory powers under section 263 of the Act in cases of order of summary assessment made by the Income-tax Officer was not legally sustainable. Section 263 is widely worded to encompass an order passed by the Assessing Officer including the summary assessment order. There are no limiting words found in section 263 of the Act to exclude the exercise of the power of the Commissioner in the case where the Assessing Officer has made a summary assessment order.

5. *West Bengal Financial Corporation v. Dy. CIT [2003] 263 ITR 332 (Cal)*

Facts/Issues

The West Bengal State Financial Corporation formed under State Financial Corporation Act, 1951 had invested in shares of various companies aggregating to Rs.14,05,785. In the Assessment year 1992-93 the assessee corporation wrote off of the above sum as a bad investment and stated that there was no possibility of getting any amount against the investment in the shares of the company. The Tribunal turned down the said argument stating that these investments by the financial corporation were not loans and the Tribunal further mentioned that the corporation never treated the shares as stock in trade. The claims for write off were turned down by the Tribunal because the shares were still being held by the corporation.

Decision

Once the findings of the Tribunal that the shares were not treated as stock in trade by the corporation but as investments in the said company was accepted, the argument of write off made by the assessee cannot be sustained on any point of law nor on any particular section of the Income-tax Act.

6. *Dy. CIT v. Assam Asbestos Ltd. [2003] 263 ITR 357 (Gau.)*

Facts/Issues

The assessee company was engaged in the business of manufacture of asbestos sheets. It claimed that the transport subsidy being in the nature of capital receipt

should be excluded from the total income. It claimed that the transport subsidy was granted with reference to the cost of transporting raw materials and finished goods to and fro from the backward areas. The Assessing Officer held the transport subsidy to be a revenue receipt and made it taxable, as it had not been exempted under any relevant provision of the Income-tax Act.

The assessee had also claimed the expenditure incurred by him of Rs.6,93,729 in connection with survey and feasibility report and various technical services for setting up the cement plant to be a revenue expenditure on the ground that the main business of the assessee was to manufacture the asbestos sheets. The assessee wanted to set up the mini cement plant for feeding the existing need of the asbestos plant and in the process has incurred the expenses in connection with survey and feasibility report and various technical services for setting up the mini cement plant which of course did not materialize as the Government had not permitted setting up of the mini cement plant. As per the assessee, the proposed cement plant was completely interconnected with the existing business of manufacture of asbestos sheets and the production of cement which is the main raw material for manufacture of asbestos sheets, is so interconnected as to treat them as one and the same business of the assessee. The expenditure incurred by the assessee for the ground work to set up the mini cement plant was for the purpose of carrying on the business more usefully and thus should be allowed as a revenue expenditure.

The Assessing Officer held that the expenses incurred for setting up the mini cement plant were not interconnected with the existing plant for manufacture of the asbestos sheets so as to make it a part of the same business. The proposed cement plant was a separate plant which the assessee operated independently and thus it shall be constituted as a separate business distinct from the asbestos sheets manufacturing business which the assessee company was carrying on for the last so many years. The expenses incurred by the assessee towards various technical services in connection with setting up of the mini cement plant are therefore in the nature of capital expenditure and the assessee was not entitled to any deduction of the expenses incurred.

The Appellate Authority held that the transport subsidy did not come within the ambit of taxable income and thus it had to be excluded. The Tribunal accepted the finding of the Commissioner of the Income-tax (Appeals) that both units were under common management and common funds and common account and so they cannot be treated as separate business of the assessee.

Decision

The law on subsidy is settled by the Apex Court in *Sahney Steel and Press Works Ltd.* [1997] 228 ITR 253. The character of the subsidy in the hands of the recipients whether revenue or capital will have to be determined having regard to the purpose for which the subsidy was given. The source of the fund was immaterial. If the purpose was to help the assessee to set up its business or complete a project the monies must be treated as having been received for capital purposes. When the monies are given to the assessee for assisting him in carrying out the business operations and the money was given only after and conditionally upon commencement of production, such subsidy must be treated as assistance for the purpose of the trade and the subsidies which are of revenue nature would have to be taxed. When the subsidies were granted only after setting up of the new industry and the commencement of production such subsidies would only be taxed as assistance given for the purpose of carrying on the business of the assessee and the subsidies will be treated as revenue nature and would have to be taxed accordingly. The taxing authorities did not consider the purpose for which the subsidy was granted and hence the case was remitted back.

If the mini plant had come into existence it would have been an advantage of enduring benefit but when the plant had not come into existence it could not be said that the expenditure incurred for the project report was an expenditure on capital account. It was apparent that the feasibility report had not brought into being new fixed capital. Preparation of the feasibility report was to find out the viability of establishing the mini cement plant, which in turn would supply and maintain consistent supply of raw material to the already established asbestos plant of the assessee. The expenses incurred by the assessee for preparation of the feasibility report to bring into existence the mini cement plant would be revenue in nature and, therefore, the assessee was entitled to deduct the expenses incurred.

Note

Explanation 10 to section 43(1) provides that where a portion of the cost of an asset acquired by the assessee has been met directly or indirectly by the Central Government or a State Government or any authority established under any law or by any other person in the form of a subsidy or grant or reimbursement by whatever name called, then, so much of the cost as is relatable to such subsidy or grant or reimbursement shall not be included in the actual cost of the asset to the assessee.

This Explanation is a statutory recognition of the principles laid down in *Sahney Steel and Press Works Ltd.* [1997] 228 ITR 253 (SC).

7. CIT v. Kundan Investment Ltd. [2003] 263 ITR 626 (Cal)

The assessee company went in for a public issue of shares. Notices under section 133(6) of the Income-tax Act, 1961 were issued. About 82 subscribers holding 44,000 shares were selected out of the total number of subscribers of public issue. Out of these subscribers 24 had responded. These 24 subscribers represented 29,500 shares, which were accepted to be genuine. 10% representing 2300 shares could not be served. About 48% though served did not respond. The Assessing Officer collected this figure of persons responding at 40%. But the Tribunal had rightly held the same to be 70%. Since 29,500 shares represented 67% on 44,000 shares which can be rounded off to 70%, the balance 30% which was disbelieved by the Commissioner (Appeals) has been held to be genuine transaction by the learned Tribunal.

Decision

These 48,000 shareholders did not respond till the assessment was made and this information was communicated to the assessee. The assessee did not take any steps either to obtain confirmatory letters from these non responding subscribers nor had attempted to produce the subscribers nor any steps to disclose income-tax file numbers of these subscribers. He did not also apply for issuing any notice/ summons under section 131 nor took any other steps to prove the same. The burden, which was initially discharged by the assessee shifted on the revenue. This stood discharged by the revenue after the enquiry was made through issuing notice under section 133(6). When this was so communicated to the assessee it was incumbent to the assessee to take appropriate steps to substantiate the credit worthiness of the subscribers and prove the genuineness of the transaction. It had not done so. Therefore the finding of the Tribunal with regard to the public issue in respect of these 30% subscribers was perverse.

The Income-tax Officer is empowered to lift the veil of corporate identity and find out whether the apparent is real. It is the assessee on whom the onus lies. Unless sufficient materials are produced, the onus does not shift on the revenue. But once the materials are scrutinized and the result of the scrutiny is communicated to the

assessee, the onus shifts from the revenue to the assessee. Then the assessee has to take appropriate steps for proving its case.

8. CIT v. Nivedan Vannijiya Niyojan Ltd. [2003] 263 ITR 623 (Cal)

Facts/Issues

What are the ingredients to be satisfied by the assessee to prevent a cash credit being assessed as income under section 68 of the Income-tax Act, 1961?

Decision

In the case of subscription to the share capital of a company the assessee has to establish the identity of subscribers and proof of their credit worthiness and the genuineness of the transaction. The assessee had failed to establish the three ingredients in respect of an amount of Rs.3,93,000. This amount was assessable under section 68 of the Income-tax Act.

Note

In this case the Tribunal proceeded on the basis of the ratio decided in CIT v. Stellar Investment Ltd. [1991] 192 ITR 287 (Del.). According to the learned Tribunal if the subscribers were not available in that event it can be assessed at the hands of such subscribers and not at the hands of the assessee. But this decision was overruled by the full bench decision in CIT v. Sofia Finance Ltd. [1994] 205 ITR 98 (Del.). Therefore, the ratio decided in Stellar Investment Ltd. [1991] 192 ITR 287 (Del.) is no more good law. Though a SLP was preferred against stellar investment's case and the SLP was dismissed (CIT v. Stellar Investment Ltd. [2001] 251 ITR 263) yet the order of the Apex Court while dismissing SLP is not a ratio decidendi binding under Article 141 of the Constitution of India as was held by the Calcutta High Court in Rubi Trader and Exporters Ltd. case [2003] 263 ITR 300 (Cal) and Hindustan Tea Trading Company Ltd's case [2003] 263 ITR 289 (Cal).

9. CIT v. A.R.A.S.P.V. and PV [2003] 263 ITR 616 (Madras)

Facts/Issues

The assessee was a registered firm carrying on business as a dealer of Hindustan Motors Ltd. The Assessing Officer while framing the assessment order for the A.Y. 1985-86 has found from the sale bills of the assessee that assessee firm has been collecting excise duty deposit

from the buyers of motor cars and did not bring the amount collected by way of excise duty deposit in the relevant books of account. He found that the assessee had totally collected an amount of Rs.12,62,438.80 as excise duty deposit during the relevant previous year and remitted a sum of Rs.9,83,500 to the Hindustan Motors Ltd. and retained a sum of Rs.2,78,938. He also found that excise duty deposit were collected at the time of booking of the motor cars by the purchasers and the amount so collected were used for the purpose of day-to-day business by the assessee. Accordingly, he brought to tax the sum of Rs.2,78,938. The Commissioner of Income-tax (Appeal) took a different view and held that the amounts collected were deposits and not income in nature. He also found that the assessee had furnished the names of the customers from whom the amounts were collected by way of deposits and that the deposits were refundable as and when the requisite certificates were produced and the assessee has given the reason for non refunding the amounts. He held that the addition made to the income of the assessee was not assessable in law. He accepted the contention that the differential excise duty amounts were kept with the assessee and it executed indemnity bond in favour of the manufacturer agreeing to refund the amount to the customers as and when they produce evidence of the registration of the vehicles as taxies. He, therefore, held that the deposit of excise duty represented either refundable to the customer or payable to the manufacturer in case of production of certificate or failure of the customer to produce the necessary certificate respectively and it cannot be treated as part of the trading receipts of the assessee. The Tribunal held that the differential excise duty deposit was not the income of the assessee.

Decision

It was clear that the assessee had collected amounts in a sum of Rs.12,62,438.80 as deposits and remitted only a sum of Rs.9,83,500 to Hindustan Motors Ltd. and retained with it the balance amount of Rs.2,78,938 as excise duty deposit. Under clause (4)(a) of the Dealers Agreement entered into by the assessee with Hindustan Motors Ltd. the price payable by the dealer for the motor vehicle shall be that as established by the company and current at the time of delivery of the motor vehicle plus sales tax and any other taxes, duty or octroi payable to the Central or State Government and also loading and other charges as established by the company from time to time. The assessee had collected the excise duty payable by the Hindustan Motors Ltd. to the Central Government and

the excise duty so collected no doubt would form part of the price of the motor vehicle. The intention of the assessee in collecting the amount was towards the excise duty levy though it has agreed to return the amount to the purchaser in case the purchaser produced the necessary proof for the registration of the vehicle as a taxi and that too within the prescribed period. It is inconceivable that the character of receipt would change depending upon the contingency of the purchaser handing over the necessary documents and the assessee returning the money to the purchaser. The assessee had collected the amount as part of its trading receipts for ultimately meeting the statutory liability.

Note

The Madras High Court in CIT v. Southern Explosive Company [2000] 242 ITR 107 laid down the following principles:

“The true character of the receipt must be judged with reference to the reasons for the collection and the liability for meeting which the collection was made. When the liability is a statutory liability, which the assessee was required to meet and for meeting which it was by the statutes or authorities permitted to collect the amount required from its customers, the true character of the collection is a trading receipt. By calling a portion of the amount as deposit, it cannot be said that the assessee had constituted itself as trustee, and therefore, the amounts received were not required to be regarded as part of its trading receipt. Had the assessee been unsuccessful in its claim that his goods were not to be treated as chemicals there is no doubt that the amounts though collected as deposit, would have been paid over to the State Government as the amounts had been collected for payment to the State Government as sales tax in the event of the goods being treated as chemicals”.

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For the attention of Members

Restoration of Membership and Certificate of Practice

Attention of members was drawn to Regulation 6 of the Chartered Accountants, Regulations, 1988 which provides, inter alia, for payment of annual membership fee and certificate of practice fee on 1st April each year. Individual notices to members requesting them to pay their annual membership and certificate of practice fee for the year 2003-04 were also sent. Announcement drawing attention of members to the requirement of payment of said annual fees for the current year were also published in the past issues of our Journal.

The names of members who had not paid their fees within the stipulated period are in the process of being removed or their certificates of practice are under cancellation. The removal notification and cancellation of certificate of practice notification w.e.f. 22.12.2003 are under issue.

In the event a member's name has been removed or his certificate of practice has been cancelled on account of non-payment of fees, the member concerned ceases to have the right to practise the profession of Chartered Accountancy and also the right to train articled clerks under him.

Regulation 19 and Regulation 11 of the Chartered Accountants Regulations, 1988, provide for restoration of membership and restoration of certificate of practice, respectively, with retrospective effect, provided the application, complete in all respects, together with the necessary fees is received from the member concerned by the Secretary of the Institute before the expiry of the relevant financial year. Members may note that restoration Fee of Rs. 100.- is a part of the fees payable by the members before the expiry of the relevant financial year, as prescribed in Regulation 19. Members whose names are removed or certificate of practice are cancelled may, if they so desire, apply in the appropriate form (form No. 9/101)* along with necessary fees in accordance with these Regulations.

*Form 109/101 are available on the website of the Institute at www.icai.org