Legal Decisions with Notes

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INCOME-TAX

Plant

1. *CIT v. A.B.A. Sons (2003) 264 ITR 469 (SC)*

Facts/Issues

Whether cinema building is "plant" for the purposes of depreciation and extra shift allowance.

Decision

Following its decision in *CIT v. Anand Theatres (2004) 244 ITR 192 (SC)*, the court held that cinema theatres are premises and are not "plant" for the purposes of depreciation and extra shift allowance under sections 32 and 43(3) of the Income-tax Act, 1961. The cinema building is not a tool or an apparatus for carrying on business activity. The assessee is not entitled to depreciation and extra shift allowance applicable to a plant in relation to the cinema theatre.

Note

The Finance Act, 2003 has excluded buildings or furniture and fittings from the scope of the term "plant" w.e.f. A.Y. 2004-05.

2. *Sajan Das and Sons v. CIT (2003) 264 ITR 435 (Del)*

Facts/Issues

During the course of assessment proceedings, the Assessing Officer noticed an entry of Rs.3,00,000, said to be a gift. The gift was purportedly received by a pay order, drawn on a NRE Account with American Express Bank, New Delhi. Suspecting the genuineness of the said gift, the Assessing Officer required the assessee to prove the genuineness of the gift. Further, the donor himself contradicted the assertions of the assessee. He sent a letter to the Directorate of Enforcement wherein he denied having made any gift to any person at any point of time. The Assessing Officer treated the said amount as unexplained cash credit and added the same to the total income of the assessee as undisclosed income. The Appellate Authorities confirmed the order of the Assessing Officer.

Decision

A mere identification of the donor and showing the movement of the gift amount through banking channels is not sufficient to prove the genuineness of the gift. Since the claim of gift is made by the assessee, the onus lies on him not only to establish the identity of the person making the gift but also his capacity to make a gift and that it has actually been received as a gift from the donor. The court, having regard to the inquiries conducted by the Assessing Officer from the bank with which the assessee was admittedly confronted and bearing in mind the fact that the supposed creditor was not related to the assessee, upheld the order of the Assessing Officer.

CONSTITUTIONAL VALIDITY OF SERVICE-TAX

3. *Advertising Club & Others v. Central Board of Excise & Customs and others (2003) 264 ITR 386 (Mad.)*

Facts/Issues

The point at issue was the constitutional validity of the service tax levied on the taxable service provided to a client by an "advertising agency" in relation to "advertisements". The first challenge related to the "legislative competence" on the part of the Parliament to pass the law. The impugned tax amounted to a "tax on advertisements" and therefore would be covered under entry 55 of the State List. The second challenge was that there was discrimination to advertising agency vis-à-vis the Press media and the electronic media. The argument was that if the service was given as contemplated in the Act, by the advertising agency, the advertising agency had to pay the service tax. However, if such a client was served directly by the press media or the electronic media without intervention of an advertising agency, though the client gets the identical service, the said press media or the electronic media was not taxed. Another argument for the "discrimination" was that the actual expenses towards the services regarding the advertising were not excluded and the tax was charged on the "gross amount" charged by the advertising agency from its clients while,

in the case of other agency such expenditure was allowed and was permitted to be deducted from the gross amount charged. Thereby their tax liability was reduced to a considerable extent. The learned counsel for the respondent opposed all these arguments and also heavily relied on the speech of the Finance Minister while introducing the relevant legislation.

Decision

The recent trend in juristic thought not only in western countries, but also in India is that the interpretation of a statute being an exercise in the ascertainment of the meaning thereof, everything which is logically relevant should be admissible. The speech of the Finance Minister introducing the legislation is certainly relevant for ascertaining the intention of the legislature. The impugned tax was a "tax on service" and is entirely independent of and different from the existing taxes covered by the taxes provided in the State List. That itself would suggest that this cannot come within the arena of entry 55 of the State List also.

Where a person gets his advertisement flashed in the press media or electronic media, it could certainly not be said to be a service provided by the press media or electronic media. There is nothing done excepting flashing a prepared advertisement by the press media or for that matter, electronic media. The decision as to how and in what format the advertisement should be, how it should be projected, at what point of time it should be flashed, in which areas it should be exhibited or the manner in which it should be drafted and exhibited has got nothing to do with the press media or electronic media. That would be the task of "advertising agency" alone. Therefore, where a client goes to the press media and asks for flashing of the advertisement and such advertisement is flashed in the media, this cannot be deemed to be a service provided by that media to such a client. Similarly, when a person approaches the electronic media and flashes an advertisement on the radio or television, as the case may be, the radio or television simply would flash the advertisement as per the instructions of the person concerned but such person will not get advantage of the expertise of the advertising agency. Therefore, it cannot be said that the press media and electronic media provide the same service and, therefore, it cannot be complained that they should also be brought in the tax net like advertising agencies. There is ample discretion in the Legislature, which discretion has been recognized and approved by the Apex Court.

Though taxing laws are not outside article 14, however, having regard to the wide variety of diverse economic criteria that go into the formation of a fiscal policy, the Legislature enjoys a wide latitude in the matter of selection of persons, subject-matter, events, etc. for taxation. The tests of the vice of discrimination in a taxing law are, accordingly, less rigorous. In examining the allegations of a hostile, discriminatory treatment what is looked into is not its phraseology, but the real effect of its provisions. A Legislature does not, as an old saying goes, have to tax everything in order to be able to tax something. If there is equality and uniformity within each group, the law would not be discriminatory. The Legislature can exercise an extremely wide discretion in classifying items for tax purposes so long as it refrains from clear and hostile discrimination against particular persons or classes. Further, the court did not accept the arguments that levying tax on the gross amount was violative of the constitution. The constitutional validity of a statute cannot be decided on the basis of "measure of tax".

Note

The Madras High Court also upheld the constitutional validity of the levy of tax on security agencies in the case of GDA Security Pvt. Ltd., v. Union of India (2003) 264 ITR 396.

4. All India Federation of Tax Practitioners v. Union of India (2003) 264 ITR 466 (Ori)

Facts/Issues

This was an application praying for the stay operation of the impugned National Tax Tribunal Ordinance, 2003. It was argued that there was no justification for the President to promulgate the said ordinance in view of the fact that Parliament was again to meet in December 3, 2003. Further, no notification had been issued under section 3 of the said Ordinance establishing the Tribunal nor any infrastructure for its benches was available, due to which the Tribunal could not work. Once a notification was issued constituting the Tribunal, all pending appeals and references in the High Court would stand transferred to the National Tribunal and in that case various parties in appeals and references that are pending in the High Court would be seriously prejudiced in as much as it would not be possible for such benches to take up urgent matters so long as sufficient infrastructure was not set up for the benches.

Decision

The issue of the notification as contemplated by or under section 3 of the said Ordinance was stayed till the date of next hearing.

Note

With the dissolution of the Lok Sabha, the National Tribunal Bill has lapsed. Further, under article 123 of the Constitution of India the Presidential Ordinance would lapse with the end of six weeks from the date of dissolution of Lok Sabha.

5. *Shri Swastik Steels Pvt. Ltd. v. Assistant Commission of Income-tax (2003) 264 ITR 447 (Bom)*

Facts/Issues

There was a delay of 14 months in filing of the audit report. The assessee's conduct to the notices issued by the Assessing Officer could not be termed strictly as cooperative. The Assessing Officer sought to levy a penalty under section 271B of the Income-tax Act.

Decision

The assessee did not conduct himself strictly within the four corners of the law. It sought adjournment without communicating the reasons and finally gave out that the disputes between the two families of the Directors were the reasons for the delay in getting the audit report. Such disputes could not be termed as a reasonable cause for waiving or dispensing with the penalty under section 271B.

6. Powers of Settlement Commission

CIT v. Sant Ram Mangat Ram Jewellers & Others (2003) 264 ITR 564 (SC)

Facts/Issues

The Settlement Commission restricted the interest chargeable under section 234B to 50%. Whether it has the power to waive such interest.

Decision

The Settlement Commission has no power to waive mandatory interest as contemplated under section 234A (for default in furnishing return), section 234B (for default in payment of advance tax) and section 234C (for deferment of advance tax) of the Income-tax Act, 1961. Therefore, the Settlement Commission was not entitled to restrict interest chargeable under section 234B for default in payment of advance tax to 50 percent.

7. Service Tax on Chartered Accountants – constitutional validity.

Jodhpur Chartered Accountants Society and another v. Union of India and others (2003) 264 ITR 529 (Raj.)

Facts/Issues

The constitutional validity of the service tax levied on practising Chartered Accountants was one of the issues in this case.

Decision

The subject matter of taxation available to Parliament are enumerated in entries 80 to 97 of List 1. Entries 45 to 66 of List 2 are available to the State legislature. Under Article 246(1) Parliament has exclusive power to make laws with respect to any of the matters and those included the powers to impose tax enumerated in List-I. Where the case does not fall either in the State List or the Concurrent List, Parliament has residuary power under Entry 97 of List-I. The point at issue is whether there is tenable and true distinction between tax on service and a tax on profession envisaged by Entry 60 of the State List. Even if the service tax is linked with the professional income or the professional service even then, it had a distinct aspect of services. A tax which the professional had to pay because he has had the privilege to carry on the profession or because he was carrying on the profession in a particular State is totally distinct and separate from the tax which he has to pay on service and which tax he would be able to pass on to the customer who has had the advantage of his professional services. A profession tax has to be paid whether a professional actually has given the professional service or not whereas, the service tax will not be payable if a professional like a Chartered Accountant or architect has in reality not rendered any professional services to a customer. A tax on profession can be imposed if a person carries on a profession. Such a tax on profession is irrespective of the question of income.

It is true that the speech made by the member of the Legislature on the floor of the House when a Bill enacting a statute being debated is not admissible but as held by the Apex Court in K.P. Verghese v. ITO (1981) 131 ITR 597, the speech made by the mover of the Bill explaining the reasons for introduction of the Bill can certainly be referred to for the purpose of ascertaining the object and purpose for which the Legislature is enacting the Bill.

On the question of discrimination the Legislature has ample freedom to select and classify persons, districts, goods, properties, income and objects which it would tax and which it would not tax.

8. *CIT v. Nedungadi Bank Ltd. (2003) 264 ITR 545 (Ker.)*

Facts/Issues

In the original assessment of the assessee bank the notional loss on valuation of securities held by the bank was allowed as a deduction. Subsequently, the department thought that in the light of the Supreme Court judgement in Vijay Bank Ltd. v. CIT (1991) 187 ITR 541 such loss could be allowed as a deduction. Hence, a notice of re-assessment was issued.

Decision

The crux of the matter in this case was whether the securities held by the bank should be considered as capital investment or stock in trade. The High Court noted that the Supreme Court in the above mentioned case did not lay down any specific proposition regarding whether the securities held by the bank should be considered as capital investment or as stock in trade. The Tribunal in this case had found out that the securities held by the bank were in the nature of stock in trade and hence the notional loss on the valuation of such securities was allowed as a deduction. The High Court upheld the finding of the Tribunal.

Note

An interesting point is whether the mode of disclosure in the balance sheet of the bank of the securities held by the bank would in any way influence the decision. For example, a bank may hold a security on a mandatory basis according to the guidelines of the Reserve Bank of India. It may hold securities in the course of its business of banking. Should any distinction be drawn between these two types of securities?

9. *CIT v. B. Rai [2003] 264 ITR 617 (P & H)*

Facts/Issues

The assessee, who was at the relevant time District and Sessions Judge, for the assessment year under consideration, had claimed higher pay scale than was being allowed to him. The claim of the assessee for higher pay scale was allowed. The court while passing order for grant of higher pay scale also ordered payment of interest at the rate of 12 per cent per annum from the date of accrual of the amount till the date of actual payment. The amount of interest thus payable worked out to Rs.1,17,975 which was claimed by the assessee as interest not in the nature of income. The claim was not accepted by the Assessing Officer but it was accepted by the Tribunal.

Decision

The interest was not paid under a statute consequent upon grant of arrears of salary on account of higher pay scale, but was in fact paid in the discretion of the court vested in it under article 226 of the Constitution of India. The grant of interest was in the absolute discretion of the court. It was not assessable.

10. *CIT v. Atwood Oceanics International S.A. [2003] 264 ITR 761 (Uttar)*

Facts/Issues

Atwood Oceanics International Company was the representative assessee of its employee – Gene Little who was employed during the accounting year ending March 31, 1983, relevant to the assessment year 1983-84, on off shore drilling rig operating in Bombay High for oil exploration in the Continental Shelf of India for ONGC. The return of income was filed on April 17, 1986. Original assessment was done on April 19, 1986, under section 143(3) of the Income-tax Act, 1961, on the total income of Rs.1,34,729.

In the assessment proceedings, the assessee contended that the income of the employee was earned beyond 12 nautical miles of territorial waters during the year ending March 31, 1983, and was therefore not taxable in the assessment year 1983-84 and therefore no taxable perquisite could be added to the income of the assessee. This argument was rejected by the Assessing Officer on the ground that the Government of India had issued a notification on March 31, 1983, by which the Income-tax Act, 1961 was made applicable to the continental shelf as also to the exclusive economic zone which went beyond 12 nautical miles. According to the Assessing Officer, the notification came into force with effect from April 1, 1983, and therefore the income of the employee earned during the previous year 1982-83 became taxable during the assessment year 1983-84.

Decision

In order to levy tax the income must accrue in the territory to which the Income-tax Act applies. On March 31, 1983, the Government of India issued Notification No.G.S.R. 304(E) under section 6(6) and section 7(7) of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones

Act, 1976. By the said notification the provisions of the Income-tax Act were made applicable from April 1, 1983, to the continental shelf and exclusive economic zone. In the instant case, the foreign technician had earned salary income before April, 1983, by working on the oil rigs, located beyond 12 nautical miles and therefore he was not taxable for the assessment year 1983-84.

11. CIT v. Kanya Kumari District Cooperative Spinning Mills Ltd. [2003] 264 ITR 685 (Mad)

Facts/Issues

The question that arose for consideration was whether certain amounts received by the assessee as subsidy were to be treated as revenue receipts or capital receipts. The assessee received certain amount of subsidy from the Government of Tamil Nadu and in the assessment proceedings for the assessment year 1985-86, the assessee claimed that the amount received as subsidy from the Government of Tamil Nadu was a capital receipt and not liable to tax. The Government of Tamil Nadu, taking into account the welfare of Adi Dravidas and their poor representation in the assessee's firm sanctioned certain financial assistance amounting to a sum of Rs.10.5 lakhs under a special component plan to the assessee to recruit 70 Adi Dravidas and the assessee received the same. The additional workers were also recruited by the assessee.

Decision

The court followed the Supreme Court decision in Sahney Steel and Press Works Ltd. v. CIT [1997] 228 ITR 253. A close reading of the Government order as well as the order sanctioning the amount clearly showed that the Government of Tamil Nadu had framed a special component plan for employment of persons from Adi Dravida community and to provide employment to persons coming from that community, the government had granted the subsidy with the object and intention to benefit the person coming from Adi Dravida community by providing them employment. The amount received by the assessee had nothing to do with the trade or business of the assessee. It was not a reimbursement of salary; it was not made for the normal working of the bill; it was not made for the benefit of the assessee; but was paid with the social objective in mind. The amount received by way of subsidy under the scheme was capital in nature.

INDIRECT TAXES*

1. Whether Rule 8 of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 can be applied for valuing the goods straightway without using Rule 4.

   Tolin Rubbers Pvt. Ltd. Vs. Commissioner of Customs, Cochin [2004] 163 ELT 289 (SC)

   The Assessing Authority computed the value of the machinery in terms of Rule 8 of Customs Valuation Rules on the basis of the Chartered Engineer's Certificate which stated the condition of the machinery to be satisfactory and residual life of 10 years after giving maximum depreciation of 70%.

   The Supreme Court observed that the value of the goods has to be determined as per Rule 4(1) and only when the conditions specified in Rule 4(2) are not fulfilled, then the transaction value as per Rule 4(1) has to be rejected and further determination has to be made as per Rule 8. Since the assessing authorities did not provide any reasons for rejecting the transaction value, it was held by the Supreme Court that the Bill of Entry as made by the appellant (according to Rule 4) should be accepted and the appeal was allowed accordingly.

2 (a) Whether the freight on returning the damaged goods to manufacturer forms part of the assessable value?

(b) Whether an additional trade discount, which is to be adjusted with reimbursement of damages, forms part of the assessable value?

Neelkamal Plastics Ltd. vs. Commissioner of Central Excise, Noida [2004] 164 ELT 197 Tri-Del)

(a) The assessee company manufactured plastic chairs. It had a replacement policy of reimbursing the 100% of the cost of damaged chairs by way of giving credit equivalent to the value of the damaged chairs. The company used to charge Rs.30 to Rs.40 per chair as cost of freight in returning the defective pieces to it. No other additional consideration was received by the assessee. The issue for consideration was whether such return freight for damaged goods was liable to be added to the assessable value.

The CESTAT held that the amount of Rs.30 to Rs.40 per chair relates to the cost of return freight on damaged goods. It did not, in any

***(By Ms. Smita Pandey, Executive Officer, ICAI)**

way, represent the value of goods. Neither did the assessee receive any additional consideration for sale nor did he clear any chair for the replacement without payment of duty. Therefore, the demand raised had no legal or factual basis and was required to be set aside.

(b) The assessee company had a practice of giving additional Trade discount of 1% to all the dealers. This discount had to be adjusted against the credit equivalent to the value of the goods which were damaged. In case the allowable credit was more/less than the additional trade discount, the difference was adjusted by way of Debit/Credit Note.

The question involved here was that whether such discount which was given uniformly to all dealers and adjusted against the credit equivalent to the value of the goods, if damaged, could be included in the assessable value.

The CESTAT observed that such a discount was in the nature of damage discount. It was decided in *CCE Vs. Vikram Detergent Ltd., 2001 (127) E.L.T. 641 (SC),* damage discount was in the nature of refund or benefit to buyer by way of compensation for damage, breakage or losses suffered by goods after removal from the factory and was not eligible for deduction.

As per the facts of the case if the eligible credit was lower than the additional Trade Discount, the difference shall be adjusted by way of debit note. The provision for debit note left room for return of part of the discount to the manufacturer. It is well settled that in order to be eligible for deduction, a discount must be one which is not returnable in any manner. Therefore, the said discount was includible in the assessable value. ■

ANNOUNCEMENT

E-mail ID for Partnership CA Firms

Executive Committee at its meeting held on October 28, 2003 approved the creation of emails Ids firmname@icai.org to begin with for all the partnership firms registered with the Institute. The following are the salient features of the facility:-

1. Mail-id: The mail id for the firm would be firm name suffixed by "@icai.org ". That is, a firm with firm name XYZ & Company would be allotted a mail id of XYZ @ icai.org.
2. Password: Initially a default password will be allotted and users will be required to change the password at first login to ensure that nobody makes unauthorized use of the facility.

   Web Interface: The facility will be similar to a yahoo mail or hotmail with web interface. Web interface will be accessible from the Institute's website www.icai.org by clicking on Webmail link from the home page of the site. Alternatively, the main can be accessed from the URL http://mail.icai.org
3. Microsoft Outlook Configuration: MS Outlook/Outlook Express is the most commonly used mail client today. The configuration of MS Outlook for the Institute's mail id will be very similar to that for any ISP. Steps involved are (a) start MS Outlook and issue the commands Tools – Accounts- Add – Mail. Thereafter requisite details have to be specified, as required in configuring a mail account. The POP3 Server and SMTP Server IP for this facility are 202.140.156.226. In case of difficulty, you may take the help of computer vendor/your office administrator in making the requisite configurations.
4. Terms of Use: Will be provided by the Institute. It is required to ensure access to the said facility by authorized persons only and that the facility is NOT to be used for fraudulent or illegal or unauthorized purposes.
5. Mail Facility Activation: In case of an interest for availing the service, you may send you request either by e-mail to firmname@icai.org or by post to Jt.Secretary (IT), ICAI, IP Marg, New Delhi-110002 within the next 15 days.
6. Mail Facility Continuation: As with all mail services, you are required to access the facility at least once in thirty days. IN case you do not use this facility for over a month, the mails are liable to be deleted and the facility suspended without further notice.

It is hoped that this facility will be found useful and will be used extensively. You are welcome to send your suggestions if any to the mail id firmname@icai.org.