Legal Decisions[1]

DIRECT TAXES

Income-tax Act

LD/60/116
CCI Ltd.
Vs.
Jt. CIT
February 28, 2012 (KAR)
[Assessment Year 2007-08]

Section 14A of the Income-tax Act, 1961 - Total income - Expenditure incurred in relation to income not includible in

Where assessee had not retained shares with intention of earning dividend income and dividend income was incidental to his business of sale of shares, which remained unsold, it could not be said that expenditure incurred in acquiring shares had to be apportioned to the extent of dividend income and such apportioned part of expenditure should be disallowed from deductions

When no expenditure is incurred by the assessee in earning the dividend income, no notional expenditure could be deducted from the said income.

The assessee was a dealer in shares and securities. 63 per cent of the shares, which were purchased, were sold and the income derived therefrom was offered to tax as business income. The remaining 37 per cent of the shares were retained. It had remained unsold with the assessee. It was those unsold shares had yielded dividend, for which, the assessee had not incurred any expenditure at all.

The Karnataka High Court held that where the dividend income is exempted from payment of tax, if any expenditure is incurred in earning the said income, the said expenditure also cannot be deducted. In this case, the assessee had not retained shares with the intention of earning dividend income and the dividend income was incidental to his business of sale of shares, which remained unsold by the assessee. Therefore, it could not be said that the expenditure incurred in acquiring the shares had to be apportioned to the extent of dividend income and that should be disallowed from deductions.

LD/60/117
CIT
Vs.
Hariprasad Bhojnagarwala
August 2, 2011 (GUJ-FB)

Section 23 of the Income-tax Act, 1961 - Income from house property – Annual value

Benefit of section 23(2) in respect of annual value of house is available to an individual; a Hindu Undivided Family can be seen being a family of a group of natural persons and, hence, benefit of section 23(2) is also available to a Hindu Undivided Family

The provisions of section 23(2) makes it clear that the benefits of the relief in respect of self-occupied property is available only to the owner who can reside in his own residence, that means, the benefit of relief is available to self-occupied property only to an individual assessee and not to an imaginary assessable entity.

From different decisions and the provisions of law, the following facts emerge:-

(i) The benefit of section 23(2) is available if the house is in occupation of the owner for the purpose of his own residence; and

(ii) A partnership firm, which is a fictional entity, cannot physically reside and so a partnership firm cannot claim the benefit of the provision, which is available to an assessable entity only.

The question arises as to, whether a Hindu Undivided Family can be held to be a fictional entity? The answer will be in the negative. A Hindu Undivided Family is nothing but a group of individuals related to each other by blood relations, or in a certain manner. A Hindu Undivided Family can be seen being a family of a group of natural persons. There is no dispute that the said family can reside in the house, which belongs to Hindu Undivided Family. A family cannot consist of artificial persons. The Income Tax Appellate Tribunal, Delhi Bench in the case of *ITO vs. Tarlock Singh & Sons* 29 ITD 139 noticed that under section 13 of General Clauses Act, while the words in masculine gender shall be taken to include females and words in singular shall include plural and vice versa. Therefore, it had rightly held that the word 'owner' would include 'owners' and the words 'his own' would include 'their own'. There is nothing, therefore, in the words used in section 23(2), which excludes application of such provision to HUF, which is a group of individuals related to each other.

LD/60/118
CIT (Central), Ludhiana
Vs.
Punjab Breweries Ltd.
(Now amalgamated with M/s Unite Breweries)
April 17, 2012 (P&H)
[Assessment year 1989-90]

Section 37(1) of the Income-tax Act, 1961 - Business expenditure – Allowable as

Where assessee company paid C&F fees to a company for which there was no evidence and further, as a result

[1] *Readers are invited to send their comments on the selection of cases and their utility at eboard@icai.org.*

of appointment of C&F agent, there was no increase in sale, and funds were actually passed to Chairman and his wife of holding company of assessee as interest free loans, transactions would be held to be colourable and, hence, liable to be disallowed

The assessee-respondent was engaged in the manufacture and sale of beer of different brands. It was a closely held Company and a subsidiary of United Breweries Ltd. The assessee company was selling products without the help of any handling agent. It had opened a branch office at Faridabad and had employed 8 persons for that office. For the first time, in respect of the assessment year 1987-88 the assessee company appointed M/s Blue Chip as C & F handling agent for the purposes of sale of Mc Dowell products. In respect of the preceding assessment years *i.e.* 1987-88 and 1988-89, C & F handling charges claimed to have been paid to M/s Blue Chip were disallowed.

The Assessing Officer found that there was no material on record to show that any services were rendered by M/s Blue Chip and Company. It was also found that there was no evidence placed on record by the assessee to show that its sales were promoted by the appointment of the handling agent M/s Blue Chip. From the various transactions between the Blue Chip and Vijay Mallya, the Chairman and M.D. of holding company of the assessee company as well as others it was found that substantial part of the payment had been made to the Blue Chip & Company from the assessee-company as interest free loan to Vijay Mallya and his wife Samira Mallya. Agreement between the assessee company and M/s Blue Chip which formed the basis of C & F handling charges was found to be a sham transaction and a devise to reduce the assessee-company's taxable income as well as to create capital in the hands of Blue Chip and interest free liquidity in the hands of United Breweries and Vijay Mallya and his wife. After the agreement, M/s Blue Chip could not find any new buyer for the assessee and the sales of Mc Dowell products showed dramatic decline after the appointment as C & F handling agent. Therefore, the entire sum of ₹12,29,769/- was added to the declared income of the assessee. On appeal, the CIT (A) found that by giving Blue Chip and this had been forced upon the assessee by Mc Dowell at the instance of Vijaya Mallaya who had been benefited by giving this business to M/s Blue Chip. Further, the assessee's staff strength at Faridabad was not reduced by allotting the work to Blue Chip. License fee for this L-I was also being paid by the assessee unlike in Ghaziabad Depot where License fee was collected from other party. Since the work was allotted to Blue Chip, they had given interest free loans to Vijaya Mallaya, his wife and director and other relations. It was not a genuine transaction but indirectly benefiting Mallayas.

On appeal, the Tribunal found that in the preceding years 1987-88 and 1988-89 the Tribunal had decided the issue in favour of the assessee- respondent. The Tribunal followed the same.

The High Court of Punjab and Haryana held that in the case of *C.K. Gangadharan v. CIT* (2008) 304 ITR 61, the Supreme Court held that if the revenue does not prefer an appeal in one case it would not operate as a bar for the department to prefer an appeal in another case where there is a just cause for doing so or particularly if it is in public interest to do so or for a pronouncement by the higher court when divergent views are expressed by the Tribunals or the High Courts.

In the instant appeal, the view taken by the Tribunal which has decided the issue merely on the ground that in respect of assessment years 1987-88 and 1988-89 the Tribunal had accepted the claim of the assessee-respondent, could not be accepted. It would not be in public interest to accept such a claim when there was no evidence of rendering any service by Blue Chip to the assessee-company. The sole object of diverting funds to Blue Chip was to facilitate passing of funds as interest free loan to Mallyas. Agreement between the assesee-company and Blue Chip company had been found to be a sham transaction by the Assessing Officer as well as by the CIT (A). Therefore, no C&F handling charges could be allowed to the assessee.

LD/60/119

SREI Infrastructure Finance Ltd.
Vs.
Income Tax Settlement Commission
March 30, 2012(DEL)
[Assessment year 2009-10 & 2010-11]

Section 50B read with Section 2(42C) of the Income-tax Act, 1961 - Capital gains – Computation of, in case of slump sale

Section 50B applies to all types of 'transfers' that can be categorised as a "slump sale"; further term slump sale as contemplated under section 2(42C) also covers transactions under scheme of arrangement

Under a scheme of arrangement, there was transfer of the petitioner-company's project finance business and assets based financing business, including its shareholding in company SIBPL to its subsidiary SIDFL. The Settlement Commission held that the consideration of ₹375 lacs received by the assessee from SIDFL was taxable under the Section 50B of the Act as 'slump sale'. Settlement Commission has also

computed the taxable capital gains under Section 50B.

The contention of the petitioner was that the 'transfer' under the Scheme of Arrangement was not a sale under Section 50B of the Act. The Scheme of Arrangement was sanctioned by the High Court of Calcutta under Section 391 to 394 of the Companies Act, 1956 and was statutory in nature and character. It was pleaded that Section 50B of the Act had no applicability as the 'transaction' was under the Scheme of Arrangement and the same was not a 'slump sale' as contemplated under Section 2(42C) of the Act. The petitioner claimed that Section 2(42C) deals with limited category/type of transactions i.e. sales, which are construed as a 'slump sale' and the broader and wider definition of the term 'transfer' as defined under Section 2(46) is not applicable to "slump sales".

The High Court held that the term 'slump sale' as now been specifically defined in Section 2(42C) means transfer of one or more undertakings as a result of sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales. The use of the word 'transfer' in said section is significant. The term 'transfer' is used in said section is with reference to the transaction in the nature of 'slump sale'. Thus any type of "transfer" which is in nature of slump sale i.e. when lump sum consideration is paid without values being assigned to individual assets and liabilities are covered by the definition clause 2(42C) and then by Section 50B of the Act. This is the reasonable, plausible and natural grammatical meaning which has to be given to the definition clause 'slump sale'. It is not correct to construe and regard the word 'slump sale' to mean that it applies to 'sale' in a narrow sense and as an antithesis to the word 'transfer' as used in Section 2(47) of the Act. The intention of the legislature was to plug in the gap and tax slump sales and not to leave them out of the tax net. The term 'slump sale' has been used in the enactment to describe a particular and specific type of transfers called slump sales. Use of word 'sale' in the term 'slump sale' does not and is not intended to narrow down the concept of 'transfer' as defined and understood in Section 2(47) of the Act. All transfers in nature of 'sales' i.e. 'slum sales' are covered by the definition clause 2 (42C) of the Act. The word 'transfer' as defined and understood in Section 2(47) of the Act is wide. It is an inclusive definition of wide import. It includes sale, exchange or relinquishment, extinguishment of any right in an asset, compulsory acquisition under the law, etc.

The term 'slump sale' has been defined to mean a transfer of a business undertaking or a business for a lumpsum consideration with all its assets and liabilities, without values being assigned to individual assets/ liabilities. The said term has no other significance and one should not read into and understand that the word 'sale', used in the term 'slump sale', as a cause/ reason to give a restrictive meaning to "slump sale", i.e. it can only apply to "sales" in a narrow sense and not to "transfers" under Section 2(47). This is apparent as, when one reads the proviso and sub-section (1) to Section 50B together and in a harmonious way, it is clear that it applies to all types of "transfers" that can be categorized as a "slump sale". Sub-section (2) to Section 50B of also refers to transfer of an undertaking or division by way of sale i.e. "slump sale" and prescribes the mode of computing and calculating capital gains on such transactions.

Resultantly, the contententions raised by the petitioner were to be rejected.

LD/60/120
CIT-II
Vs.
Kan Construction and Colonizers (P.) Ltd.
April 4, 2012 (ALL)
[Assessment Year 2006-07]

Section 50C read with section 2(14) of the Income-tax Act, 1961 - Capital gains – Full value of consideration

Provisions of section 50C are not applicable with respect of sale of land where plots of land were held by assessee as stock-in-trade and not as capital asset

In the appeal the Revenue has not disputed the finding of Tribunal, that the land in question was stock-in-trade, on the ground of being perverse or against the material on record. The Tribunal has categorically found as a fact that "there is no material to controvert

this contention of the assessee that the plots of land sold were held by the assessee company as stock in trade." This finding is sufficient to dispose of the appeal.

The Lucknow Bench of Allahabad High Court held that section 50C also uses the word "capital asset." For applicability of section 50C one of the essential requirements is that an asset should be capital asset.

From the ratio of the various judicial decision, it can be culled out that whether sale of land is sale of capital asset or stock in trade is essentially a question of fact. There is no rule of thumb to address the said issue. Several principles have been evolved in the judicial decisions, but although are more in the nature of guidelines. The question has to be answered in each case having regard to the circumstances of that case. There may be factors both for and against a particular point of view. The Court has to answer the question on a consideration of all of them in a process of evolution. The inference has to be drawn on a cumulative consideration.

The assessee is a builder. Construction of buildings is its business. The assessee has sold number of buildings, with regard to which there is no dispute. The dispute is with regard to the sale of plots. Investment in purchase and sale of plots by a builder who is indulged in selling buildings is ancillary and incidental to his business activity. It is a matter of record that the assessee has treated the land as stock in trade which finds corroboration from its balance sheet. Stock in trade has been excluded from the definition of capital asset. According to the Webster's New International Dictionary, the 'stock-in-trade' is "*The goods kept for sale by a shopkeeper. The fittings and appliances of a workman*." In other words, the stock-in-trade includes all such chattels as are required for the purposes of being sold or let to hire on a person's trade. According to Stroud's judicial dictionary, "*stock-in-trade comprises all such chattels as are required for the purposes of being sold, or let to hire on a person's trade*". The Commissioner of Income-tax (Appeals) and the Tribunal on analysis of the facts of the case have reached to the conclusion that section 50C has no application as it was a case of transfer of plots which was stock-in-trade. An income earned from such transaction is liable to be taxed as income from business activity.

The view taken by the Tribunal is on terra-firma. The inference drawn by the Tribunal is based on relevant consideration. There was no grievance to the observations of the Tribunal that in the balance sheet also the land has been disclosed as stock in trade. The provisions of section 50C are not applicable with

respect of sale of land where plots of land were held by assessee as stock-in-trade and not as capital asset.

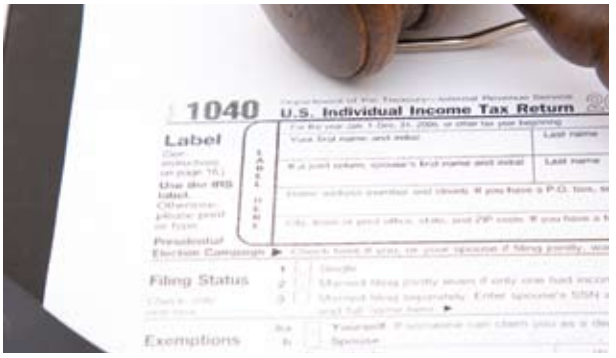
LD/60/121
General Insurance Corporation of India
Vs.
Deputy Commissioner of Income-tax, Mumbai 1(3)
December 1, 2011 (BOM)
[Assessment Year 2006-07]

Section 147 read with Section 148 and Section 10 of the Income-tax Act, 1961 - Income escaping assessment

Where exemption under clause 10(38) was specifically denied and reasons for reopening assessment merely postulate that exemption under clauses (15), (23G) and (33) of section 10 was wrongly allowed, this is clearly a situation where there is a change in opinion by Assessing Office and thus it can be held that there is no tangible material for Assessing Officer to reopen assessment

The Assessing Officer declined to grant the benefit of an exemption under section 10(38) to the assessee engaged in insurance business, on the ground that during the assessment year the assessee had carried on a regular business activity of trading in shares and was not an investor. The exemptions under clauses (15), (23G) and (33) of section 10 were however allowed. The Assessing Officer, in the reasons which have been declared to the assessee for reopening assessment under section 147, has now taken the view that on a combined reading of section 44 and the First Schedule the position that emerges is that no other section of the Act applies to a company which carries on general insurance business except the provisions contained in Rule 5 of the First Schedule. On this basis, it has been contended that the claims have been "wrongly allowed". The reasons which had been set out by the Assessing Officer constituted a mere change of opinion and there was no tangible material on the basis of which the assessment could be reopened.

The High Court Bombay held that under section 147 the Assessing Officer is empowered to reopen an assessment where he has reason to believe that any income chargeable to tax has escaped assessment for any assessment year. Under clause (3) of *Explanation* 2 the Legislature has set out cases where income chargeable to tax is deemed to have escaped assessment. Such cases include a case where an assessment is made but (i) income chargeable to tax has been underassessed; or (ii) such income has been assessed at too low a rate; or (iii) such income has been made the subject of excessive relief under the Act; or (iv) excessive loss or depreciation



allowance or any other allowance under the Act has been computed. The power of the Assessing Officer to reopen an assessment even within a period of four years is structured. Following the amendment of section 147 by the Direct Tax Laws (Amendment) Act, 1987 with effect from 1 April 1989 Parliament has provided for only one condition for exercise of the power to reopen an assessment within four years which is that the Assessing Officer has reason to believe that income has escaped assessment. While recognising that after 1 April 1989 the power to reopen assessment is wider than before, the Supreme Court has held in *Commissioner of Income-Tax v. Kelvinator of India Ltd*. [2010] 320 ITR 561 (SC) that a "schematic interpretation" should be given to the words "reason to believe" failing which section 147 would confer arbitrary power upon the Assessing Officer to reopen an assessment on the basis of a mere change of opinion.

In the instant case, it is apparent that the Assessing Officer had applied his mind to the claim of the assessee to exemption under clauses (15), (23G), (33) and (38) of section 10. The exemption under clause (38) was specifically denied. The reasons for reopening the assessment merely postulate that the exemption under section 10 was wrongly allowed. This is clearly a situation where there is a change in opinion by the Assessing Officer. There is no tangible material for the Assessing Officer to reopen the assessment.

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Section 44 read with Section 147 of the Income-tax Act, 1961 - Insurance business

Where the act of reopening the assessment would have to be regarded as a mere change of opinion which has also not been based on any tangible material, it could be held that the reopening of the assessment is contrary to law

Section 44 provides that the profits and gains of any business of insurance of a mutual insurance company shall be computed in accordance with the rules in the

First Schedule. Part 'A' of the First Schedule containing Rules 1 to 4 deals with profits of life insurance business while Part B consisting of Rule 5 deals with computation of profits and gains of other insurance business.

The Assessing Officer proceeded for reopening the assessment on the premise that in computing the profits and gains of business for an assessee who carries on general insurance business no other section of the Act would apply and that the computation could be carried out only in accordance with section 44 read with Rule 5 of the First Schedule.

The High Court held that the CBDT in its communication dated 21 February 2006 to the Chairman of IRDA clarified that the exemption available to any other assessee under any clauses of section 10 is also available to a person carrying on non-life insurance business subject to the fulfilment of the conditions, if any, under a particular clause of section 10 under which exemption is sought. It needs to be emphasised that it is not the case of the Assessing Officer that the assessee had failed to fulfil the condition which attached to the provisions of the relevant clauses of section 10 in respect of which the exemption was allowed. This of course is apart from clause (38) of section 10 where the Assessing Officer had rejected the claim for exemption in the original order of assessment under section 143 (3). The Assessing Officer above all was bound by the communication of the CBDT. Having followed that in the order under section 143 (3) he could not have taken a different view while purporting to reopen the assessment. Having applied his mind specifically to the issue and having taken a view on the basis of the communication noted earlier, the act of reopening the assessment would have to be regarded as a mere change of opinion which has also not been based on any tangible material. Consequently, the reopening of the assessment is contrary to law.

LD/60/122
Asstt. CIT, Raipur
Vs.
Major Deepak Mehta
November 8, 2011 (Chattisgarh)
[Assessment Year 1997-98]

Section 152 read with Section 147 of the Income-tax Act, 1961 - Reassessment – Other provisions

Where there was no escapement of assessment or no assessment in respect of said head, which formed reason to believe in notice and in respect of other incomes no notice was issued and assessee had no opportunity to put forward his case under section 152 (2) to avail benefit of said section for dropping proceedings, Revenue cannot take advantage of Explanation 3 to section 147, as same is not available in facts of the case

The assessee filed the income return for declaring income of ₹1,49,854. The return was processed under section 143(1) and it was found that the capital work in progress under the head building shown in the balance sheet as on 31-3-1996 for a sum of ₹15,35,551 was not carried forward to the balance sheet as on 1-4-1996. The total fixed assets on closing balance as on 31-3-1996 was ₹52,51,629 whereas

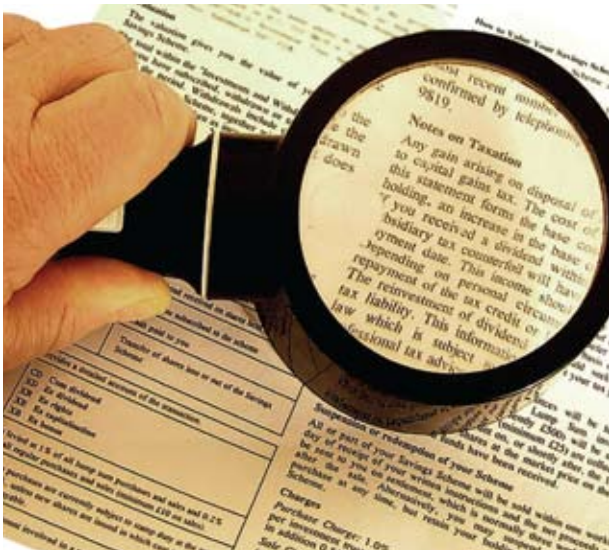
the opening balance as on 1-4-1996 was shown at ₹31,35,246, showing the difference of ₹21,16,383. A notice under section 143(2)(i) was served on the assessee on 28-2-2001. It was found that there was the total income of ₹12,13,240 and accordingly the order under section 143 (3) read with section 147 was passed on 28-3-2002 by the Assessing Officer.

The Commissioner (Appeals) held that the Assessing Officer found items under assessment other than the one for which he had issued notice. Therefore, he could not take action under section 152(2). The Tribunal held that the assessee had rightly proceeded to invoke the provisions of section 152(2) to resist the Assessing Officer to reopen the whole assessment.

The High Court of Chattisgarh held that from bare perusal of the entire provisions of sections 147 to 153, it is clear that the Assessing Officer should have reason to believe to reopen assessment under the provisions of section 147 before making the assessment, reassessment or recomputation.

The assessee has a right to inform the Assessing Officer that the income which has allegedly escaped assessment was shown and had been taken into account and the assessment had been properly made. In that event the Assessing Officer has an obligation to drop the proceedings of the said income, under the provisions of section 152(2).

Explanation 3 to section 147 provides that if the proceedings on the basis of reasons recorded under sub-section (2) section 148 in the course of proceedings of the income reasons have been recorded under section 148 (2), the other income may also be included, which has escaped assessment for the purpose of assessment or re-assessment under section 147, in the same proceeding.



In the facts of the case, the income in respect of building to the tune of ₹21,16,383 formed reason to believe that the same had escaped assessment, as in the notice issued under section 148. In the course of proceeding other incomes were also found to have escaped assessment.

The assessee filed his reply under section 152(2) stating therein that the said income which had formed reasons in the notice under section 148 had not escaped assessment, as the same was disposed of in the same assessment year itself and for that no details were given.

The Tribunal has also come to the conclusion that, in fact, there was no escapement of assessment or no assessment in respect of the said head, which formed the reason to believe in the notice. In respect of other incomes no notice was issued and the assessee had no opportunity to put forward his case under section 152(2), to avail benefit of the said section for dropping the proceedings. Thus, the Revenue cannot take advantage of the *Explanation* 3 to section 147, as the same is not available in the facts of the case.

Explanation 3 is applicable only in the event the income was formed opinion in the notice has been found correct and the proceeding in the respect of the said income was not dropped under section 152(2).

The main object and purpose of section 147 read with section 148 is that if there is any escaped assessment and the Assessing Officer has reason to form the opinion a notice must be given to the assessee to file returns or to show that there was no escaped income and under section 152(2) the proceedings may be dropped. In that context, explanation provides that along with the proceedings for the escaped income which had formed reason to believe and the assessee has been properly intimated to show his case, proceedings of the other incomes may also be examined along with the said income.

The Revenue's appeal, being bereft of merit, was liable to be dismissed.

LD/60/123
A, In Re
Mach 22, 2012 (AAR)

Section 195 read with Section 115-O of the Income-tax Act, 1961, read with Article 10 of the Indo-Mauritius DTAA - Deduction of tax at source - Payments to Non-resident

Where proposal of buy-back is a scheme devised for avoidance of tax and in fact, it is a colorable device for avoiding tax on distributed profits as contemplated in Section 115-O, and further, distribution in question will satisfy definition of dividend under Act and

consequently taxable as such, receipts in hands of Mauritius Shareholder company would be taxable in India in terms of Article 10 of the DTAC between India and Mauritius

The applicant-company is a closely held Public Limited Company. 48.87 % of its share is held by 'A'(U) of USA, 25.06% by 'A'(M) of Mauritius, 27.37% by company 'A'(S) of Singapore and 1.76% by the general public. The applicant has passed a resolution proposing a scheme of buy-back of its shares from existing shareholders in accordance with Section 77A of the Indian Companies Act. 'A' (Mauritius) which holds 25.06% of shares in the applicant and incorporated on 6.4.2001 in Mauritius, proposes to accept the offer of buy-back. It acquired the shares in the applicant during the period 2001 to 2005 for ₹280 per share on the first occasion and ₹320 per share on the subsequent occasions. It is in that context that the applicant approached Authority for Advance Ruling as to whether the capital gains that may arise, is chargeable to tax in India?

The Authority for Advance Rulings ruled that in this case, there is no dispute that no dividend had been paid to any of the shareholders after 1.4.2003 on which date Section 115-O of the Act was introduced in its present form. The accumulation in the reserves was allowed to be increased considerably. It may be noted that the major shares are held by the 'A' group and only 1.76% of shares are outstanding with the general public. The payment of dividend in the normal course by a company making profits, would have meant that the applicant would have been obliged to pay tax on distribution of profits to its shareholders. Instead of distributing the dividend on the basis of profits that accrued, the applicant allowed the reserves to grow. The proposed buy-back, if followed up, would mean that considerable sums would be repatriated to 'A" (M) in Mauritius without the tax on the distributed profits being paid, by resort to paragraph 4 of Article 13 of the DTAC between India and Mauritius. In this context, it is significant to note that neither 'A' (U), USA nor 'A' (S), Singapore accepted the offer of buy-back, obviously because in the case of one it would have been taxable in India as capital gains and in the case of the other, its taxability would have depended on certain conditions being fulfilled, whereas under the India-Mauritius DTAC, capital gains is totally out of the Indian tax net. There was no proper explanation on the part of the applicant as to why no dividends were declared subsequent to the year 2003 when the company was regularly making profits and when dividends were being distributed before the introduction of Section 115-O of the Act in its present form. Therefore, the proposal of buy-back is a scheme devised for avoidance of tax.

In fact, it is a colorable device for avoiding tax on distributed profits as contemplated in Section 115-O of the Act.

It is true that if the receipt in the hands of 'A' (M) is treated as capital gains, it would be Section 46A of the Act that will be attracted and by the force of paragraph 4 of Article 13 of the concerned DTAC, the receipt would not be taxable in India. But in view of the finding that the transaction of buy-back proposed to be resorted to, is a colorable transaction, the question is whether the amount would not be taxable as dividend in terms of Section 2(22) of the Act as amended with effect from 1.4.2003. When the proposed transaction is found to be colorable, it is not a transaction in the eye of law and once it is ignored as such, the arrangement can only be treated as a distribution of profits by a company to its shareholders which does not attract Section 115-O of the Act. Dividend in terms of the definition includes any distribution by a company of accumulated profits to its shareholders. The exemption is only in respect of a germin buy-back of shares. On the finding that the proposed buy-back is colourable, the distribution in question will satisfy the definition of dividend under the Act and consequently taxable as such. Under Article 10, paragraph 2 of the DTAC, dividend paid by a company which is a resident of India, to a resident of Mauritius, may also be taxed in India, according to the laws of India but subject to the limitation contained therein,. It may also be noticed that the payment in question, would also satisfy the definition of dividend in paragraph 4 of Article 10 of the DTAC between India and Mauritius. Therefore, the proposed payment would be taxable in India in terms of paragraph 2 of Article 10 of the DTAC between India and Mauritius.

In the light of the reasoning and conclusion as above, the amount that would be payable by the applicant to 'A' (M) would be taxable in India in terms of Article 10 of the DTAC between India and Mauritius. Further, the applicant is required to withhold tax on the proposed remittance of the proceeds to 'A' (M).

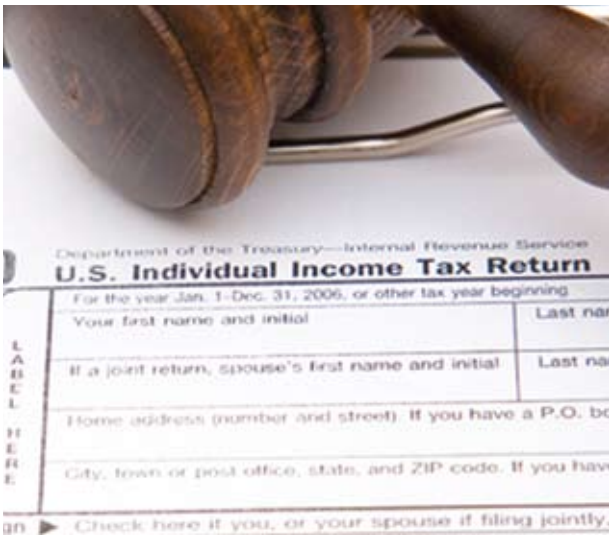
LD/60/124
CIT
Vs.
Ranka & Ranka
November 2, 2011 (KAR)

Section 260A of the Income-tax Act, 1961 - High Court - Appeal to

Instruction No.3/11 dated 9-2-2011 prescribing monetary limit of filing appeal before High Court as ₹ 10 lakhs is also applicable to all pending appeals

The Centre has formulated the National Litigation Policy to reduce the cases pending in various courts in India under the National Legal Mission to reduce average pendency time from 15 years to 3 years.

Instruction No. 3/11 dated 9-2-2011 is issued subsequent to the aforesaid National Litigation Policy. A perusal of the aforesaid policy makes it clear that though the said instruction was issued as a measure for reducing litigation, it was issued in supersession of the earlier instruction enhancing the monetary limits and prescribing certain conditions. The very fact that clause 11 provides that this instruction will apply to appeals filed on or after 9th February, 2011 and where appeals have been filed before that date, the same will be governed by the instructions on this subject, operative at the time when the said appeal was filed, makes it clear that the said instruction is not applicable to the pending proceedings. The National Litigation Policy provides that appeals in Revenue matters should not be filed if the stakes are not high and are less than that amount to be fixed by the revenue authorities, it equally provided that cases which are found without merit should be withdrawn. Similarly, cases which are covered by the decision of the Courts also have to be withdrawn. Officer has to be appointed and all pending cases have to be reviewed and frivolous and vexatious matters have to be filtered from the meritorious cases and the same are withdrawn. In other words, the National Litigation Policy dealt with pending cases and wanted the pending cases to be reduced by way of withdrawal, so that valuable time of the Courts would be spent in resolving other pending cases so as to achieve the goal in the National Legal Mission to reduce average pendency from time from 15 years to 3 years.



The National Litigation Policy expressly stated that the Government must cease to be a compulsive litigant. The philosophy, that the matters should be left to the Courts for ultimate decision is to be discarded and the easy approach that let the Court decide, must be eschewed and condemned. The Revenue has not applied its mind in this direction. No attempt is made to reduce the pendency of the litigation by filtering frivolus and vexatious matters from meritorious ones and said cases are withdrawn. The only measure taken for reducing the litigation is, by raising the monetary limit. However, as the same is made prospective, it had no application to the pending cases. Therefore, the said Instruction No. 3/11 do not fulfill the requirement prescribed by the National Litigation Policy. It only partially satisfies the requirement in respect of future litigation. Under the aforesaid instruction, the crucial date is the date of filing of the appeal. It is that date when the tax effect is less than the monetary limit prescribed, the Revenue is precluded from filing such appeals. Though the date of filing of the appeal may be the criteria, that by itself would not provide a rationale sufficient to distinguish between pending cases and cases to be filed in future. The earlier monetary limit was fixed in the year 2005. So it is after six years, the monetary limit is enhanced. If only the Instruction No. 3/11 had been made applicable to the pending cases also, as laid down in the National Litigation Policy, the object of the policy would have been fulfilled. One of the ways of giving effect to the said policy is to make that instruction applicable retrospectively to all pending appeals as on the date of the circular. It would substantially serve the object of the policy.

If Instruction No. 3/11 is also made applicable to the pending appeals before this Court, it would grant relief to the assessee. Apart from granting relief to the assessee, if number of appeals pending before this Court are disposed of on the basis of the said circular, the precious time which would be saved by this Court could be better utilized for deciding disputes where tax effect is enormous. That apart, the duration, an appeal takes in this Court would be reduced as desired by the National Litigation Policy.

The Parliament with the best of intention, as incentive to trade and industry, has extended several benefits under the Act. Without properly appreciating the context and the object with which those provisions are enacted, the department has interpreted those provisions preventing those, benefits reaching the persons to whom it was intended. In most of the cases, the Tribunal has come to the rescue of those assessee, has interpreted those provisions in proper perspective and have extended the benefit to the assessee. It is against those orders, most of the appeals are filed mechanically as compulsive litigation without any sense of responsibility. Most of the appeals which are filed by the Revenue are frivolous and vexatious. The majority of the appeals are filed with the sole object of leaving it to the Courts for ultimate decision. The approach is, 'let the Court decide'. The authority who decides to prefer the appeal is not prepared to take the responsibility. There is an attempt to save their skin, so that tomorrow they are not held responsible in any manner. It is this approach, which is to be eschewed and condemned, as stated in the National Litigation Policy. It is yet another ground to make this circular applicable to the pending proceedings.

The object sought to be achieved by such circulars /instructions and also the law declared by the Apex Court, the National Litigation Policy 2011 as well as the various schemes introduced by the Department granting relief to persons who have not even filed returns and paid taxes, are kept in mind, to bring the circular/instruction in harmony with the National Litigation Policy, it would be appropriate to hold that the benefit of such circular/instruction also applies to the pending cases in appeal in various Courts and Tribunals on the date of the circular/instruction.

INDIRECT TAXES

Central Excixe

LD/60/125

CCE, Surat-I

Vs.

Favourite Industries

February 29, 2012 (SC)

Section 3 of Central Excise Tariff Act, 1985 - Emergency power of the Central Government to increase duty of excise

Finished goods manufactured by 100% Export Oriented Unit out of raw material supplied by another 100% EOU, and subsequently, cleared in Domestic Tariff Area in accordance with EXIM Policy 1997-2002, are entitled to benefit of exemption provided under Notification No.8/97-CE, dated 1.3.1997

The respondent was engaged in the manufacture of processed Polyester Grey Man Made fabric, out of raw materials obtained indigenously and/or imported free of Central Excise/Customs duties, as the case may be, under the obligation of export of the final product as well as clearance of final product in the DTA on payment of appropriate duty.

The assessee has contended that they are entitled for the benefit of the exemption from payment of certain amount of duty as provided in the Notification No.8/97-CE, dated 1.3.1997.

However, the revenue submitted that the assessee had purchased the raw material/finished products from a 100% EOU for its manufacturing activity and in the hands of the purchaser industrial unit, the transaction would be a deemed import and the finished goods in question would be deemed to be made out of imported raw material/finished product and, therefore, the assessee could not take the benefit of the Notification No. 8/97-CE. In such cases, Notification No. 2/95-CE was to be applied.

The Supreme Court held that the Notification No.2/95-CE dated 4.1.1995 exempts all excisable goods mentioned in the Schedule to the Tariff Act, from payment of duty leviable under section 3 of the Act. The Notification provides the measure/cap of exemption from payment of excise duty by an assessee/industrial unit. It says the exemption is from the excise duty which is in excess of the amount calculated at 50% of each of the duties of customs leviable under section 12 of the Customs Act, 1962 read with any Notification issued under section 25 of the Customs Act. The Notification also makes it clear with regard to the nature or type of goods that the 100% EOU should be manufacturing in its industrial unit. It says that the exempted goods should be in a nature or type of goods which are, normally, produced/manufactured outside India and, but for any reason, they are imported to India. That only means, there must be a similarity between the goods manufactured by a 100% EOU with that of the goods produced or manufactured outside the country but if it is imported into this country. The Notification provides two conditions in order to avail the benefit provided under the Notification. They are conjoint and not disjoint. Firstly, the exemption is available only, if the goods are produced or manufactured in a 100% EOU or FTA or EHTP unit or STP unit and, secondly, they must be allowed to be sold as per EXIM Policy 1997-2002. Proviso is appended to the Notification. A reference to the same may not be necessary for the purpose of the disposal of this appeal.

The Notification No.8/97-CE, dated 1-3-1997 exempts finished goods, rejects and waste or scrap enumerated in the Schedule to the Tariff Act, from payment of excise duty under section 3 of the Act.

Yet again, the Notification provides the entitlement or cap up to which the assessee can avail benefit under the Notification insofar as the payment of excise duty. The Notification also speaks of compliance of two conditions by an industrial unit for taking benefits/ advantage of the Notification. Firstly, the finished goods must be produced or manufactured in a 100% EOU or FTA from the raw material produced or manufactured in India (emphasis supplied). The second condition is that the goods must have been allowed to be sold in India as per sub paras (a), (b), (c), (d) and (f) of para 9.9 or para 9.20 of the EXIM Policy 1997-2002.

The Notification No.8/97-CE speaks of finished goods produced or manufactured by a 100% EOU and if it is sold in a DTA, the said EOU can take the benefit of the Notification no.8/97-CE.

The notification requires to be interpreted in the light of the words employed by it and not on any other basis. There cannot be any addition or subtraction from the notification for the reason the exemption notification requires to be strictly construed by the Courts. The wordings of the exemption notification have to be given its natural meaning, when the wordings are simple, clear and unambiguous.

The finished goods manufactured by the 100% Export Oriented Unit out of the raw material supplied by another 100% EOU, and subsequently, cleared in the Domestic Tariff Area in accordance with the EXIM Policy 1997-2002 are entitled to the benefit of the exemption provided under the Notification No.8/97-CE, dated 1.3.1997.

Customs

LD/60/126

Arteco Coolants India Pvt. Ltd., In re

January 27, 2012 (AAR)

Heading 3824 90 90 of the Customs Tariff Act, 1975 – Super Concentration

Super concentrates named CSC-GEN, CSC-QFB and CIP-FG cartifreeze coolant shall be classified as products of chemical industry under residuary entry of Chapter 38 of tariff, i.e., heading 3824 90 90 of First Schedule to the Customs Tariff Act, 1975

The applicant is a wholly owned subsidiary of Arteco NV, Belgium and proposes to undertake the manufacture of antifreeze coolants in India. For this purpose, they propose to import super concentrate, a constituent of the antifreeze coolants to be manufactured by them. Ruling has been sought on the classification of the super concentrate to be imported by them.

The Authority for Advance Rulings ruled that according to the technical literature, Mono Ethylene Glycol (MEG) is a widely used heat transfer agent (coolant) for automotive and industrial applications. It is used in combination with water and corrosion inhibiting chemicals that provide corrosion resistance to enhance the performance and life of engines. MEG, having low freezing point, contributes to lowering the freezing point of the cooling mixture. Through properties termed as colligative properties, it also raises the boiling point of the mixture – thus, enhancing the effective temperature range in which the coolant can operate. There is a continuous depression of freezing point as the concentration of MEG in water increases until a characteristic concentration is achieved – with the minimum freezing point being reached when the concentration of MEG in water is 70%. Beyond this concentration, the freezing point of the mixture starts rising again, which is why 100% glycol is never used as antifreeze. Boiling point elevation works in a similar manner though there is no maximum experienced. Glycerol has similar uses in antifreezes although it has been overtaken by ethylene glycol in terms of extensive use. However, it is said to be staging a comeback on account of its non-toxicity. Technical literature also shows that the concentration of MEG (and glycerol) in the final antifreeze coolant depends upon the requirements of particular engines or applications.

A perusal of rules 2(a) and 2(b) of the General Rules for Interpretation of Import Tariff shows that while the former refers to "an article", the latter refers to "a material or substance". The former deals with incomplete or unfinished articles and articles presented unassembled or disassembled while the latter deals with mixtures and combinations of materials or substances. What is at issue is the classification of a chemical mixture. Hence, *prima facie*, it would appear that rule 2(a) would not apply to this case. The examples given in the relevant HSN explanatory notes to the General Rules for

Interpretation of the Harmonized System seem to bear this out (e.g. bicycle without paddle or tyres, bicycle, unassembled or disassembled, with all components presented together). Equally importantly, notes (III) and (IX), under rule 2(a) state that in view of the scope of headings of sections I to VI, the provisions of rule 2(a) do not normally apply to goods of these sections. Therefore, rule 2(a) cannot apply to this case.

It is rule 2(b) that refers to mixtures and combinations of materials and substances and, having regard to the nature of the goods in question, will apply to the instant case if the goods are capable of being classified in two or more headings. The rule further states that the classification of goods consisting of more than one material or substance shall be according to the principles of rule 3. As explained in the relevant HSN notes, the effect of this rule is to extend the heading referring to any material or substance to include its mixtures and combinations with other materials or substances. It also extends any heading referring to goods of a given material or substance to include goods consisting partly of that material or substance. The notes further explain that such mixtures or combinations, if *prima facie* classifiable under two or more headings, must be classified in accordance with principles of rule 3.

To apply this rule, therefore, one has to first see whether the goods in question, *prima facie*, fall for classification under two or more headings.

The entry in heading 3820 00 00 reads "ANTI-FREEZING PREPARATIONS AND PREPARED DE-ICING FLUIDS". The case turns upon the meaning of the word "preparations". The word "preparations" has not been defined either in the tariff under this heading or in the relevant HSN notes.

From the dictionary meaning, it would appear that the word "preparations" refers to something that is made ready for use, which is clearly not the case here as it is established that the superconcentrates, in the form in which they are imported, cannot be put to use as anti- freeze coolants. Hence, they do not seem to answer the description "anti-freeze preparations". Therefore, rule 3(a) will not be applicable. As according to technical authorities cited the properties of anti-freezing and anti-corrosion are both important in anti-freeze preparations, it cannot be said that any one of them gives the anti-freeze mixture its essential character. Consequently, resort cannot be had to rule 3(b) as well to classify the goods under 3820 00 00. We have already held that rule 2(a) of the General Rules for Interpretation cannot apply to these goods. Therefore, on the basis of meaning of the word "preparations" and the inapplicability of rule 2(a), their classification under heading 3820 00 00 is ruled out. The product CIP-FG in any case contains no glycol or glycerol and as such has no anti-freeze properties.

The goods are undeniably products of chemical industry. There is other specific headings of the tariff under which they could fall for classification. Consequently, their classification will have to be under the residuary entry of chapter 38 of the tariff *i.e.* heading 3824 90 90. The list of products mentioned in notes (A) and (B) of the HSN notes for heading 38.24 is an inclusive and not an exhaustive list. It can therefore be only illustrative.

Accordingly, it is to be ruled that the super concentrates named CSC-GEN, CSC-QFB and CIP-FG shall be classified as products of the chemical industry under the residuary entry of Chapter 38 of the tariff, i.e., heading 3824 90 90 of the First Schedule to the Customs Tariff Act, 1975.

OTHER ACTS

Banking Laws

LD/60/127

JIK Industries Limited
Vs.
Amarlal V. Jumani
February 1, 2012 (SC)

Section 147 read with Section 138 of the Negotiable Instruments Act, 1881 read with section 320 of the Cr. P. C. – Offences to be Compoundable

As a result of section 147, offences under N.I. Act are made compoundable, but main principle of such compounding, namely, consent of person aggrieved or person injured or complainant cannot be washed away nor can same be substituted by virtue of section 147; it cannot be said that as a result of sanction of a scheme under section 391 of Companies Act, 1956 there is an automatic compounding of offences under section 138 of N.I. Act even without consent of complainant

Under the Scheme of modern legislation, non-obstante clause has a contextual and limited application. The 'non-obstante clause' must be kept measured by the legislative policy and it has to be limited to the extent it is intended by the Parliament and not beyond that.

The non-obstante clause used in section 147 of N.I. Act does not refer to any particular section of the Code of Criminal Procedure but refers to the entire Code. When non-obstante clause is used in the aforesaid fashion the extent of its impact has to be found out on the basis of consideration of the intent and purpose of insertion of such a clause.

It is clear from a perusal of the Statement of Objects and Reasons that offence under the N.I. Act, which

was previously non- compoundable in view of section 320 sub-section 9 of the Code has now become compoundable. That does not mean that the effect of section 147 is to obliterate all statutory provisions of section 320 of the Code relating to the mode and manner of compounding of an offence. Section 147 will only override section 320 (9) of the Code in so far as offence under section 147 of N.I. Act is concerned.

No special procedure has been prescribed under the N.I. Act relating to compounding of an offence. In the absence of special procedure relating to compounding, the procedure relating to compounding under section 320 shall automatically apply in view of clear mandate of sub-section (2) of section 4 of the Code.

In view of section 4(2) of the Code, the basic procedure of compounding an offence laid down in section 320 of the Code will apply to compounding of an offence under N.I. Act.

It is well settled that a judgment is always an authority for what it decides. It is equally well settled that a judgment cannot be read as a statute. It has to be read in the context of the facts discussed in it. Following the aforesaid well settled principles, the basic mode and manner of effecting the compounding of an offence under section 320 of the Code cannot be said to be not attracted in case of compounding of an offence under N.I. Act in view of section 147 of the same.

Section 320 of the Cr.P.C. contains comprehensive provisions for compounding. A perusal of section 320 makes it clear that the provisions contained in section 320 and the various sub-sections is a Code by itself relating to compounding of offence. It provides for the various parameters and procedures and guidelines in the matter of compounding. It cannot be said that as a result of incorporation of section 147 in the N.I. Act, the entire gamut of procedure of section 320 of the Code are made inapplicable to compounding of an offence under the N.I. Act, If so happened, the compounding of offence under N.I. Act will be left totally unguided or uncontrolled. Such an interpretation apart from being an absurd or unreasonable one will also be contrary to the provisions of section 4(2) of the Code. There is no other statutory procedure for compounding of offence under N.I. Act. Therefore, section 147 of the N.I. Act must be reasonably construed to mean that as a result of section 147, the offences under N.I. Act are made compoundable, but the main principle of such compounding, namely, the consent of the person aggrieved or the person injured or the complainant cannot be washed away nor can the same be substituted by virtue of section 147 of N.I. Act.

For the reasons aforesaid, it cannot be said that as a result of sanction of a scheme under section 391 of the Companies Act there is an automatic compounding of offences under section 138 of the N.I. Act even without the consent of the complainant.

SEBI

LD/60/128
DLF Ltd.
Vs.
SEBI
January 1, 2012 (DEL)

Section 11C of SEBI Act, 1992 - Investigation

Where case of complainant-land owner was that petitioner company did not, in its Draft Red Herring Prospectus, disclosed its modus operandi for purchase of lands and it had selectively avoided disclosure of information about intermediary companies those used to purchase lands, so as to avoid disclosure of any potential liability, and civil or criminal proceedings that had arisen or might arise in connection with land purchases, SEBI has jurisdiction of direct investigation against petitioner and its alleged associates about breach of SEBI (Disclosure of Investor Protection Guidelines) 2000

The complainant claimed to have entered into business transactions with an unlisted company, Sudipti in the year 2006. At that time of point of time, Sudipti was controlled by two promoters, namely, DHDL and DREDL, both of whom were wholly owned subsidiaries of DLF, the petitioner. Sudipti was claimed to have been incorporated on 24-3-2006. In connection with public issue, the petitioner filed a Draft Red Herring Prospectus (DRHP) with the SEBI on 12.05.2006. In the said DRHP, it was indicated that Sudipti was one of the joint ventures of DLF. However, this DRHP was subsequently withdrawn by the merchant bankers of the petitioner and a fresh DRHP was submitted on 02.01.2007, in which Sudipti was not mentioned as being associated with DLF.

The complainant claimed that the petitioner and Sudipti had ensnarled and cheated him of ₹31,09,50,000 towards sale proceeds of certain lands. A First Information Report (FIR) under section 420 of IPC was got registered at the instance of respondent no.2 against Sudipti and a few others on 26.04.2007.

In pursuance of the directions of the Division Bench of the High Court, SEBI granted hearing to the parties which has resulted in the passing of the impugned order stating that the SEBI would investigate into the allegations in respect of the petitioner and Sudipti and the said investigation would focus on the violations, if

any, of the provisions of the erstwhile SEBI (Disclosure and Investor Protection) Guidelines, 2000.

The Delhi High Court held that the petitioner alleged that SEBI had no jurisdiction to pass such directions having, prima facie observed that petitioner-DLF was aware of the registration of the FIR against Sudipti, the Board proceeded to deal with the question whether it was the petitioner's duty to disclose the same in the prospectus.

The Board noted the case of the respondent-complainant that DLF used Sudipti along with a maze of intermediary companies to purchase land which forms part of the land disclosed in the DRHP. The case of the complaint was that the DLF purchases land through a maze of intermediary companies controlled by it, through a series of back to back purchases of debentures through which the purchase money flowed to an entity that purchases the land and that the company enters into a series of back to back development rights agreements whereby it acquired the development rights in the land so purchased, by paying the same amount of money to the entity purchasing the land in lieu of the development rights, which money is then used to redeem the back to back debentures.

The case of the complainant/Respondent No. 2 was that the DLF did not, in its Draft Red Herring Prospectus, disclose its modus operandi for the purchase of lands and selectively avoided disclosure of information about the intermediary companies it used to purchase lands, so as to avoid disclosure of any potential liability, civil or criminal proceedings

that had arisen or may arise in connection with land purchases.

The Board also took note of the fact that DLF in its DRHP filed in the year 2007 disclosed that out of the total land holdings of approximately 10,000 acres, only 0.5% holding was held by the company and the balance holding was held in the name of the company's subsidiaries/associate/group company/ companies under the control and management of key management personnel of the company.

The complainant produced before the Board additional submission to support the allegation against the petitioner. The Board observed that it did not deem it proper to disregard the same without testing the veracity of such submissions in the interest of justice and in the interest of the securities market and the investors.

While observing that the original complaints dated 4th June, 2007, 19th July, 2007 did not contain allega-tions of the petitioner funding Sudipti indirectly through a series of transactions involving its subsidiaries/associates and the manner of purchasing lands and creating development rights on the land acquired by the companies subsidiaries by indirect funding of such purchases, the Board observed that in the interest of the securities market, the investors, as also the interest of justice, it would not be proper on the part of SEBI to dispose of the complaint by holding that those additional submissions were extraneous to the original complaint filed by the complainant/ Respondent No. 2.

The aforesaid observations of the Board left no manner of doubt that the Board has not per se relied upon the additional documents filed by Respondent No. 2 before it.

There is no bar or impediment cast on the Board by the SEBI Act, to say that it would not entertain or look into evidence that the complainant may rely upon in support of his complaint earlier made, while considering whether, or not, to direct an investigation. There is no reason to put any such fetters on the powers of the Board or to read such restrictions into the statute, which are clearly not there. The Board is the Sole authority created by law to deal with complex issues which arise in the management and supervision of the securities markets. Any such restrictions, artificially introduced would denude the Board of its powers and hamper its functioning.

The Division Bench in its judgment, had not precluded the Board from looking into any additional information/ documents that Respondent No. 2/ Complainant might produce in support of his complaints.

The adequacy or sufficiency of the reasons which weighed with the Board in entertaining the reasonable belief with regard to the possible existence of circumstances mentioned in Clauses (a) and (b) of section 11 C (1) cannot be gone into. However, it could not be said that the reasons were not relevant, or have no bearing on the matters in regard to which the Board had formed its belief. It also could not be said that there is no rational or intelligible nexus between the reasons contained in the impugned order, and the reasonable belief entertained by it because, if, the allegations levelled by Respondent No. 2, and the materials relied upon by him would be established, and, on the other hand, the defence of the petitioner would not be substantiated, it might tantamount to violation of the provisions of the SEBI Act; of the Rules, and; of the Regulations made or the direction issued by the Board under the Act, which had been taken note of in the impugned order itself.

Pertinently, it was not even the petitioner's case, that the Board while passing the impugned order had acted out of bad faith against the petitioner. It was clear that the belief entertained by the Board had a rational connection with the reasons given by it in the impugned order, which were not extraneous or irrelevant.

Thus, the SEBI was justified in passing the impugned order directing investigation into the allegations about the breach of the SEBI (Disclosure of Investor Protection Guidelines) 2000, and failure of disclosure of information required to be made in the red herring prospectus by the petitioner-DLF.

■

Section 11, read with section 11C of Securities and Exchange Board of India Act, 1992 - Functions of Board

Where allegations were made in respect of violations of SEBI Rules, Regulations, etc., at stage of consideration of issue by SEBI as to whether an investigation should be ordered by appointing an investigating authority, parties are not required to be given opportunity to be heard in presence of opposite party

In pursuance of the directions of the Division Bench of the High Court, SEBI granted hearing to the parties which had resulted in the passing of the impugned order stating that the SEBI would investigate into the allegations in respect of the petitioner and its alleged associates and the said investigation would focusing on the violations of the provisions of the SEBI (Disclosure and Investor Protection) Guidelines, 2000 read with the relevant provisions of the Companies Act, 1956.

SEBI, before passing the impugned order did not provide an opportunity to the petitioner to hear the submissions of the complainant, or to deal with or respond to the written submissions of respondent No. 2-complainant. Similarly, the complainant was not granted an opportunity to hear and deal with or respond to either the oral submissions of the petitioner or to their written submissions. Therefore, the peitioner opposed the validity of the order.

The Delhi High Court held that SEBI has been invested with powers & responsibilities to function in a dual capacity. It functions in an inquisitorial capacity while examining the issue, whether reasonable grounds exist to believe that the transactions in securities are being dealt with in a manner detrimental to the investors or the securities market or, whether any intermediary or any person associated with the securities market has violated any of the provisions of the SEBI Act or the rules & regulations made thereunder, or directions issued by the Board. If it finds that reasonable grounds exist to believe the existence of the aforesaid state of affairs, it can direct an investigation by an investigating authority under section 11C of the Act. Once the investigation has been ordered under section 11C and an investigation report made, the SEBI while examining the said report and acting upon it, functions in its quasi judicial capacity. This is evident from section 11(4) of the Act.

The submission of the petitioner ought to have been granted a full-fledged hearing by the Board i.e, the Board should have heard the Respondent No. 2 complainant in the presence of the petitioner, and the petitioner should have been provided with the written submissions of Respondent No. 2 and should also have been provided opportunity to meet the case of Respondent No. 2 at the stage of consideration of the issue whether an investigation should be ordered by appointing an investigating authority, therefore, cannot be accepted. If accepted, it would lead to a piquant situation where the Board shall, only on the basis of a prima facie assessment return its findings which would, in turn, impinge upon the functions to be discharged by the investigating authority to be appointed to investigate into the matter. Pertinently, an investigating authority is extensively empowered to unearth facts (see section 11C(2) to 11C(9) of the SEBI Act), and cause a detailed investigation into the matter. That exercise would get defeated if the Board were to, on the basis of a prima facie view, return findings of fact by itself holding a full fledged hearing. As in the case of Competition Commission of India, in the present case as well, the functions to be performed by SEBI cannot be rendered nugatory by imposition of unnecessary directions or impediments which are not postulated by the plain language of section 11C. ■