

Legal Decisions¹



Income-tax Act

LD/61/12
CIT, Bangalore
Vs.

De Beers India Minerals Pvt. Ltd.
March 15, 2012 (KAR)

Section 9 of Income-tax Act, 1961, read with Article 12 of

DTA between India and Netherlands - Income - Deemed to accrue or arise in India

Income received by Dutch company from Indian diamond prospecting company for providing technical services to supply technical data related to geological survey including drawings, plans, maps, etc., to diamond bearing deposits targets but withheld technical knowledge of such data processing would not be fees for technical services within meaning of DTA between India and Netherlands

The assesseees were engaged in the business of prospecting and mining for diamonds and other minerals. They have been granted licences by different State Governments for mineral reconnaissance activities. For this purpose, to carry out geophysical survey, the assesseees entered into an agreement with a Dutch company Fugro which is an expert in performing air borne geophysical services to acquire during data the survey, process data and provide necessary reports.

The Karnataka High Court held the followings:

Issue of Fees for technical services

In terms of agreement/contract between the assesseees and Fugro and in view of the facts of the case, it was clear that assesseees acknowledge the services of Fugro for conducting survey, taking photographs and providing data information and maps. That was the technical services which the Fugro had rendered to the assesseees. The technology adopted by Fugro in rendering those technical services was not made available to the assesseees. The survey report was very clear. Unless the technology was also made available, the assesseees were unable to undertake the very same survey independently excluding Fugro in future. Therefore, that technical services which was rendered by Fugro was not of enduring in nature. It

was a case specific. The assesseees can make use of the data supplied by way of technical services and put its experience in identifying the locations where the diamonds are found and carrying on its business. But the technical services which was provided by Fugro would not enable the assesseees to independently undertake any survey either in the very same area Fugro conducted the survey or in any other area. They did not get any enduring benefit from the aforesaid survey. In that view of the matter, though Fugro rendered technical services as defined under Section 9(1)(vii) *Explanation 2*, it did not satisfy the requirement of technical services as contained in DTAA, Therefore, the liability to tax was not attracted.

Development and transfer of any technical plan or technical design to the assessee

Fugro was engaged in providing services relating to collection and processing of the data. The contract was for providing of services and not for supply of technical design or plan. Fugro compiled the data and processed them for error correction and delivered it to the assesseees in a computer readable media. Using this raw Input data provided by Fugro, the assesseees would further process same in software technology which were not owned or provided and, thus, by Fugro would generate report to determine probable targets. The reports and maps were are only additional mode of representation of data and it was not a technical plan or design as understood in law. The agreement entered into between the assesseees and the Fugro, makes it clear that the information and data to any site on which any work services were performed under the agreement would belong exclusively to the assesseees and the Fugro keep such information strictly confidential. Therefore, the technical plan or design always belonged to the ownership of the assesseees. It never vested with Fugro. Under the terms of the agreement, the data collected was kept confidential under the supervision of the Government of India. Under the terms of the agreement, the ownership of the data collected or other documents vested with the assesseees only and not with Fugro. Therefore, the Fugro was never the owner of the said data and, hence, the question of transfer of such data did not arise. The assesseees were given the licence for prospecting under the provisions of Mines & Minerals (Development and Regulation) Act, 1957. By virtue of the aforesaid

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

licence, the assesseees were given the right to undertake reconnaissance, prospecting or mining operations in any area except under and in accordance with the terms and conditions of reconnaissance permit or of a prospecting licence as the case might be of a mining lease granted under the Act and the Rules made thereunder. Reconnaissance permits means permit granted for the purpose of undertaking the reconnaissance operations. Reconnaissance operations means any operations undertaken for preliminary prospecting of a mineral through regional, aerial, geophysical or geophysical survey's and geological mapping on a grid specified from time to time by the Central Government or sub-surface excavation. Prospecting operations means any operations undertaken for the purpose of exploring, locating or proving mineral deposits.

It is because of the statutory obligation imposed by the Mineral Concession Rules, 1969 on the licensee in the contract entered into between the assesseees and Fugro, it was specifically provided in the agreement that all information and data relating to any site on which any work or services are performed under the agreement would belong exclusively to the assesseees and the contractor would keep such Information strictly confidential. All information recorded in digital and analog form and all products derived from information were the property of the assesseees. The contractor agreed not to divulge any information to any person or organisation without the written permission of the assesseees and only to be divulged to the assesseees, personnel who were specified by the assesseees as appropriate persons to whom the contractor might provide information. The agreement further provided that the contractor would not grant entry to any data site of aircraft to any person other than those authorised by the assesseees and the contractor shall exercise all due care to preserve the integrity of all information.

Therefore, the assesseees not being possessed with the technical know-how to conduct this prospecting operations end reconnaissance operations, engaged the services of Fugro which was expert in the field. By way of technical services Fugro delivered to the assesseees the data and information after such operations. The said data is certainly made use of by the assesseees. Not only the said data and information was furnished in the digital form, it was also provided to the assesseees in the form of maps and photographs. These maps and photographs which were made available to the assesseees could not be construed as Technology made

available. Fugro had not devised any technical plan or technical design. Therefore, the question of Fugro transferring any technical plan or technical design did not arise in the facts of these cases. The maps which were delivered were not of kind of any developmental activity. As such, the information which was furnished to the assesseees by way of technical services in the digital form was also given in the form of maps. Therefore, the case on hand did not fall in the second part of the aforesaid clause dealing with development and transfer of plans and designs. Therefore, there was no development and transfer of any technical plan or technical design to the assesseee.

LD/61/13

CIT-10

Vs.

Black & Veatch Consulting (P) Ltd.

April 9, 2012 (BOM)

[Assessment Years 2003-04 and 2004-05]

Section 10A read with Section 72 and Section 80-A of Income-tax Act, 1961 - Free Trade Zone

Brought forward unabsorbed depreciation and losses of a unit, income of which is not eligible for deduction under section 10A cannot be set off against current profit of eligible unit for computing deduction under section 10A

Section 10A is a provision which is in the nature of a deduction and not an exemption. The deduction under section 10A has to be given effect to at the stage of computing the profits and gains of business. This is anterior to the application of the provisions of section 72 which deals with the carry forward and set off of business losses. A distinction has been made by the Legislature while incorporating the provisions of Chapter VI-A. Section 80A(1) stipulates that in computing the total income of an assessee, there shall be allowed from his gross total income, in accordance with and subject to the provisions of the Chapter, the deductions specified in sections 80C to 80U. Section 80B(5) defines for the purposes of Chapter VI-A "gross total income" to mean the total income computed in accordance with the provisions of the Act, **before making any deduction under the Chapter**. What the Revenue in essence seeks to attain is to telescope the provisions of Chapter VI-A in the context of the deduction which is allowable under section 10A, which would not be permissible unless a specific statutory provision to that effect were to be made. In the absence thereof,

such an approach cannot be accepted. The deduction under section 10A has to be given at the stage when the profits and gains of business are computed in the first instance.

LD/61/14

Mehru Electrical & Engg. (P.) Ltd.

Vs.

CIT, Alwar

April 27, 2012 (RAJ)

Section 24 of Income-tax Act, 1961 - Income from house property – Deductions from

If a case is adjourned by giving a last opportunity to counsel for assessee, same can be adjourned again on the date fixed, if sufficient or reasonable cause exists on that day

It was clearly mentioned by the tribunal on the last hearing on 11-1-2010 that both the parties were being given the last opportunity and the case was adjourned for 9-2-2010. Application for adjournment was filed by the assessee's counsel on 8-2-2010, which was put up for consideration before the Tribunal on 9-2-2010. From the application, it appeared that Counsel for assessee had to go to out of station due to some urgent work. Application was available on record. No one was present on behalf of assessee. Tribunal, in absence of Counsel for assessee, rejected the adjournment application.

The Rajasthan High Court held that ordinarily, it is not incumbent on the part of the Tribunal to adjourn the case again when a last opportunity had already been granted to the Counsel for assessee, however, there may be number of circumstances where adjournment becomes necessary, in the interest of justice. If Counsel for assessee had to go for some urgent work to outstation and an application for adjournment was moved in advance, then in the interest of justice, a short adjournment should have been granted. If number of opportunities had already been afforded to the Counsel for assessee, then adjournment could have been granted, on payment of cost. The Tribunal, in the present case, had not assigned any reason as to whether reason mentioned in the application for adjournment, constituted sufficient cause for adjournment or not? Even if, a last opportunity is granted and case is fixed for hearing and sufficient cause is shown on the date fixed for hearing, then the case can be adjourned and it should be adjourned, in the interest of justice.

In these circumstances, it was to be held that the Tribunal committed an illegality in rejecting the

application for adjournment and in deciding the appeal, ex-parte, without hearing the learned counsel for assessee.

LD/61/15
CIT-III, Chennai
Vs.

PVP Ventures Limited
June 19, 2002 (MAD)

[Assessment Year 2001-02]

Section 28(i) read with Section 80HHE of the Income-tax Act, 1961 - Business and professional income – Chargeable as

Where assessee issued global depository shares (GDS) with reference to establishment of offshore software development centre at Chennai and had kept FDs of GDS proceeds abroad, receipt on account of exchange fluctuation when money was brought in India is to be treated as capital receipt

The assessee issued global depository shares with reference to establishment of offshore software development centre at Chennai. The assessee kept a part of the money abroad. When the money was brought to India, due to strong dollar position, the assessee gained on the repatriated amount. This was claimed as a capital receipt.

Pointing out the printed prospectus to the issue of GDS, the Commissioner viewed that the aggregate net proceeds received were used principally to fund the establishment of offshore software development and the balance was used for working capital and for other general corporate purposes. The Commissioner viewed that the assessee had kept FDs of the GDS proceeds on its own and not because of any compulsion. Consequently, the amount received on account of exchange fluctuation was to be treated as revenue receipt and the Assessing Officer erred in reducing it in the income of the assessee while computing the deduction under Section 80HHE. He opined that in the computation of deduction under Section 80HHE, the Assessing Officer should have restricted it to 90 per cent of the receipt.

The Tribunal held that there was nothing on record to show that the retention of GDS proceeds in FDs were later on brought into to India only for a gain. The Tribunal pointed out that the increase in the value was not due to any activity of the assessee but due to the change in the exchange rate of the Indian rupee to the US Dollar. The receipt on the issue of GDS being capital in nature, the amount received on account

of exchange fluctuation also had the character of a capital receipt. Consequently, the Tribunal on facts held against the Revenue and set aside the order of the Commissioner of Income Tax.

The Madras High Court held that evidently the receipt related to the issue of global depository shares by the assessee. The said shares were issued for widening its capital base. The fact remains what was remitted was equivalent to what was received in US dollars. Thus, the receipt on account of exchange fluctuation being related to the money received on capital issue, the receipt was only capital in nature.

In the decision reported in *EID Parry Limited v. CIT, 174 ITR 11* the Madras High Court pointed out on account of exchange fluctuation, if the assessee receives further money, the same represented capital receipt. Considering the fact that the surplus amount which arose was on account of the exchange fluctuation on the money received on capital account and not on account of any transaction by the assessee, as a trading asset or as part of circulating capital, the surplus amount arising on account of exchange fluctuation has to be treated as capital receipt. In *CIT v. Jagatjit Industries Limited, 337 ITR 21*, the Delhi High Court held that for the purpose of determination of the character of the receipt, one has to know whether the amount was held by the assessee on capital account or in any other account. Thus, receipt on account of exchange fluctuation on the money held on the allotment of shares has to be held as capital only. The Delhi High Court pointed out that the money was received on allotment of shares by way of GDR and the amount was collected in US Dollars. The gain on account of exchange fluctuation was attributable to the share capital and such gain on capital account. Referring to the fact that 21 per cent of the gain was taken as revenue receipt, since the same was utilised for general corporate uses, the Delhi High Court held that the entire money collected in foreign exchange represented share capital. Thus, the use of this share capital, i.e., how this money is to be utilised, would be of no consequence. It pointed out that even if money is raised by issuance of equity shares domestically, the money thus collected as share capital is to be treated as capital receipt. Merely because part of the share capital is used as a working capital, the character of the receipt would not become a revenue receipt. Thus, once this aspect becomes clear and the entire money raised through issue of equity shares is to be treated as share capital, the gains on account of foreign exchange fluctuations, in the event such share capital collected

in foreign exchange; hence, is only capital receipts and the determination as to whether it is to be treated as capital receipt or revenue receipt cannot depend upon the end use of the share capital.

Thus, the conclusion arrived at by the Tribunal that the character of the receipt on account of exchange fluctuation is nothing but capital, was just and proper.

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

While allotting the shares to the employees in respect of Employees Staff Option Plan and Employees Staff Purchase Scheme Guidelines, the difference between market prices and price at which option is exercised by employees is to be allowed as expenditure

The assessee had debited a sum of ₹66.82 lakhs under the head of Staff Welfare expenditure. The said sum was incurred by the assessee in respect of Employees Staff Option Plan and Employees Staff Purchase Scheme Guidelines, 1999. While allowing the shares to the employees, the difference in the value was to be allowed as expenditure. The Assessing Officer allowed the Staff Welfare expenditure incurred in terms of accounting policies prescribed in SEBI guidelines.

The Commissioner revised this claim accepted by the Assessing Officer and held that the accounting treatment prescribed by SEBI, nowhere suggests that it was revenue expenditure to be debited to the Profit and Loss Account as it was only a notional and contingent expenditure. In the circumstances, the Commissioner held that the shares allotted under Employees Staff Option Plan and Employee Staff Purchase Scheme Guidelines, having not stated anything about the manner of treatment to this expenditure, the difference in the value at which the shares were allotted and the market value of the shares did not warrant any allowance as expenditure. The Commissioner passed an order directing the Assessing Officer to revise the assessment.

The Tribunal pointed out that the shares were issued to the employees only for the interest of the business of the assessee to induce employees to work in the best interest of the assessee. The allotment of shares was done by the assessee in strict compliance of SEBI regulations, which mandate that the difference between the market prices and the price at which the option is exercised by the employees is to be debited to the Profit and Loss Account as expenditure. The

Tribunal pointed out that what had been adopted was not notional or contingent as had been submitted by the Revenue. Pointing out to the Employees Stock Option Plan, the Tribunal in its order stated that it was a benefit conferred on the employee. So far as the company is concerned, once the option was given and exercised by the employee, the liability in this behalf got ascertained. This was recognised by SEBI and the entire Employees Stock Option Plan was governed by guidelines issued by SEBI. On the facts thus found, the Tribunal held that it was not a case of contingent liability depending on the various factors on which the assessee had no control. The expenditure in this behalf was an ascertained liability and, thus, the expenditure incurred being on lines of the SEBI guidelines, there could be no interference in the relief granted by the Assessing Authority for the expenditure arising on account of Employees Stock Option Plan. This expenditure incurred as per SEBI guidelines and granted by the Officer could not be considered as erroneous one calling for exercise of jurisdiction under section 263.

The Madras High Court held the assessee had to follow SEBI direction and by following such direction, the assessee claimed the ascertained amount as liability for deduction. There exists no error to disturb the order of the Tribunal.

Section 263 of the Income-tax Act, 1961 - Revision – Of orders prejudicial to revenue

To initiate revision, there must be definite finding for quashing the assessment that the Officer did not do proper enquiry at the time of assessment and, thus, this warranted exercise of jurisdiction under Section 263

Once the Commissioner (Appeals) had based his show cause notice on a particular ground to treat a receipt as having particular character, any subsequent change on receipt of a reply to the show-cause notice strikes at the very base of the grounds for exercising the authority under Section 263.

In *Malabar Industrial Co. Ltd v. CIT, 243 ITR 83*, explaining to the scope of the expression 'prejudicial to Revenue', the Apex Court pointed out that the prerequisite for the exercise of jurisdiction by the Commissioner suo moto under Section 263 is that the order of the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. The Apex Court pointed out that the said provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer. Every

loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. Thus, when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of Revenue; or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, the order of assessment cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income Tax Officer is unsustainable in law.

There must be definite finding for quashing the assessment that the Officer did not do proper enquiry at the time of assessment and, thus, this warranted exercise of jurisdiction under Section 263.

While assuming jurisdiction under Section 263, the Commissioner has to satisfy himself, out of statutory compulsion that as the order passed by the Officer is an erroneous one and prejudicial to the Revenue warranting exercise of power under Section 263.

LD/61/16

CIT, Kolkata

Vs.

SMIFS Securities Ltd.

August 22, 2012(SC)

[Assessment Year 2003-04]

Section 32 of the Income Tax Act, 1961 - Depreciation

Stock Exchange Membership Cards are assets eligible for depreciation under Section 32.

Section 32 of the Income Tax Act, 1961 - Depreciation

Goodwill' is an asset under Explanation 3(b) to Section 32(1)

In accordance with Scheme of Amalgamation of company YSN (Amalgamating Company) with the appellant-assessee company assets and liabilities of YSN were transferred to and vested in the assessee company. In the process goodwill has arisen in the books of the assessee company. It was explained that excess consideration paid by the assessee over the value of net assets acquired of YSN should be considered as goodwill arising on amalgamation. It was claimed that the extra consideration was paid towards the reputation which the Amalgamating Company was enjoying in order to retain its existing clientele. The Assessing Officer held that goodwill is not an asset falling under *Explanation 3* to Section 32(1).

The Supreme Court held that, from the reading of *Explanation 3* to Section 32(1), it is clear that 'Goodwill' is an asset under *Explanation 3(b)* to Section 32(1). The Assessing Officer came to the conclusion that no amount was actually paid on account of goodwill. This was a factual finding. The Commissioner (Appeals) has come to the conclusion that the assets and liabilities of YSN were transferred to the assessee for a consideration; that the difference between the cost of an asset and the amount paid constituted goodwill and that the assessee-Company in the process of amalgamation had acquired a capital right in the form of goodwill because of which the market worth of the assessee-Company stood increased. This finding has also been upheld by the Tribunal. Therefore, there was no reason to interfere with the factual finding.

Section 36(1)(vii) of the Income Tax Act, 1961 – Bad Debts

Manner in which assessee maintains its accounts is not conclusive for deciding nature of expenditure; where concurrent finding of facts recorded by the authorities below indicate that assessee claimed deduction in course of business under section 36(1)(vii), said claim cannot be denied merely because Tax Audit Report indicated said amount to have been incurred on capital account

The question was raised regarding cancellation of disallowance of bad debt. The Revenue contended that, since the Tax Audit Report indicated the amount to have been incurred on capital account, the assessee was not entitled to deduction on account of bad debt. Both the CIT(A) as well as the ITAT concluded that the assessee has satisfied the provisions of Section 36(1)(vii). They have held that bad debt claimed by the assessee was incurred in the normal course of business and, therefore, the assessee was entitled to deduction under Section 36(1)(vii).

The Supreme Court held that, it is well-settled now by a catena of decisions that the manner in which the assessee maintains its accounts is not conclusive for deciding the nature of expenditure. In the present case, the concurrent finding of facts recorded by the

authorities below indicate that the assessee claimed deduction in the course of business under section 36(1)(vii). Therefore, the claim was to be allowed.

LD/61/17

Arisudana Spinning Mills Ltd.

Vs.

CIT, Ludhiana

September 5, 2012(SC)

[Assessment Year 1998-99]

Section 80-IA read with Section 143 of the Income Tax Act, 1961 - Deductions - Profits and gains from industrial undertakings engaged in infrastructure developments, etc.

Where assessee had not maintained a separate account for manufacturing as a part of industrial undertaking, Assessing Officer was justified in working out manufacturing account giving a bifurcation for purpose of section 80-IA

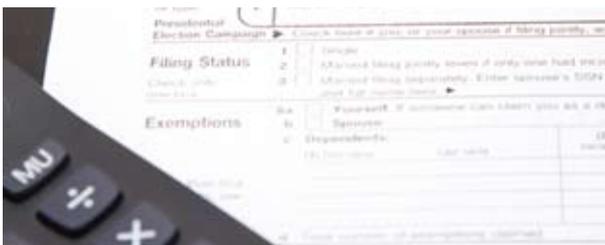
The assessee-Company was engaged in the business of manufacturing of yarn. The assessee derived income from what it called 'manufacturing activity'. It denied that it had undertaken any trading activity during the year in question. On income of ₹51,82,666, the assessee claimed deduction at the rate of thirty per cent under Section 80-IA amounting to ₹15,54,800.

On scrutiny the Assessing Officer found that the assessee had not maintained a separate trading and profit and loss account for the goods manufactured while in the assessment year in question, it appeared that the assessee had sold raw wool, wool waste and textile and knitting cloths. When a query was raised, the assessee contended that, for certain business exigencies in the assessment year in question, it had sold the above items.

According to the assessee, the sale of raw wool, wool waste, etc., would not disentitle it from claiming the benefit under Section 80-IA. The Department found that the assessee has not maintained the accounts for manufacture of yarn actually produced as a part of industrial undertaking. Consequently, the Assessing Officer worked out, on his own the manufacturing account giving a bifurcation in terms of quantity of raw wool produced.

The assessee challenged the preparation of separate trading account by the Assessing Officer in respect of manufacturing activities and trading activities. The Tribunal and the High Court upheld the order of the Assessing Officer.

The Supreme Court held that, on facts, the assessee ought to have maintained a separate account in respect



of raw material which it had sold during the assessment year. If the assessee had maintained a separate account, then, in that event, a clear picture would have emerged which would have indicated the income accrued from the manufacturing activity and the income accrued on the sale of raw material. There was no reason why separate accounts were not maintained for the raw material sold and for the income derived from manufacture of yarn. Therefore, these appeals filed by the assessee were to be dismissed.

LD/61/18

Asstt. CIT, Mumbai

Vs.

ICICI Securities Primary Dealership Ltd.

August 22, 2012 (SC)

Section 147 of the Income Tax Act, 1961 - Income escaping assessment

Where in return, assessee had fully disclosed details of stock and shares, but later on revenue reopened assessment on ground that loss incurred was a speculative loss, same being change of opinion, reopening was not proper

The assessee had disclosed full details in the Return of Income in the matter of its dealing in stocks and shares. According to the assessee, the loss incurred was a business loss. Later on, the Assessing Officer reopened the assessment taking the view that the loss incurred was a speculative loss.

The Supreme Court held that, the re-opening of the assessment by the Assessing Officer was clearly a change of opinion. The order reopening the assessment was not maintainable.

Note: Judgment & Order of Bombay High Court in ICICI Securities Primary Dealership Ltd. Vs. Asstt. CIT (Writ Petition No. 1999 of 2006 dated 22-08-20056), upheld.

LD/61/19

General Motors India Pvt. Ltd.

Vs.

Dy.CIT

August 23, 2012 (GUJ)

[Assessment Year 2006-07]

Section 147 read with Section 148 of the Income-tax Act, 1961 – Income Escaping Assessment

After a notice for re-assessment has been issued it is not open to Assessing Officer to decide objection to notice under section 148 by a composite assessment order; Assessing Officer is required to, first decide objection of assessee filed under section 148 and serve a copy of order on assessee and after giving some reasonable time to assessee for challenging his order, it is open to him to pass an assessment order.

Where after a notice for re-assessment has been issued, no order has been passed by the Assessing Officer deciding the objection filed by the assessee under Section 148 of the Act and assessment order has been passed or the order deciding an objection under Section 148 of

the Act has not been communicated to the assessee and assessment order has been passed or the objection filed under Section 148 has been decided along with the assessment order, order of the Assessing Officer would be bad in law. If the objection under Section 148 has been rejected without there being any tangible material available with the Assessing Officer to form an opinion that there is escapement of income from assessment and in absence of reasons having direct link with the formation of the belief, the writ Court under Article 226 can quash the notice issued under Section 148 of the Act. The writ petition filed by the petitioner is maintainable. The Assessing Officer is mandated to decide the objection to the notice under Section 148 and supply or communicate it to the assessee. The assessee gets an opportunity to challenge the order in a writ petition. Thereafter, the Assessing Officer may pass the reassessment order. It was not open to the Assessing Officer to decide the objection to notice under section 148 by a composite assessment order. The Assessing Officer was required to, first decide the objection of the assessee filed under section 148 and serve a copy of the order on assessee. And after giving some reasonable time to the assessee for challenging his order, it was open to him to pass an assessment order. Where this was not done by the Assessing Officer, the order on the objection to the notice under section 148 and the assessment order passed under the Act deserve to be quashed.

Section 147 read with Section 148 and Section 32 of the Income-tax Act, 1961 – Income Escaping Assessment

An assessment order cannot be reopened on the ground that in original assessment order, Assessing Officer had not correctly applied the provisions of Section 32(2) when assessee had disclosed fully and truly all material facts necessary for his assessment

Where there was no omission or failure on the part of the assessee to make a return under Section 139 and the assessee had disclosed fully and truly all material facts necessary for his assessment for the year, nor subsequently, the Assessing Officer had any tangible material on record, on the basis of which he could have formed his opinion or could have reason to believe that income chargeable to tax had escaped assessment, assessment order could not be reopened.

The Assessing Officer has the power to reopen the assessment proceedings if some tangible material had come to his knowledge. However, he cannot reopen

the assessment merely because on the same documents considered earlier by him, another inference was possible. The reassessment can only take place if the conditions laid down under Section 147 are fulfilled otherwise under the garb of change of opinion, the Assessing Officer may review his earlier assessment order.

The Apex Court in *Commissioner of Income Tax vs. Kelvinator of India Limited*, (2010) 320 ITR 561 has observed that the concept of change of opinion is an in-built test to check abuse of power by the Assessing Officer. The Assessing Officer has wide power to reopen the assessment proceedings with effect from 1.4.1989 provided there was some tangible material to come to the conclusion that there was escapement of income from assessment and the reasons under Section 147 must have a link with the formation of the belief. The tangible material must have nexus to the escapement of income from being assessed to tax, but without there being any tangible material, it is not open to the Assessing Officer to form a belief that income of the assessee has escaped assessment from tax.

The Assessing Officer while forming his opinion and recording reasons under Section 147 of the Act, in the instant case, was aware that at the time of original assessment, the Assessing Officer had considered the material on record and took a conscious decision in scrutiny assessment and allowed the unabsorbed depreciation pertaining to Assessment Year 1997-98 of ₹43,60,21,158/- to be set off against the income of Assessment Year 2006-07. No tangible material was available with the Assessing Officer while forming opinion under Section 147 of the Act. Reopening of original assessment order on the ground that unabsorbed depreciation was allowed to be set off, wrongly, against the provisions of amended Section 32(2) would amount to reviewing the original assessment order which is not permissible.

If on the facts disclosed by the assessee, a wrong legal inference is taken by the Assessing Officer at the time of original assessment then it would not confer any power on him under Section 147 of the Act to commence reassessment proceedings. The Assessing Officer cannot take benefit of his own wrong and reopen the assessment proceedings under Section 147 of the Act. It would be a case of second thought on the same material and the omission to draw the correct legal presumption during the original assessment proceedings did not warrant initiation of proceedings under Section 147 of the Act. Whether the legal

inference has been rightly drawn or not is none of the concern of the subsequent Assessing Officer and the assessee cannot be held responsible for the remissness on the part of Assessing Officer in not applying the correct law. The mistake of law claimed to have been committed by the Assessing Officer in allowing unabsorbed depreciation of Assessment Year 1997-98 to be set off against the income of Assessment Year 2006-07 was not due to assessee's omission or failure to disclose fully and truly all material facts. The mistake, if any, committed by the Assessing Officer at the time of assessment could not furnish a ground to the Assessing Officer to reopen the original assessment order as it would amount to change of opinion.

Where the assessee had disclosed fully and truly all material facts necessary for his assessment for the year and in response to the queries of the Assessing Officer, the assessee had placed entire material demanded by the Assessing Officer. And on the material on record, the Assessing Officer applied his mind and allowed unabsorbed depreciation for the year Assessment Year 1997-98 and other assessment years, to be carried forward and set off against the income of Assessment Year 2006-07, then merely because the Assessing Officer did not give reasons for allowing the claim of unabsorbed depreciation in the original assessment order would not make the assessment order illegal. The Assessing Officer, in law, must be deemed to have formed an opinion that the assessee's claim deserves to be accepted. Thus, in such a situation, the original assessment order cannot be reopened as it would amount to change of opinion by the Assessing Officer and the reassessment order is liable to be set aside.

Section 32 read with Section 147/148 of the Income-tax Act, 1961 - Depreciation

Unabsorbed depreciation from Assessment Year 1997-98 upto the Assessment Year 2001-02 got carried forward to assessment year 2002-03 and became part thereof; it came to be governed by provisions of section 32(2) as amended by Finance Act, 2001 and were available for carry forward and set off against profits and gains of subsequent years, without any limit whatsoever

The question arose for consideration was whether the unabsorbed depreciation pertaining to Assessment Year 1997-98 could be allowed to be carried forward and set off after a period of eight years or it would be governed by Section 32 as amended by Finance Act 2001. The reason given by the Assessing Officer under section 147 is that Section 32(2) of the Act

was amended by Finance Act No. 2 of 1996 *w.e.f.* Assessment Year 1997-98 and the unabsorbed depreciation for the Assessment Year 1997-98 could be carried forward up to the maximum period of 8 years from the year in which it was first computed. According to the Assessing Officer, 8 years expired in the Assessment Year 2005-06 and only till then, the assessee was eligible to claim unabsorbed depreciation of Assessment Year 1997-98 for being carried forward and set off against the income for the Assessment Year 2005-06. But the assessee was not entitled for unabsorbed depreciation for Assessment Year 1997-98, which was not eligible for being carried forward and set off against the income for the Assessment Year 2006-07.

The Gujarat High Court held that prior to the Finance Act No. 2 of 1996 the unabsorbed depreciation for any year was allowed to be carry forward indefinitely and by a deeming fiction became allowance of the immediately succeeding year. The Finance Act No. 2 of 1996 restricted the carry forward of unabsorbed depreciation and set-off to a limit of 8 years, from the Assessment Year 1997-98. Circular No.762 dated 18.2.1998 issued by the Central Board of Direct Taxes (CBDT) in the form of Explanatory Notes categorically provided, that the unabsorbed depreciation allowance for any previous year to which full effect cannot be given in that previous year shall be carried forward and added to the depreciation allowance of the next year and be deemed to be part thereof. So, the unabsorbed depreciation allowance of Assessment Year 1996-97 would be added to the allowance of Assessment Year 1997-98 and the limitation of 8 years for the carry-forward and set-off of such unabsorbed depreciation would start from Assessment Year 1997-98.

The CBDT Circular No. 14/2001 clarifies the intent of the amendment of the provision of section 32(2) by the Finance Act, 2001 that it is for enabling

the industry to conserve sufficient funds to replace plant and machinery and accordingly the amendment dispenses with the restriction of 8 years for carry forward and set off of unabsorbed depreciation.

The amendment is applicable from Assessment Year 2002-03 and subsequent years. This means that any unabsorbed depreciation available to an assessee on 1st day of April, 2002 (Assessment Year 2002-03) will be dealt with in accordance with the provisions of section 32(2) as amended by Finance Act, 2001 and not by the provisions of section 32(2) as it stood before the said amendment. Had the intention of the Legislature been to allow the unabsorbed depreciation allowance worked out in Assessment Year 1997-98 only for eight subsequent assessment years even after the amendment of section 32(2) by Finance Act, 2001 it would have incorporated a provision to that effect. However, it does not contain any such provision. Hence keeping in view the purpose of amendment of section 32(2), a purposive and harmonious interpretation has to be taken. While construing taxing statutes, rule of strict interpretation has to be applied, giving fair and reasonable construction to the language of the section without leaning to the side of assessee or the revenue.

But if the legislature fails to express clearly and the assessee becomes entitled for a benefit within the ambit of the section by the clear words used in the section, the benefit accruing to the assessee cannot be denied. However, Circular No.14 of 2001 had clarified that under Section 32(2), in computing the profits and gains of business or profession for any previous year, deduction of depreciation under Section 32 shall be mandatory. Therefore, the provisions of section 32(2) as amended by Finance Act, 2001 would allow the unabsorbed depreciation allowance available in the Assessment Years 1997-98, 1999-2000, 2000-01 and 2001-02 to be carried forward to the succeeding years, and if any unabsorbed depreciation or part thereof could not be set off till the Assessment Year 2002-03 then it would be carried forward till the time it is set off against the profits and gains of subsequent years.

Therefore, it can be said that, current depreciation is deductible in the first place from the income of the business to which it relates. If such depreciation amount is more than the amount of the profits of that business, then such excess comes for absorption from the profits and gains from any other business or business, if any, carried on by the assessee. If a balance is left even thereafter, that becomes deductible from out of income from any source under any of the other heads of income during that year. In case there is a



still balance left over, it is to be treated as unabsorbed depreciation and it is taken to the next succeeding year. Where there is current depreciation for such succeeding year the unabsorbed depreciation is added to the current depreciation for such succeeding year and is deemed as part thereof. If, however, there is no current depreciation for such succeeding year, the unabsorbed depreciation becomes the depreciation allowance for such succeeding year.

Therefore it is to be held that any unabsorbed depreciation available to an assessee on 1st day of April 2002 (Assessment Year 2002-03) will be dealt with in accordance with the provisions of section 32(2) as amended by Finance Act, 2001. And once the Circular No.14 of 2001 clarified that the restriction of 8 years for carry forward and set off of unabsorbed depreciation had been dispensed with, the unabsorbed depreciation from Assessment Year 1997-98 upto the Assessment Year 2001-02 got carried forward to the assessment year 2002-03 and became part thereof, it came to be governed by the provisions of section

32(2) as amended by Finance Act, 2001 and were available for carry forward and set off against the profits and gains of subsequent years, without any limit whatsoever.

LD/61/20

CIT, Gujarat

Vs.

Gujarat Flouro Chemicals

August 23, 2012 (SC)

**Section 214 of the Income Tax Act, 1961 -
Interest - Payable by government**

Judgment of Supreme Court in Sandvik Asia Limited Vs. Commissioner of Income Tax, [2006] 280 ITR 643/2006 (2) SCC 658 holding that interest is payable by the Revenue to assessee if the aggregate of installments of Advance Tax/TDS paid exceeds assessed tax, requires reconsideration

The question which arose as to whether interest is payable by the Revenue to the assessee if the aggre-

gate of installments of Advance Tax/TDS paid exceeds the assessed tax?

The Supreme Court held that, in the case of *Sandvik Asia Limited Vs. Commissioner of Income Tax & Ors.*, [2006] 280 ITR 643/2006 (2) S.C.C. 658, the Division Bench of the Supreme Court held that, in view of the express provisions, the assessee was entitled to compensation by way of interest for the delay in payment of the amounts lawfully due to the assessee, which were withheld wrongly by the Revenue.

However, Section 214 does not provide for payment of compensation by the Revenue to the assessee in whose favour a refund order has been passed. Moreover, in *Sandvik Asia* (supra), interest was ordered on the basis of equity. It was also ordered to be paid on the basis of Article 265 of the Constitution.

There are serious doubts about the correctness of the judgment in *Sandvik Asia* (supra). The judgement of this Court in the case of *Modi Industries Limited Vs. Commissioner of Income Tax*, 1995 (6) S.C.C. 396 correctly holds that Advance Tax or TDS loses its identity as soon as it is adjusted against the liability created by the Assessment Order and becomes tax paid pursuant to the Assessment Order. If Advance Tax or TDS loses its identity and becomes tax paid on the passing of the Assessment Order, then, is the assessee not entitled to interest under the relevant provisions of the Act?

In this connection, one may refer to the provisions of Sections 195(1), 195A, 214, 219, 237, 243 and 244. The plain reading of the relevant provisions makes it clear that *Sandvik Asia* (supra) has not been correctly decided. Therefore, this matter is to be placed before the Chief Justice for appropriate orders.

where statutory orders under section 234 was not delivered to petitioner, complaint was not maintainable

A letter dated 24.02.2004 was issued by the ROC to the company to inquire about its affairs. This was duly replied vide letter dated 15.04.2004. The reply was examined and thereafter an order dated 19.04.2004 under section 234(1) was issued to the company which remained unresponded. Thereafter another order dated 16.06.2004 under section 234(3A) was issued by ROC requesting the Company to furnish the desired information, but no response was received. As no response was received qua the aforesaid two orders, a show cause notice dated 26.07.2005 was issued to the company under section 234(4)(a) which also did not evoke any response. Thereafter a report was sent by ROC to the Central Government in terms of section 234(6) seeking advice for prosecution of company under section 234. It was thereafter that the complaint was filed in the Court of ACMM by the ROC against the Company and its functionaries including the petitioners. The ACMM passed the impugned order of summoning of all the accused including the petitioners. The impugned order is assailed the petitioners.

The Delhi High Court held that it was submitted that three orders dated 19.04.2004, 16.06.2004 and 26.07.2005 under section 234 (1), 234 (3A) and 234 (4) (a) respectively were issued by the ROC to the petitioner company, but these evoked no response. However, from the perusal of the record, it could be seen that there was no evidence which was brought by the respondent to *prima facie* prove the service of such orders on the petitioner company. The receipt of such statutory orders was a *sine-qua-non* for alleging non-compliance of the orders of the respondent. Reply to the letter by the petitioner company could not be equated to acknowledgement of a statutory notice as per the requirement of law. In the present case, absence of any documentary proof of service of such orders of ROC on the petitioner company indicates that the prosecution was initiated without giving any opportunity to the petitioner company to advance its reply. The respondent/complainant had made an averment regarding the issue of statutory orders, however, they were silent as regard to the factum of delivery or mode of proof of delivery of the said statutory orders. Thus, *prima facie* the statutory orders under section 234 were not delivered to the petitioner and that being so the complaint was not maintainable. ■

Companies Act



LD/61/21

Jiyuan Li

Vs.

Registrar of Companies

March 1, 2012 (DEL)

Section 234 of the Companies Act, 1956 read with Section 482 of the Criminal Procedure Code – Power of Registrar to

call for Information or Explanation

Receipt of statutory orders is a sine-qua-non for alleging non-compliance of orders of ROC;