Legal Decisions[1]

Income-tax Act

LD/61/22
CIT, Delhi-IV
Vs.
The Instalment Supply Limited
April 17, 2012 (DEL)
[Assessment Year 1994-95]

Section 32 of the Income-tax Act, 1961 – Depreciation

Terms and conditions mentioned in the agreement may be relevant to allow depreciation but the Court has also to take into account the surrounding circumstances as well as the type and nature of the asset

The Assessing Officer noticed that the assessee had claimed that they had purchased some items/parts of computer systems etc. for ₹40 lacs from HCL and these items/parts were again leased back to the same company. The assessee had claimed that cost of each of the said items, was less than ₹5,000/- and accordingly they were entitled to 100% depreciation as a lessor. The Assessing Officer observed that the transaction was a finance transaction, but had been given colour of a lease transaction. The assessee had advanced ₹ 40 lacs to HCL and had agreed to receive back this amount along with the interest over a period of six years, but the item/parts were described as a lease property. The Assessing Officer thus rejected the claim of the assessee. The Commissioner (Appeals) affirmed the said decision. On further appeal, the Tribunal has reversed the findings of the Assessing Officer/ Commissioner (Appeals), *inter alia*, on the ground that the conditions of a valid lease were fully satisfied. The assessee had also proved necessary conditions for claiming depreciation which are: (1) that it was owner of the assets leased out; and (2) that the assets were used for business purposes. Further, there was nothing on record to show that the lease transaction entered into by the assessee was sham transaction. Tribunal relied on invoice issued by HCL Hewlett Packard Limited and observed that this invoice had not been taken into consideration. With regard to claim of depreciation, it was observed that when the business of the assessee was leasing, the actual use and the fact how the asset was being used by the lessee, was not relevant.

The Delhi High Court held that the real issue and question involved in the present case is, whether or not the agreement in question was a finance agreement or an operating lease. The aforesaid question cannot be decided by merely looking at the title of the agreement itself or the nomenclature given to the said agreement. The terms and conditions mentioned in the agreement may be relevant but the Court has to also take into account the surrounding circumstances as well as the type and nature of the asset. The two types of transactions i.e. finance agreement and operational lease are different.

In *Association of Leasing and Financial Service Companies Vs. Union of India*, (2011) 2 SCC 352 the Supreme Court has held that finance lease transfers all the risks and rewards incidental to ownership, even though the title may or may not be eventually transferred to the lessee. In the case of "finance lease" the lessee could use the asset for its entire economic life and thereby acquires risks and rewards incidental to the ownership of such assets. In substance, finance lease is a financial loan from the lessor to the lessee. On the other hand an operating lease is a lease other than the finance lease.

In *Sundaram Finance Limited vs. State of Kerala*, AIR 1966 SC 1178 it was observed that where the intention of the appellants in obtaining the hire-purchase and the allied agreements was to secure the return of loans advanced to their customers, and no real sale of the vehicle was intended by the customer to the appellants, the transactions were merely financing transactions.

In view of the aforesaid position, it could be said that the matter has not been examined and considered by the Tribunal from the right perspective, the real issue and controversy had not been examined. The tribunal has not considered the legal position to reach its conclusion. Therefore, an order of remand was to be passed directing the Tribunal to examine the controversy afresh.

LD/61/23
CIT, Jaipur-II
Vs.
The Asian Marketing
April 11, 2112 (RAJ)

Section 40(b) of the Income-tax Act, 1961 – Expenses disallowed – Remuneration, interest, etc. paid to partner by firm

Where amount of remuneration had not been

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

quantified in partnership deed and it mentioned that remuneration would be payable as per norms fixed by relevant provisions of Income-tax Act, Tribunal was justified in holding that remuneration payable to partners was to be allowed

The dispute by the Revenue was that the amount of remuneration paid to the partners of the assessee firm had not been quantified in the partnership deed. So the said expenditure could not be allowed. Tribunal noted that the partnership deed mentions that remuneration would be payable as per norms fixed by the relevant provisions of the Income-tax Act. Thus, the Tribunal concluded that the quantification of the remuneration is apparent from the partnership deed. The requirement in law is that remuneration should have been authorised and the amount of remuneration shall not exceed the amount as mentioned in sub-clause (v) of Section 40(b). The relevant provision has used the word 'authorised' and not the word used 'quantify'. Therefore, the remuneration payable to the partners was to be allowed.

The High Court of Rajasthan held that the question of payment of remuneration is a question of fact and finding of the Tribunal in this regard was based on partnership deed. There is a concurrent finding of fact recorded by Appellate Authority as well as Appellate Tribunal, which cannot be interfered with by this Court.

LD/61/24

Orient Green Power Pte. Ltd, In Re

August 14, 2012 (AAR)

Section 45, read with Sections 47 and 48 of the Income-tax Act, 1961 – Capital Gains – Chargeable as

Where applicant company failed to demonstrate that transfer of shares of an Indian group company to another Indian group company was authorised by Articles of Association and was effected in the mode prescribed by the Articles of Association and meeting requirements of Section 82 of Companies Act, matter was to be left to Assessing authority for deciding question of taxability

The applicant OGPL, a Singapore company, holds 99.61% of the share capital in Indian company, OGPL. OGPL-Singapore also holds 49.75% of the share capital in another Indian company BWFL. The balance 56.25% shares in BWFL India is held by OGPL India. According to OGPL-Singapore, it has transferred its 49.75% shares held in BWFL India, to OGPL India without consideration. The transaction is evidenced by a memorandum of gift dated 30.01.2010. Before the coming into force of Section 56(2) (viia) of the Income-tax Act, the transaction was not taxable under the Act in terms of Section 45, read with Section 48, since the transfer was one without consideration. The transaction which was a gift, was also exempted from the operation of Section 45, by virtue of Section 47(iii). The OGPL-Singapore has approached the Authority for a Ruling on the relevant questions raised in the application.

The Authority for Advance Rulings ruled that shares dealt with are shares of a public limited company governed by the Companies Act, 1956. It is claimed that, what can be called an oral gift, was made by one corporation to another corporation. Such a form of transfer appears to be strange, unless it be one which has been set up for some purpose. That purpose, according to the Revenue, is for avoiding the payment of tax and to get out of the clutches of Section 56(2) (viia) which came into effect on 1.6.2001. It cannot be said that this submission on behalf of the Revenue is far-fetched. This submission, in any event made it necessary for the applicant to demonstrate before this authority that the transfer was authorised by the Articles of Association and was effected in the mode prescribed by the Articles of Association and meeting the requirements of Section 82 of the Companies Act.

This Authority has the jurisdiction not only to consider the law but also to consider the facts. The ruling is to be given at the instance of an applicant, on a transaction. Here, it is a concluded transaction, according to the applicant. While therefore, considering the question of giving the ruling, this Authority has also the right, nay, the duty, to consider the reality of the transaction and the genuineness of the transaction, in addition to its validity. When such transactions are entered into involving assets, substantially worth, it behoves the applicant before this Authority, to establish to the hilt, the factum, the genuineness and the validity of the transaction, of the right to enter into the transaction and the bona fides of the transaction especially when the Revenue has challenged the genuineness of the transaction itself. In the light of the pleas raised by the Revenue and the circumstances obtaining, a proper enquiry into the question of the genuineness and validity of the transaction is necessary. The Assessing Authority under the Act would be in a better position to go into and decide these questions. In view of the failure of the applicant to show that the alleged transfer in question was effected in the manner prescribed by its Articles

of Association, it would not be proper to accept the assertions in the application and in the submissions about the genuineness and validity of the transaction. There may be a resolution of the Board of Directors authorising such a transaction and the question would be whether they have the right to pass such a resolution, in the light of Articles of Association and whether their resolution has been given effect to in the manner prescribed by the Articles of Association.

LD/61/25
CIT
Vs.
Dynamic Consultants Pvt. Ltd.
[Assessment Years 2004-05 to 2006-07]

Section 45 read with Section 28(i) of the Income-tax Act, 1961 – Capital Gains – Chargeable as

Where number of shares held by assessee NBFC were meager, purchased out of surplus fund, transactions were not frequent, assessee was not maintaining a separate heads in books of accounts as shares were held and treated as investment, shares could not be held as stock in trade and income from sale of them should be treated as capital gains

The company was an NBFC. The Assessing Officer treated ₹24,77,878, on sale of 12 shares as business income instead of short term capital gain. The Assessing Officer observed that the transactions were regularly entered into and the sale and purchase was not occasional but continuous; the assessee did not maintain separate books of accounts for investments and regular business; and lastly the assessee had taken into account the diminution in value of investments in the books of accounts in the assessment years 2004-05 to 2006-07. The first appellate authority held that income from sale of shares held for less than 6 months should be treated as trading/business income. Shares, which had been held for more than 6 months should be treated as "investment" and short term capital gain. The Tribunal treated the gain was short term capital gains.

The High Court of Delhi held that five shares had been purchased in the last financial year and the average period of holding in the shares in question was more than four months. There were 12 shares and the transactions were not frequent. The purchases were out of surplus funds. Their main business was not trading in shares but was an occasional independent activity. The assessee had also pointed out that the short-term transactions were the result of either a mistake, or wrong information. The assessee was not maintaining a separate heads in the books of accounts for shares held as stock in trade or investment, as the shares were held and treated as investment. Further, the number of transactions, 19 in all in one year cannot be considered as continuous and regular. The provision for diminution in value was as per the Accounting Standard 13 regarding Accounting of Investments. The Assessing officer ignored several other aspects and questions which have been raised and noticed and form the basis of finding recorded by the Tribunal. The order by the Tribunal therefore does not require any interference.

LD/61/26
CIT
Vs.
Vinay Mittal
April 27, 2012(DEL)
[Assessment Years 2007-08]

Section 45 read with Section 28(i) of the Income-tax Act, 1961 – Capital Gains – Chargeable as

Where total number shares is substantial but transactions in question are only seven in number and period of holding was not insignificant, same may be treated by assessee as an investment portfolio and not a trading portfolio

The assessee was an employee and was in service of a company. He had salaried income. The assessee had also made purchases and had sold securities. He was maintaining two separate portfolios, *i.e.*, investment

portfolio and trading portfolio. While assessee claimed that the shares in question formed part of the investment portfolio and were not part of the trading portfolio, the Assessing Officer sought to levy tax on sale purchase of securities as business income.

The Delhi High Court held that as far as seven shares/transactions which are subject matter of short term capital gains are concerned it is noticeable that in four cases, the shares were held for a period of more than 7 months, 8 months, 8.5 months and 11 months. In three cases shares were held for 2.4 months, 2.5 months and 4 months. Quantum or total number shares is substantial, but the transactions in question are only seven in number and the period of holding as mentioned above cannot be treated as insignificant and small. Quantum or total number may not be determinative but in a given case keeping in view period of holding may indicate intention to make investment. The same may be treated by the assessee as an investment portfolio and not a trading portfolio. The Tribunal has mentioned that the assessee has received substantial dividend income of more than ₹19 lakhs and ₹27 lakhs in the preceding two assessment years. The Assessing Officer was influenced to a large extent of the fact that the assessee had earned huge profits during the year in question from the sale of the said shares. This can happen even in case of investment portfolio because when investment is liquidated to earn gains and change their portfolio. Element of uncertainty and risk is always there when a person deals in securities but this factor cannot be determinative factor whether the assessee is trading in shares or is an investor. Some investors do take risk. The Assessing Officer without specifically dealing with the transactions has recorded that during the financial year 2006-07, the assessee had indulged in frequent and regular trade in securities.

He has not mentioned whether the assessee had indulged in frequent transactions in the previous period or subsequently.

In the earlier assessment years, transactions in the investment portfolio by the assessee were accepted by the Assessing Officer. Merely because the assessee had sold the said shares in the relevant year and made substantial gains and could not show basically the objective for acquiring the shares was not as an investor but as a trade. The ratio of sales and purchase may be relevant in a particular case but when an assessee liquidates any investment, the said ratio will always be in favour of sales. Thus, the income would be capital gains and not business income.

LD/61/27
CIT-Central – III
Vs.
Cello Plast
July 27, 2012 (BOM)
[Assessment Years 2006-07]

Section 54EC of the Income-tax Act, 1961 – Capital Gains - Investment in certain bonds

In order to avail deduction, six months provided for investing in bonds may be reasonably extended in view of non availability of bonds

On 22-3-2006, the respondent sold its factory building earning a long term capital gain. To avail of the exemption under Section 54EC, the respondent had to invest the sale proceeds in the REC bonds within six months from the date of the sale of the factory building, *i.e.*, on or before 21-9-2006. REC bonds were not available during 4-8-2006 to 22-1-2007. The respondent purchased the REC bonds only on 31-1-2007. The question was whether despite the same, the respondent was entitled to the benefit of Section 54EC in the facts and circumstances of the case.

The Bombay High Court held that REC bonds could not be purchased as they were not available throughout the period of six months commencing from the date of the sale of the factory by the respondents and even thereafter till the extended date of 31-12-2006 under the CBDT Circular. That the bonds were available for a limited time during this period between 1-7-2006 to 31-8-2008, makes no difference. The respondents had time till 21-9-2006, to invest in these bonds to avail the benefit under Section 54EC. Section 54EC entitles a person to avail of the right conferred

thereby at any time during the period of six months from the date of sale of the asset. The respondents cannot be deprived of this right conferred by the Act for no fault of theirs.

Therefore, in the present facts, the six months provided for investing in bonds may be reasonably extended in view of the non availability of bonds till 22-1-2007.

A person cannot be expected to make the investment on the first possible date on which the bonds were made available after the expiry of the six months period or any extended date prescribed by the CBDT. During the period the bonds were unavailable a person is likely to invest the amount elsewhere. To expect or require him not to do so would be unjust for reasons too obvious to state. He cannot then be expected at a day's notice to break the investment and transfer the same to the bonds stipulated in Section 54EC.

The respondents admittedly invested in the bonds on 31-1-2007 i.e. within nine days of their being available once again from 22-1-2007. Considering that the bonds were not available for a long period, an extension of merely nine days is extremely reasonable in the present facts.

It cannot be contended that the respondent in any case could have purchase the bonds of the National Highway Authority which was an alternative mode of investment provided for availing the benefit of Section 54EC.

The statue itself provides that the assessee, who is subject to long terms capital gain tax, can avail of exemption under Section 54EC if he invests in bonds of either the National Highway Authority of India or the Rural Electrification Corporation Limited. The choice of investing in one of the two organisations is with the respondent and the appellant revenue contrary to the statue cannot force the respondent to invest only in the bonds of one in preference to the other. The choice of which bonds to purchase is entirely with the respondent and in case the bonds of respondent's choice are not available as is proved in the present case, the time to invest in the bonds get automatically extended till the bonds are available in the market and the assessee can purchase the same.

LD/61/28

Castleton Investment Limited, In re

August 14, 2012 (AAR)

Section 115JB of the Income-tax Act, 1961 – Special provision for payment of tax by certain companies

Section 115JB applies not only to domestic companies, but also to a foreign company

On a reading of this sub-section, which is said to prevail over the other provisions of the Act, what emerges is that a company has to pay tax as provided for in this sub-section if the tax payable by it as otherwise determined under the Act, is less than the minimum prescribed herein. It also provides the rate at which the tax is to be paid. This section does not need any aid from tools of interpretation for its understanding. It is plain and clear.

Section 115JB on its wording makes no distinction between a resident company and a non-resident company. *Prima facie*, it applies to all companies. The definition of a company in Section 2(17) means an Indian company or any company incorporated by or under the laws of a country outside India. In other words, by definition, a company means a non-resident company as well.

When Section 115JB was inserted by clause (49) of the Finance Act, 2000, the notes on the clauses explaining the Finance Bill, 2000, did not indicate that Section 115JB proposed to be introduced with effect from 1.4.2001, was confined in its operation to domestic companies only. Amendments were made to Section 115JB by the Finance Act of 2006 which came into effect from 1.4.2007. Additions and reductions of amounts to and from 'book profit' as explained in *Explanation I* were made. Dealing with deductions, in the proviso, clause (ii) was modified by showing the amount of income to which any of the provisions of "Section 10 (other than the provisions contained in clause 38 thereof)" were introduced, thus, taking out income from long term capital assets from the reckoning. Simultaneously, the proviso to Section 10(38) was also inserted bringing income from long

term capital gains in for the purpose of Section 115JB while calculating the book profit.

Both Section 10(38) and Section 115JB refer to a company. Company as per definition in the Act, takes in an Indian company and a foreign company. As far as a company is concerned, the proviso exhorts that the income by way of long-term capital gain of a company shall be taken into account in computing the book profit and income-tax payable under Section 115JB of the Act. Section 115JB by its wording, overrides Section 10(38) and Section 115JB(1) of the Act, leads to the position that as far as a company is concerned, its total income has to be computed based on its book profit in juxtaposition to the prescription in Section 115JB of the Act. Thus, as far as a company is concerned, Section 10(38) and Section 115JB are to some extent interlinked, though Section 115JB would override Section 10(38) itself. If by an interpretative process one were to come to the conclusion that Section 115JB is confined in its operation to resident companies, one has also logically to say that Section 10(38) will also operate only in respect of a resident company.

Surely, there is no need to restrict or warrant for restricting the operation of these two sections in the Act in the absence of any compelling circumstance. In this context, with great respect, it appears that the reasoning in the Ruling in *XYZ, In Re* 234 ITR 335 is impressive.

Section 115JB overrides Section 34 to 48 of the Act. So by reading Section 115JB as confined in its operation to domestic companies alone, one may be doing violence to the special scheme of taxation adopted for taxing certain companies. Unless there are compelling reasons no such interpretation is justified. There is no compelling reason to jettison the scheme of taxation adopted by the Act by reading down Section 115JB as confined in its application to domestic companies alone. And thus Section 115JB(1) would equally apply to a foreign company.

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Section 112 of the Income-tax Act, 1961 – Capital Gains - Tax on long term capital gains

If income gets taxed under Income-tax Act, obviously, Section 112(1) would also be attracted; issue whether it may not get taxed under Income-tax Act in view of DTAC is another question

Section 112(1) would be attracted when the income of an assessee includes income chargeable under the head capital gains under the Act. In the instant case the income of the applicant would be capital gains. Once it is, Section 112 is attracted. If the income gets taxed

under the Act, obviously, Section 112(1) would also be attracted. Issue that it may not get taxed under the Act in view of the DTAC is another question.

LD/61/29

Inductotherm (India) Pvt. Ltd.
Vs.
M. Gopalan, Dy. CIT
August 6, 2012 (GUJ)
[Assessment Years 2002-03]

Section 143 read with Section 147 of the Income-tax Act, 1961 – Assessment

Even in case of reopening of an assessment which was previously accepted under Section 143(1) without scrutiny, Assessing Officer would have power to reopen assessment, provided he had some tangible material on basis of which he could form a reason to believe that income chargeable to tax had escaped assessment

It is undoubtedly true that proviso to Section 143(2) prescribes a time limit within which notice could be issued. It is equally well settled that notice is mandatory and in absence of notice under Section 143(2) within the time permitted, scrutiny assessment under Section 143(3) cannot be framed. However, merely because no such notice was issued, to contend that the assessment cannot be reopened, is not backed by any statutory provisions.

The return filed by the petitioner was not taken in scrutiny. No assessment, thus, took place. The Assessing Officer without any assessment, merely issued an intimation under Section 143(1) accepting such return. In that view of the matter, it cannot be stated that the Assessing Officer formed any opinion with respect to any of the aspects arising in such return. In such a case, scope for reopening such assessment under Section 147 as compared to an assessment which was previously framed under Section 143(3) of the Act, whether beyond or within four years from the end of the relevant assessment year, is substantially wider.

The Apex Court in case of *Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers P. Ltd.* [2007] 291 ITR 500 (SC) noticed such distinction and noted that the scheme of Sections 143(1) and 143(3) is entirely different. It was noticed that after 1.4.1989, the provisions contained in Section 143 underwent substantial changes. It was noticed that the intimation under Section 143(1) is given without prejudice to the provisions of Section 143(3) and though technically the intimation would be deemed to be demand notice under Section 156, that did not per se preclude the right of the Assessing Officer to proceed under Section 143(2)(a) of the Act. The Apex Court observed that the word "intimation" as substituted for assessment carried different concepts. It was observed that while making an assessment, the Assessing Officer is free to make any addition after granting an opportunity to the assessee. The Apex Court observed that under the first proviso to the newly substituted Section 143(1), with effect from June 1, 1999, except as provided in the provision itself, the acknowledgment of the return shall be deemed to be an intimation under Section 143(1) where (a) either no sum is payable by the assessee, or (b) no refund is due to him.

It is significant that the acknowledgment is not done by any Assessing Officer, but mostly by ministerial staff. Can it be said that any assessment is done by them? The reply is an emphatic no. The intimation under Section 143(1)(a) was deemed to be a notice of demand under Section 156, for the apparent purpose of making machinery provisions relating to recovery of tax applicable. By such application only recovery indicated to be payable in the intimation became permissible. And nothing more can be inferred from the deeming provision. Therefore, there being no assessment under Section 143(1)(a), the question of change of opinion, as contended, does not arise.

Despite such difference in the scheme between a return which is accepted under Section 143(1) as compared to a return of which scrutiny assessment under Section 143(3) is framed, the basic requirement of Section 147 that the Assessing Officer has reason

to believe that income chargeable to tax has escaped assessment is not done away with. Section 147 permits the Assessing Officer to assess, re-assess the income or re-compute the loss or depreciation if he has reason to believe that any income chargeable to tax has escaped assessment for any assessment year. This power to reopen assessment is available in either case, namely, while a return has been either accepted under Section 143(1) or a scrutiny assessment has been framed under Section 143(3) of the Act. A common requirement in both of cases is that the Assessing Officer should have reason to believe that any income chargeable to tax has escaped assessment.

In *Rajesh Jhaveri's* (supra), the Apex Court observed that phrase "reason to believe" mean cause or justification. If the Assessing Officer has cause or justification to know or subjective satisfaction that income had escaped assessment, it can be stated to have reason to believe that income chargeable to tax had escaped assessment.

It would, thus, emerge that even in case of reopening of an assessment which was previously accepted under Section 143(1) without scrutiny, the Assessing Officer would have power to reopen the assessment, provided he had some tangible material on the basis of which he could form a reason to believe that income chargeable to tax had escaped assessment.

Even for reopening of an assessment which was accepted previously under Section 143(1) without scrutiny, the Assessing Officer should have reason to believe that income chargeable to tax has escaped assessment. For mere verification of the claim, power for reopening of assessment could not be exercised. The Assessing Officer in guise of power to reopen an assessment, cannot seek to undertake a fishing or roving inquiry and seek to verify the claims as if it were a scrutiny assessment.

The Assessing Officer had some material at his command to form a belief that income chargeable to tax had escaped assessment. In respect of the claim of deduction under Section 80HHC, the Assessing Officer was of the opinion that the Central as well as the State Sales Tax and other income in the net profit would not qualify for deduction under Section 80HHC. The Assessing Officer further noted that the assessee had debited warranty expenses of ₹ 1,43,48,347 to the P & L

Account, out of which an amount of ₹1,05,48,633 was incurred during the financial year under consideration. He was, therefore, of the opinion that remaining amount of ₹37,99,714 was not allowable expenditure.

The Gujarat High Court held that such reason would permit the Assessing Officer to reopen the assessment. The Assessing Officer has found that a claim not arising during the year under consideration was made. He desires to disallow such a claim. Thus, it could not be stated that the ground was not germane.

In view of the above discussion, the notice for reopening was not invalid or lacked jurisdiction.

LD/61/30

CIT, Central-II, Mumbai
Vs.
Virendra & Co.
July 20, 2012 (Bom)
[Assessment Years 1986-87]

Section 145 of the Income-tax Act, 1961 – Method of Accounting

Generation of scrap in ship-breaking is determined by type of vessel; generation of non ferrous scrap declared in line with that of other years, is to be accepted

The assessee carried on business of ship breaking. It claimed that scrap generated and sold from the breaking of ships was in the aggregate of 7144 metric tons and out of which 0.81% i.e. 57.95 metric tons was non ferrous metal. The Assessing officer relying upon the scrap generated by the three other ship breaking units held that the non ferrous metal which was generated and sold was 2% of the total recovery of scrap i.e. 142.88 metric tons. Consequently, the Assessing Officer concluded that the excess non ferrous metal generated an undisclosed income of ₹21.08 lacs. The Commissioner (Appeals) upheld the order of the Assessing officer. The Tribunal held that there cannot be any standard measure of generation of scrap while carrying out the activity of ship breaking. It depends upon the type of the vessel being broken. The Tribunal also held that the cases of other ship breakers being relied upon by the Assessing officer to conclude that generation of non ferrous scrap is in excess of 2% cannot be relied upon as the same was never put to the assessee so as to enable the assessee to deal with the same.

The Bombay High Court held that the Tribunal on the basis of the evidence before it has come to the conclusion that 0.81 % of the total recovery being attributed to non ferrous scrap generated during the

course of ship breaking by the assessee was correct. The assessee had maintained excise record and its books were audited and the department does not challenge the purchases and sales reflected in the assessee's books of accounts. It is important to note that between 0.90% to 1.40% of non ferrous scrap being generated out of the total scrap on the activity of ship breaking has been accepted by the department upto the Assessment Year 1990- 91. Even for subsequent assessment years 1992-93 to 1996-97, generation of non ferrous scrap at 0.81% had been accepted by the department.

LD/61/31

CIT-IV, New Delhi
Vs.
Usha International Limited
September 21, 2012 (DEL-FB)

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

In case return of income is processed under Section 143(1) and no scrutiny assessment is undertaken, there can be no change of opinion and reassessment proceedings can be validly initiated while in case an issue or query is raised and answered by the assessee in original assessment proceedings but thereafter the Assessing Officer does not make any addition in the assessment order, such cases will be hit by principle of - change of opinion and reassessment proceedings will be invalid

The Full Bench of High Court held that for reopening an assessment made under Section 143(3), the following conditions are required to be satisfied:-

(i) The Assessing Officer must form a tentative or *prima facie* opinion on the basis of material that there is under-assessment or escapement of income;

(ii) He must record the *prima facie* opinion into writing;

(iii) The opinion formed is subjective but the reasons recorded or the information available on record must show that the opinion is not a mere suspicion.

(iv) Reasons recorded and/or the documents available on record must show a nexus or that in fact they are germane and relevant to the subjective opinion formed by the Assessing Officer regarding escapement of income.

(v) In cases where the first proviso applies, there is an additional requirement that there should be failure or omission on the part of the assessee in disclosing full and true material facts. *Explanation* to the section stipulates that mere production of books of accounts or other documents from which the Assessing Officer could have, with due diligence, inferred material facts, does not amount to —full and true disclosure of material facts. (The proviso is not applicable where reasons to believe for issue of notice are recorded and notice is issued within four years from the end of assessment year.)

They deal with the term and facets of the term - change of opinion. The expression - change of opinion postulates formation of opinion and then a change thereof. In the context of Section 147 it implies that the Assessing Officer should have formed an opinion at the first instance, i.e., in the proceedings under Section 143(3) and now by initiation of the reassessment proceeding, the Assessing Officer proposes or wants to take a different view.

The word 'opinion' is derived from the latin word 'opinari' which means 'to believe', 'to think'. The word 'opinion' as per the *Black's Law Dictionary* means a statement by a Judge or a court of a decision reached by him incorporating cause tried or argued before them, expounding the law as applied to the case and, detailing the reasons upon which the judgment is based. Advanced Law Lexicon by P. Ramanatha Aiyar (3rd Edition) explains the term 'opinion' to mean - something more than mere retaining of gossip or hearsay; it means judgment or belief, that is, a belief or a conviction resulting from what one thinks on a particular question... An opinion is a conviction based on testimony….. they are as a result of reading, experience and reflection.

In the context of assessment proceedings, it means formation of belief by an Assessing Officer resulting from what he thinks on a particular question. It is a

result of understanding, experience and reflection to use the words in Law Lexicon by P. Ramanatha Aiyar. Question of change of opinion arise when an Assessing Officer forms an opinion and decides not to make an addition or holds that the assessee is correct and accepts his position or stand.

It is, therefore, clear from the various legal precedents that: (1) Reassessment proceedings can be validly initiated in case return of income is processed under Section 143(1) and no scrutiny assessment is undertaken. In such cases there is no change of opinion; (2) Reassessment proceedings will be invalid in case the assessment order itself records that the issue was raised and is decided in favour of the assesse. Reassessment proceedings in the said cases will be hit by principle of - change of opinion; (3) Reassessment proceedings will be invalid in case an issue or query is raised and answered by the assessee in original assessment proceedings but thereafter the Assessing Officer does not make any addition in the assessment order. In such situations it should be accepted that the issue was examined but the Assessing Officer did not find any ground or reason to make addition or reject the stand of the assessee. He forms an opinion. The reassessment will be invalid because the Assessing Officer had formed an opinion in the original assessment, though he had not recorded his reasons.

In the second and third situation, the Revenue is not without remedy. In case the assessment order is erroneous and prejudicial to the interest of the Revenue, they are entitled to and can invoke power under Section 263 of the Act. Thus, where an Assessing Officer incorrectly or erroneously applies law or comes to a wrong conclusion and income chargeable to tax has escaped assessment, resort to Section 263 of the Act is available and should be resorted to. But initiation of reassessment proceedings will be invalid on the ground of change of opinion.

Here a distinction must be drawn between erroneous application/interpretation/ understanding of law and cases where fresh or new factual information comes to the knowledge of the Assessing Officer subsequent to the passing of the assessment order. If new facts, material or information comes to the knowledge of the Assessing Officer, which was not on record and available at the time of the assessment order, the principle of —change of opinion will not apply. The reason is that - opinion is formed on facts. Opinion formed or based on wrong and incorrect facts or which are belied and untrue do not get protection and cover under the principle of - change of opinion. Factual information or material which was incorrect or was not available with the Assessing Officer at the time of original assessment would justify initiation of reassessment proceedings. The requirement in such cases is that the information or material available should relate to material facts. The expression 'material facts' means those facts which if taken into account would have an adverse affect on the assessee by a higher assessment of income than the one actually made. They should be proximate and not have remote bearing on the assessment. The omission to disclose may be deliberate or inadvertent. The question of concealment is not relevant and is not a precondition which confers jurisdiction to reopen the assessment.

Correct material facts can be ascertained from the assessment records also and it is not necessary that the same may come from a third person or source, i.e., from source other than the assessment records. However, in such cases, the onus will be on the Revenue to show that the assessee had stated incorrect and wrong material facts resulting in the Assessing Officer proceeding on the basis of facts, which are incorrect and wrong. The reasons recorded and the documents on record are of paramount importance and will have to be examined to determine whether the stand of the Revenue is correct.

The second category will be a case of change of opinion and cannot be reopened for the reason that the assessee, as required, has placed on record primary factual material but on the basis of legal understanding, the Assessing Officer has taken a particular legal view. However, as stated above, an erroneous decision, which is also prejudicial to the interest of the Revenue,

can be made subject matter of adjudication under Section 263 of the Act.

The reasons recorded or the documents available must show nexus that in fact they are germane and relevant to the subjective opinion formed by the Assessing Officer regarding escapement of income. At the same time, it is not the requirement that the Assessing Officer should have finally ascertained escapement of income by recording conclusive findings. The final ascertainment takes place when the final or reassessment order is passed. It is enough if the Assessing Officer can show tentatively or *prima facie* on the basis of the reasons recorded and with reference to the documents available on record that income has escaped assessment.

It cannot be said that even if the Assessing Officer did not examine a particular subject matter, entry or claim/deduction and therefore had not formed any opinion, it must be presumed that he must have formed an opinion. This is not what was argued by the assessee or held and decided. There cannot be deemed formation of opinion even when the particular subject matter, entry or claim/deduction is not examined.

Distinction between disclosure/declaration of material facts made by the assessee and the effect thereof and the principle of change of opinion is apparent and recognised. Failure to make full and true disclosure of material facts is a precondition which should be satisfied if the reopening is after four years of the end of the assessment year. The explanation stipulates that mere production of books of accounts and other documents, from which the Assessing Officer could have with due diligence inferred facts does not amount to full and true disclosure. Thus, in cases of reopening after 4 years as per the proviso, conduct of the assessee and disclosures made by him are relevant. However, when the proviso is not applicable, the said precondition is not applicable. This additional requirement is not to be satisfied when re-assessment proceedings are initiated within four years of the end of the assessment year. The sequitor is that when the proviso does not apply, the re-assessment proceedings cannot be declared invalid on the ground that the full and true disclosure of material facts was made. In such cases, re-assessment proceedings can be declared invalid when there is a change of opinion. As a matter of abundant caution we clarify that failure to state true and correct facts can vitiate and make the principle of change of opinion inapplicable. This does not require reference to and the proviso is not invoked. The difference is this; when proviso applies the condition stated therein must be satisfied and in other cases it is not a prerequisite or condition precedent but the defence/plea of change of opinion shall not be available and will be rejected.

Thus, if a subject matter, entry or claim/deduction is not examined by an Assessing Officer, it cannot be presumed that he must have examined the claim/deduction or the entry, and therefore, it is the case of - change of opinion. When at the first instance, in the original assessment proceedings, no opinion is formed, principle of —change of opinion cannot and does not apply. There is a difference between change of opinion and failure or omission of the Assessing Officer to form an opinion on a subject matter, entry, claim, deduction. When the Assessing Officer fails to examine a subject matter, entry, claim

or deduction, he forms no opinion. It is a case of no opinion.

Whether or not the Assessing Officer had applied his mind and examined the subject matter, claim etc. depends upon factual matrix of each case. The Assessing Officer can examine a claim or subject matter even without raising a written query. There can be cases where an aspect or question is too apparent or obvious to hold that the Assessing Officer did not examine a particular subject matter, claim etc. The stand and stance of the assessee and the Assessing Officer in such cases are relevant.

Section 114 of the Indian Evidence Act is a general provision dealing with presumption of facts, inferences drawn from facts, patterns drawn from experience and observations based upon habits of the society, human action, usages and ordinary course of human affairs and conduct. The presumption is no evidence or proof. It only shows on whom the burden of proof lies. Section 114 is permissive and not a mandatory provision. Nine situations by way of illustrations are stated. These are by way of example or guidelines. As a permissive provision it enables the Judge to support his judgment but there is no scope of presumption when facts are known. As observed by the Supreme Court in *Suresh Budharmal Kalyani vs. State of Maharashtra*, [1998] 7 SCC 337, a presumption can be drawn only from facts and not from other presumptions by a process of probable and logical reasoning. Presumption of facts under Section 114 is rebuttable. The presumption raised under illustration (e) to Section 114 of the Evidence Act, means that when official act is proved to have been done, it will be presumed to have been regularly done but it does not raise any presumption that an act was done for which there is no evidence or proof.

The statute does not require that the information must be extraneous to the record. It is enough if the material, on the basis of which the reassessment proceedings are sought to be initiated, came to the notice of the Income-tax Officer subsequent to the original assessment. If the Income-tax Officer had considered and formed an opinion on the said material in the original assessment itself, then he would be powerless to start the proceedings for the reassessment. Where, however, the Income-tax Officer had not considered the material and subsequently come by the material from the record itself, such a case would fall within the scope of Section 147(b) of the Act.

It was observed by the Supreme Court in *CIT vs. Kelvinator of India*, (2010) 2 SCC 723 that amended provisions are wider. What is important and relevant is that the principle of - change of opinion was equally applicable under the unamended provisions.

There may be cases where the Assessing Officer does not and may not raise any written query but still the Assessing Officer in the first round/ original proceedings may have examined the subject matter, claim etc, because the aspect or question may be too apparent and obvious. To hold that the assessing officer in the first round did not examine the question or subject matter and form an opinion, would be contrary and opposed to normal human conduct. Such cases have to be examined individually. Some matters may require examination of the assessment order or queries raised by the Assessing Officer and answers given by the assessee but in others cases, a deeper scrutiny or examination may be necessary.

The stand of the Revenue and the assessee would be relevant. Several aspects including papers filed and submitted with the return and during the original proceedings are relevant and material. Sometimes application of mind and formation of opinion can be ascertained and gathered even when no specific question or query in writing had been raised by the Assessing Officer. The aspects and questions examined during the course of assessment proceedings itself may indicate that the Assessing Officer must have applied his mind on the entry, claim or deduction etc. It may be apparent and obvious to hold that the Assessing Officer would not have gone into the said question or applied his mind. However, this would depend upon the facts and circumstances of each case.

LD/61/32

CIT, Chennai

Vs.

High Energy Batteries (India) Ltd.

April 17, 2012 (MAD)

[Assessment Years 1995-96 to 1997-98]

Section 147 of Income-tax Act, 1961 - Income Escaping Assessment

In absence of any material to pronounce on genuineness of transaction, mere fact that what had been purchased had been leased out to vendor or that vendor had undertaken to pay hire charges on behalf of assessee to hire purchase company, per se, cannot lead to a conclusion that transaction is a sham one

The assessee had purchased machinery on 10.03.1995 from a sister concern for ₹250 lakhs. The assessee had paid a sum of ₹50 lakhs and the balance of ₹200

Committee on Financial Markets and Investors' Protection

INVITING RESOURCE PERSONS FOR CONDUCTING INVESTOR AWARENESS PROGRAMMES

Introduction

The Committee on Financial Markets and Investors' Protection (CFM&IP) is one of the Non-Standing Committees of the Institute of Chartered Accountants of India. The functions of the Committee include preparing suggestions on various Regulations / Circulars relating to Financial Markets for submission to the Government/Regulators.

We are pleased and proud to state that the Institute of Chartered Accountants of India has been designated as the nodal authority by the Ministry of Corporate Affairs, Government of India to organize **Investor Awareness Programmes** throughout India in the district headquarters and big cities through the Institute's network of Regional Councils and Branches during the year 2012-13. The Ministry also desired that to conduct Investor Awareness Programmes in the smaller towns' services of Resource Persons may be availed.

Resource Persons

The Committee invites proposals from Chartered Accountants, Bankers, Capital Market experts, MBAs from reputed Institutes, Professors and Lecturers having knowledge and flair of capital market and public speaking skills for acting as Resource Persons to conduct the Investor Awareness Programmes in smaller towns other than district headquarters. You can send your resume along with the names of the towns where programmes are proposed to be conducted at cfmip_rp@icai.org

The Scheme

The resource persons have to plan and organise Investor Awareness Programmes of two hours duration in small towns (other than district headquarters) at their own initiative. Arranging venue, assembling **at least 50 participants per programme and disseminating financial literacy will be their key responsibilities. For this, MCA will reimburse Rs. 5,000/- per programme inclusive of TA/DA, honorarium and other costs or *actual expenses* whichever is less.**

Committee on Financial Markets and Investors' Protection
ICAI Bhawan
Administrative Block, Third Floor,
A-29, Sector 62,
NOIDA - 201 309
Phone: 0120 - 3045945/905
E-mail: cfmip_rp@icai.org

Guidelines

The Guidelines for conducting such programmes by resource persons are as follows:

1. Programmes can be conducted at small towns, cities, blocks and taluka/ tehsils but not in villages.
2. Progamme should be of 2 hours.
3. The target audience for the programme should be household investors, businessmen, housewives, students (higher secondary, graduate, post graduate and MBA students), persons working in Govt. department/private jobs etc.
4. Maximum Four (4) programmes can be conducted in the same town, taluka, tehsils, block etc. Please ensure a gap of 20 days with different venues once the programme is conducted in the same town, taluka, tehsils, block etc.
5. Number of participants should be at least 50. While conducting an IAP in a school premises, majority of participants i.e. atleast 25 participants should be non-students that may include teachers, staff members, students' parents and general public. Photographs should clearly show the strength of non-students participants.
6. Venue should be selected at a place where adequate number of prospective investors may be the target participants.
7. Pamphlet/ Booklet/ Reading Material with important points covered in the talk should be circulated. Material in Hindi or regional language can also be distributed. Soft copy of reading material will be provided by the ICAI.
8. Please send the programme details like (place, date, venue, target audience) atleast 5 days in advance for approval at cfmip_rp@icai.org.
9. Topics to be covered may be restricted to the contents of booklets sent to you.
10. The following documents are required to be submitted within 15 days of conduct of programme to enable us to process reimbursement:
    - At least 4 Photographs giving coverage of maximum participants with banner and faculty while the programme is in progress.
    - Attendance sheet containing name, address and mobile nos. of the participants. Signatures of participants are must on the attendance sheet so provided.
    - Brief Report covering aspects of Topics covered and feedback of participants.
    - A duly signed undertaking by Resource Person that the programme has been conducted at informed time and place. In case programme has been conducted at some organization, management/degree collage, school etc. then such undertaking has to be countersigned by organization head/principal also.
    - Statement of expenses duly certified by the recourse person along with original bills if any.
11. Programmes should not be used for publicity of any organization/firm/ company or any investment product.
12. A resource person can conduct a maximum of 10 programmes in a month subject to total number of 60 programmes till 31st March, 2013.

lakhs was financed by Wipro Finance. As far as this transaction was concerned, a perusal of the same showed that the records were available before the Assessing Authority at the earliest of the transactions which related to the assessment year 1995-96 and there was nothing on record to show that the transaction had not gone through between the assessee and Wipro Finance. The only ground on which the Revenue seeks to question this agreement is the minutes of the meeting of the Board of Directors of the sister concern where there was a reference to the sale of the machinery to meet the financial needs of the said company. The monthly payment by the assessee to Wipro Finance Limited was to be met by the rental dues payable by the sister concern to Wipro Finance, being made to meet the monthly payment of the assessee company to Wipro Finance. The Revenue laid stress on this aspect of the sister concern making payment to Wipro Finance of the rental dues as by way of satisfaction of the assessee's commitments under the hire purchase agreement.

The Madras High Court held that as far as this aspect is concerned, there was no material in the agreement between the assessee and Wipro Finance and between the assessee and sister concern, by which one may say that the lessee the sister concern had undertaken under the said agreement the responsibility of meeting the liabilities of the assessee company to Wipro Finance. In fact, the lessee company had undertaken to pay the lease rentals on the due date as specified and that the last payment was to be made by the assessee. A copy of the instalments paid by the assessee to Wipro Finance for the assessment year 1996-97 also figures in as one of the documents filed before this Court. Leaving this aspect aside, even assuming that the lessee company had undertaken such responsibility to meet the liability of the assessee company to pay the hire purchase amount to Wipro Finance, this circumstance would not in any manner, lead to the inference that the agreement was a sham one, for, it is a matter of pure commercial understanding between two parties under the agreement to decide as to the modalities of lease rental payment. In the light of the above, there was no material other than what had been mentioned above and considered by the Officer at the original assessment as placed by the assessee, to come to a definite conclusion on the character of the transaction as had been alleged by the Revenue. Given the freedom to enter into agreements with parties and guided by commercial considerations, even to invoke the theory of tax evasion, the Revenue must have sufficient material to draw an inference of what had been shown as an understanding on an agreement between the parties, is not, in fact, so.

In the absence of any material to pronounce on the genuineness of the transaction herein, the mere fact that what had been purchased had been leased out to the vendor or that vendor had undertaken to pay the hire charges on behalf of the assessee to the hire purchase company, *per se*, cannot lead to a conclusion that the transaction is a sham one. Therefore, the Tribunal was right in holding that the re-opening of assessment by the assessing officer was bad in law.

LD/61/33

CIT-Central, Cochin
Vs.
P.D. Abrahm alias Appachan
February 10, 2012 (KER)
[Block Period 1988-89 to 1997-98]

Section 158BFA of Income-tax Act, 1961 - Block assessment in search cases - Levy of interest and penalty in certain cases

Section 158BFA(2) provides for mandatory penalty in respect of tax assessed on undisclosed income other than undisclosed income admitted without further contest and on which tax is paid based on return filed by assessee against notice issued under Section 158BC(a)

Penalty under Section 158BFA is the general Rule in the event of assessment of undisclosed income under Section 158BC and exclusion from penalty is an exception covered by the first proviso to the main section, which is subject to the second proviso thereto. What is clear from the first proviso is that if, pursuant to the notice issued under Section 158BC(a) assessee files return, remits tax and does not proceed to contest the undisclosed income returned based on which assessment is made, there is no scope for any penalty. However, the second proviso is an exception to the first proviso which makes it clear that if any undisclosed income is assessed over and above the undisclosed income returned by the assessee in the return filed pursuant to notice issued under Section 158BC(a), penalty is to be levied on such excess income assessed. The main provision gives a limited discretion to the Assessing Officer to levy penalty ranging from a minimum amount, which is equal to the amount of tax payable in respect of undisclosed income and the maximum is three times of such tax. In other words, unlike under Section 271(1)(c), which provides for penalty for concealment of income,

Section 158BFA(2) provides for mandatory penalty in respect of tax assessed on undisclosed income other than undisclosed income admitted without further contest and on which tax is paid based on return filed by the assessee against notice issued under Section 158BC(a).

■

Section 158BC of Income-tax Act, 1961 - Block assessment in search cases - Procedure for

There is no justification for doubting entries found in seized records pertaining to expenditure while accepting income found recorded therein

The assessee-film producer was engaged in unaccounted business and accounts seized pertain to clandestine transactions showing unaccounted receipts and unaccounted expenditure. The assessee himself has voluntarily declared undisclosed income of ₹43 lakhs over the income returned for the block period.

The Assessing Officer has considered the claim of the assessee that film directors were paid profit share of various films directed by them for the assessee. Moreover, details of payments were also available in the seized records. However, the Assessing Officer declined to believe assessee's claim for the reason that there was no written agreement between the assessee and the film directors for profit sharing over and above the agreed consideration paid to them and the cost reimbursed for the production of the film. Further the Assessing Officer heavily relied on the denial made by the film directors against receipt of payments.

The High Court of Kerala held that there is no justification for doubting the entries found in the seized records pertaining to expend while accepting the income found recorded therein. When the Department relies on the seized records for estimating undisclosed income, there is no reason why the expenditure stated therein should be disbelieved merely because there is no written agreement and that payments were not made through cheques or demand drafts. Even when unaccounted income is determined from business carried on clandestinely or not, the statute does not authorise assessment of anything other than "undisclosed income" which has to be arrived at after allowing expenditure incurred by the assessee whether it be accounted in the regular books or not. What is clear from the clandestine records seized from the assessee is that both the film producer and the film directors were engaged in collections and payments outside the regular books of accounts and that is the only reason why there is no written

agreement between them in regard to profit sharing and the payments are consciously not made through cheques or demand drafts. The Assessing Officer has also stated that the purpose of payments is not seen recorded in the seized records. This unrealistic stand is justified in the context of the business carried on by the assessee because between the film producer and the film directors income seen recorded and payments seen made should be taken as relating to business and nothing else. The mere fact that film directors have not confirmed receipt of payment in cash from the assessee also is not a ground for treating the payments as bogus or not genuine. There is nothing to doubt the genuineness of the payments because assessee himself explained that the film directors are entitled to share profits in respect of successful movies, and the Department has not established that such practice is not there in the film industry. Since, in principle, the order of the Tribunal that entries relating to payments to film directors found in the seized records should be accepted. There was also no justification to interfere with the findings of the Tribunal with regard to the payments made to the Directors though not recorded by the assessee or the payees in the regular books of accounts.

■

Section 80-IA, read with Section 158BC of Income-tax Act, 1961 - Deductions - Profits and gains from industrial undertakings engaged in infrastructure developments, etc.

No deduction under Section 80-IA can be claimed for first time in computation of undisclosed income in assessment under Section 158BC

The assessee has not made any claim in the regular returns filed. The block assessment happened to be completed 6 to 7 years after the relevant years to which the assessee's claim for deduction under Section 80-IA relates. The revenue submitted that the Department cannot verify the genuineness of the claim with reference to Form 10CCB, if the same is furnished, 10 years after the closure of the relevant assessment years, pursuant to remand order issued by the Tribunal.

The Kerala High Court held that in order to consider claim of deduction under Section 80-IA a statutory audit report in form No.10CCB is mandatory as required under the above provision of the Act. The requirement of an audit report in form 10CCB is for the Department to verify the factual position with reference to the data contained therein, which has contemporary relevance. A claim of deduction under Section 80-IA is admissible only in regular assessment that too if it is claimed along with the return accompanied by audit report in form 10CCB. In fact, if the assessee has not furnished audit report along with the return, the Assessing Officer is not required to consider the claim. No deduction can be claimed for the first time in the computation of undisclosed income in the assessment under Section 158BC.

LD/61/34
CIT, Dehradun
Vs.
Dehradun Club Ltd.
October 14, 2011 (Uttarakhand)
[Assessment Year 1988-89]

Section 234B, read with Sections 143 and 156 of Income-tax Act, 1961 - Interest - For defaults in payment of Advance tax

If assessment order does not specify charging of interest, then it could not be charged or levied under Section 156

While completing the assessment, the assessing officer had not issued any direction in respect of charging interest under Section 243B. However, while pursuing the assessment order, a notice of demand was issued under Section 156 demanding interest under Section 243B on the ground that the assessee had failed to pay advance tax within the stipulated period as specified under Section 209.

The assessee contended that the interest under Section 234B could not be charged since there was no order to that effect in the assessment order. The application of the assessee was rejected by the Assessing Officer.

The Uttarakhand High Court held that a perusal of Sections 143(3) and 156 clearly indicates that the tax, interest, penalty, or fine is payable in consequence of an order passed under the Act, namely, the assessment order. There has to be a specific order passed by the

assessing officer charging interest and, only thereafter, a notice of demand levying interest could be issued.

The language of the aforesaid provision mandates that the Income Tax Officer shall by an order in writing make an assessment of the total income or loss of the assessee and determine the same payable by the assessee on the basis of such assessment.

A notice of demand is somewhat like a decree in a civil suit, which must follow the order. When the judgment in a civil suit does not specify any amount to be recovered, the decree could not contain such amount. Similarly, when the assessment order under Section 143(3) does not indicate that interest would be leviable, the notice of demand under Section 156 levying interest would be wholly illegal since interest is payable in consequence of an order passed as is clear from Section 156. Consequently, the notice of demand cannot go beyond the assessment order and the assessee cannot be served with any such notice demanding interest. There is another aspect of the matter. The assessee must know that he has been charged with interest under a particular section of the Act. That must be specified in the assessment order and, only thereafter, a notice of demand under Section 156 could be issued.

In the light of the aforesaid, it was to be held that if the assessment order does not specify charging of interest, then it cannot be charged or levied under Section 156.

LD/61/35

CIT-II, Kanpur
Vs.
Deep Awadh Hotels (P.) Ltd.
August 3, 2011 (ALL)

Section 234B of Income-tax Act, 1961- Interest - For defaults in payment of Advance tax

If assessment order or computation sheets do not provide for interest, it cannot be charged in demand notice

There is no force in the argument that even if assessment order or computation sheets do not provide for interest, since interest is mandatory, it can be charged in the demand notice, which is signed by the Assessing Officer.

Even if any provision of law is mandatory and provides for charging of tax or interest, such charge by the assessing officer should be specific and clear and assessee must be made to know that the assessing officer has applied its mind and has ordered charging of interest. The mandatory nature of charging of interest and the actual charging of interest by application of mind and the mention of the proviso of law under which such interest is charged are two different things. Therefore, interest under Section 234B cannot be charged in such cases.

LD/61/36

CIT-II

Vs.

Sarin Chemical Laboratory

May 18, 2012 (ALL)

[Assessment Years 1991-92]

Section 234B of Income-tax Act, 1961 – Interest - Chargeable as

In absence of any mention of charging of interest in assessment order, interest cannot be charged by issuing a notice of demand

The assessee contended that the interest could not be charged under Sections 234A, 234B and 234C in the absence of any order to this effect in the assessment order. The CIT(A) took the view that no appeal is provided against charge of interest but the Assessing Officer may levy the interest while giving effect to the appellate order. The Tribunal accepted the contention of the assessee that the Assessing Officer has failed to mention in the assessment order for charging of any interest and therefore, interest could not be charged from the assessee.

Following the view taken in CIT-II, *Kanpur vs. Deep Awadh Hotels P. Ltd.* (decided on 3.8.2011) (LD/61/35 above), the Allahabad High Court held that held that in the absence of any mention of charging of interest in the assessment order, interest cannot be charged by issuing a notice of demand, the contrary argument cannot be accepted.

LD/61/37

Price Waterhouse Coopers Pvt. Ltd.

Vs.

CIT, Kolkata-I

September 25, 2012 (SC)

[Assessment Year 2000-2001]

Section 271(1)(c) of the Income-tax Act, 1961 – Penalty – For Concealment of Income

Tax Audit Report filed along with return unequivocally stated that provision for payment was not allowable under Section 40A(7) ,however, assessee made a computation error in its return of income and failed to add it back and thus it could be held that assessee had committed an inadvertent and bona fide error and had not intended to or attempted to either conceal its income or furnish inaccurate particulars and, hence, penalty could not be imposed

The assessee, an accounting firm, filed Audit Report with return stating that ₹23,70,306 was liabilities provided for payment of gratuity during the year. This provision was not allowable under Section 40A(7) and was required to be added back. However, the same had not been added by the assessee in its computation, thereby leading to underassessment of income by ₹23,70,306. The Assessing Officer saddled the assessee with penalty at 300% on the tax sought to be evaded by the assessee by furnishing inaccurate particulars.

The assessee had filed an affidavit in which it was stated that the assessee is engaged in Multidisciplinary Management Consulting Services and in the relevant year it employed around 1000 employees. It had separate accounts department which maintains day to day accounts, pay rolls etc. It was stated in the affidavit that perhaps there was some confusion because the person preparing the return was unaware of the fact that the services of some employees had been taken over upon acquisition of a business, but they were not members of an approved gratuity fund unlike other employees of the assessee. Under these circumstances, the tax return was finalised and filled in by a named person who was not a Chartered Accountant and was a common resource.

It is further stated in the affidavit that the return was signed by a director of the assessee who proceeded on the basis that the return was correctly drawn up and so did not notice the discrepancy between the Tax Audit Report and the return of income.

The Supreme Court held that the facts of the case were rather peculiar and somewhat unique. The assessee is undoubtedly a reputed firm and has great expertise available with it. Notwithstanding this, it is possible that even the assessee could make a "silly" mistake.

The fact that the Tax Audit Report was filed along with the return and it unequivocally stated that the provision for payment was not allowable under Section 40A(7) indicated that the assessee made a

computation error in its return of income. Apart from the fact that the assessee did not notice the error, it was not even noticed by the Assessing Officer who framed the assessment order. In that sense, even the Assessing Officer seems to have made a mistake in overlooking the contents of the Tax Audit Report.

The contents of the Tax Audit Report suggest that there is no question of the assessee concealing its income. There was also no question of the assessee furnishing any inaccurate particulars. It appeared that all that had happened in the present case was that through a bona fide and inadvertent error, the assessee while submitting its return, failed to add the provision for gratuity to its total income. This could only be described as a human error which every body is prone to make. The calibre and expertise of the assessee has little or nothing to do with the inadvertent error. That the assessee should have been careful could not be doubted, but the absence of due care, in a case such as the present, would not mean that the assessee was guilty of either furnishing inaccurate particulars or attempting to conceal its income.

Given the peculiar facts of this case, the imposition of penalty on the assessee was not justified. It was to be concluded that the assessee had committed an inadvertent and bona fide error and had not intended to or attempted to either conceal its income or furnish inaccurate particulars. Therefore, no penalty could be imposed on the assessee.

Right to Information Act

LD/61/38

Girish Ramchandra Deshpande
Vs.
Central Information Commissioner
October 3, 2012 (SC)

Section 8 of the Right to Information Act, 2005 - Exemption from disclosure of information

Office memos issued to an employee, show cause notices and orders of censure/punishment, etc. and details disclosed by him in his income tax returns are "personal information" which stand exempted from disclosure under clause (j) of Section 8(1) unless involves a larger public interest

The petitioner had submitted an application before the Regional Provident Fund Commissioner calling for various details relating to third respondent, who was employed an Enforcement Officer. The petitioner sought for copies of all memos, show cause notices and censure/punishment awarded to the third respondent and also details viz. movable and immovable properties and also the details of his investments, lending and borrowing from Banks and other financial institutions. Further, he had also sought for the details of gifts stated to have accepted by the third respondent, his family members and friends and relatives at the marriage of his son. The information mostly sought for finds a place in the income tax returns of the third respondent. The question that had come up for consideration was whether the abovementioned information sought for qualifies to be "personal information" as defined in clause (j) of Section 8(1).

The Supreme Court held that the details called for by the petitioner i.e. copies of all memos issued to the third respondent, show cause notices and orders of censure/punishment etc. were qualified to be personal information as defined in clause (j) of Section 8(1). The performance of an employee/officer in an organisation is primarily a matter between the employee and the employer and normally those aspects are governed by the service rules which fall under the expression "personal information", the disclosure of this has no relationship to any public activity or public interest. On the other hand, the disclosure of which would cause unwarranted invasion of privacy of that individual. Of course, in a given case, if the Central Public Information Officer or the State Public Information Officer of the Appellate Authority is satisfied that the larger public interest justifies the disclosure of such information, appropriate orders could be passed but the petitioner cannot claim those details as a matter of right.

The details disclosed by a person in his income tax returns are "personal information" which stand exempted from disclosure under clause (j) of Section 8(1) of the RTI Act, unless involves a larger public interest and the Central Public Information Officer or the State Public Information Officer or the Appellate Authority is satisfied that the larger public interest justifies the disclosure of such information.

The petitioner in the instant case had not made a bona fide public interest in seeking information, the disclosure of such information would cause unwarranted invasion of privacy of the individual under Section 8(1)(j) of the RTI Act.

The petitioner had not succeeded in establishing that the information sought for is for the larger public interest. That being the fact, the petition was to be dismissed. ■