Legal Decisions[1]

Income-tax Act

LD/61/39

Director of Income Tax (International Taxation), Mumbai
Vs.
Balaji Shipping UK Ltd.
August 6, 2012 (BOM)
[Assessment Year 2001-2002]

Section 9 read with Section 44-B of the Income-Tax Act, 1961 - Income - Deemed to be received

Income of the assessee UK shipping company by way of slot chartering would form a part of income from operations of ships and thus exempted under Article 9 of the Tax Treaty between India and UK

The respondent was a UK based shipping company. It was engaged in international transportation of goods by sea. It had chartered ships. The respondent owned over 5000 containers and had leased over 2700 containers. The respondent carried on business of transporting goods from India to international ports availing the slot hire facilities obtained on feeder vessels under Connecting Carrier Agreements with the owners / charterers of the feeder vessels. In some cases the cargo was transported directly to the final international destination/ports availing the slot hire facilities. In some cases, the cargo was delivered to an international hub port from where it was further shipped to the final destination / port on the vessels chartered by the respondent. The bills of lading for the entire journey were issued by the respondent in either case.The question that falls for consideration therefore, is whether the freight earned from or attributable to the portion of the voyage utilizing the Slot Hire Agreements falls within the ambit of Article 9 of the DTAA.

The Bombay High Court held that in the present case the respondent admittedly is a charterer of at least two ships and owns and has leased a large quantity of containers. The respondent's income from slot charters is therefore only a part of its total income. Further the respondent arranges for the transport of cargo availing the slot hire facilities acquired by it in two ways. Some of the cargo is transported directly to the final destinations abroad whereas some of it is transported to a hub port also outside India from where it is transhipped on vessels chartered by the respondent to the final destination.

The question whether the income attributable to a voyage undertaken from India by availing the slot hire facilities is liable to be taxed in India must, in this case, be addressed qua these two situations referred to. *Firstly*, where the goods are transported by an enterprise by availing of the slot hire facility obtained by it on the ship of another from a port in India upto a hub port abroad and from there transporting the goods further to their final destination upon a ship owned or chartered or otherwise controlled by it. *Secondly*, where the goods are transported by the assessee from a port in India directly to their final destination to a port abroad by availing a slot hire facility obtained by it on the ship of another. (We will refer to this as a case of the second type.) Article 9 does not require the ship to be owned by an enterprise / assessee. It merely requires the income to be "from the operation of ships in international traffic". There is no warrant for adding to the Article the requirement of the ship being owned by the enterprise. A charter is certainly contemplated by Article 9. So would an enterprise that controls the management/operation of the ship be included in Article 9 even if it does not own the ship. Such enterprises earn income from the operation of ships chartered or otherwise controlled and managed by them. If Article 9 is to be construed narrowly, as suggested by the appellant, it would be denuded of much of its effect.

Slot hire agreements have been and remain a regular feature of the shipping industry for decades. Whether they constitute a charter of a portion of a ship or not is a different matter. In a case of the first type, the carriage of goods by availing of the slot hire facility is an integral part of the contract of carriage of goods by sea.

Without it, the enterprise/assessee would be greatly hampered in its business in relation to international traffic, carriage of goods by sea. Enterprises operating in any mode or manner, do not always ply their ships all over the globe. Even if they do, their ships may not be readily available when required on a particular

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

route in connection with a contract of carriage of goods. It is necessary, therefore in such cases for them to resort to slot hire agreements. This enables them to transport the goods not on behalf of the owner of the vessel which has granted them a slot hire facility, but in their own name on behalf of their clients. The contract of carriage of goods by sea is thus performed by such enterprises on a principal to principal basis with their clients and not as agents of the owners of the ships and/or their clients. The slot hire agreements are therefore, at least indirectly, if not directly, connected and interlinked with and are integral parts of the enterprise's business of operating ships.

Without availing slot hire facilities, an enterprise would be unable to carry on its business of operating ships in international traffic at all in many cases. They may well loose much of their business. Even if business expediency is irrelevant to the interpretation of the DTAA, it indicates the close nexus between slot hires and the business of operation of ships in international traffic. If the DTAA is construed to include activities directly or indirectly connected to the operation of ships, it would include slot charters.

The second type of case poses some difficulty. Even such cases fall under Article 9(1). Article 9 would apply in respect of an enterprise that carries on the business of operation of ships in international traffic but for a valid reason is required to transport the cargo availing entirely a slot hire facility obtained by it on a ship of another. The illustrations furnished in respect of the first type of case will also apply to these cases.

An enterprise may not ply the ships owned or chartered or otherwise controlled or managed by it in respect of certain routes. It would however, on account of the business exigencies, be required to carry cargo on such routes. Business expediency could arise on account of a number of reasons and different situations such as obliging regular clients, or cultivating new ones. If it were not to do so, it may well loose clientele. Ships owned or chartered or otherwise controlled or managed by an enterprise may not be available on the particular route on a given day or for a particular period. The enterprise may already have entered into contracts or may even be required to enter into contracts for the carriage of goods on that route on that day or during that period. The trade would expect the enterprise to perform its contracts and/or ensure there is no break in its services. This it can do by

availing slot hire agreements. Their refusal or failure to do so, may well affect their business and reputation adversely.

By availing the facility of slot hire agreements, the enterprise does not arrange the shipment on behalf of the owner of the said vessel, but does so on its own account on a principal to principal basis with its clients. Such cases also have a nexus to the main business of the enterprise of the operation of ships. They are ancillary to and complement the operation of ships by the enterprise.

If they are not merely ancillary to the main business of operation of ships but constitute the primary and main activities of the enterprise, it may be a different matter, which need not be considered in the facts and circumstances of the present case.

LD/61/40

Drilcos (India) Pvt. Ltd.
Vs.
CIT, Madras
September 6, 2012 (SC)
[Assessment Year 1993-94]

Section 35AB read with Section 37 of the Income-tax Act, 1961 - Technical know-how expenditure

Where Technical Assistance Agreement was entered into between assessee and American company for acquiring know-how which was, in turn, to be used in business of assessee; section 35AB would come into play and section 37 would have no application

The assessee manufacturer of equipments entered into 'Licence and Technical Assistance Agreement' with an American company under which the American company was required to transfer technical know-how to the assessee for consideration to be paid in three instalments. The first instalment was paid. Subsequently, disputes arose between the contracting paries and the know-how was not transferred by the American company. The claim of the assessee of the amount paid under section 37 was rejected by the Department. However, the Department allowed the expenditure to be amortized under section 35AB. The contention of the assessee was that section 35AB was not applicable to this case.

The Supreme Court held that there was no merit in the assessee's contention. If one carefully analyzes section 35AB of the Act, it is clear that prior to 1st April, 1986, there was some doubt as such expenditure could fall under section 37. To remove that doubt, section 35AB stood inserted. In sub- section (1) of section 35AB, there is aconcept of amortization of expenditure. In the present case, it is true that on account of certain disputes which arose between the parties, the balance amount was not paid by the assessee to the American company.

The word 'for' in section 35AB, which is a preposition in English grammar, has to be emphasised while interpreting section 35AB. Section 35AB says that the expenditure should have been incurred for the purposes of the business of the assessee. In the present case, the Technical Assistance Agreement was entered into between the assessee and the American company for acquiring know-how which was, in turn, to be used in the business of the assessee. Once section 35AB comes into play, then section 37 has no application.

Note: Judgment of the High Court upheld.

LD/61/41

NTPC Sail Power Company Pvt. Ltd.
Vs.
CIT
July 17, 2012 (DEL)

Section 36(1)(iii) of the Income-tax Act, 1961 - Interest on borrowed capital

Where for financing expansion plans, assessee company raised capital, interest earned on temporary deposits made from surplus funds and

on deposits made with banks by way of margin or giving advances etc. for purpose of expansion, would be capital receipt being inextricably linked with setting up of power plant

The assessee company was in the process of expansion of its business by setting up new units for generation of power. For financing the expansion plans, the assessee company raised the additional capital of ₹45,000 lakhs during the year. The total interest/financial expenses incurred during the year was ₹4,499.96 lakhs. Of this, ₹3,148.27 lakhs were related to the borrowing utilized for expansion purposes. On the other hand, the assessee company earned interest on temporary deposits made from surplus funds and on the deposits made with banks by way of margin or giving advances etc. for the purpose of expansion. The same was adjusted to the Incidental Expenses during Construction (IEDC for short). The interest was adjusted on account of the matching principle since the interest earned on deposits kept in relation to the expansion were credited to/reduced from the IEDC. The Assessing Officer treated this interest as "income from other sources",

The High Court of Delhi held that the Supreme Court in *CIT v. Bokaro Steel Ltd. 236 ITR 315 (SC)* held that interest earned by investing borrowed capital in short-term deposits is an independent source of income not connected with the construction activities or business activities of the assessee, but the same cannot be said where the utilisation of various assets of the company and the payments received for such utilisation are directly linked with the activity of setting up the plant of the assessee. These receipts are inextricably linked with the setting up of the capital structure of the assessee-company. They must, therefore, be viewed as capital receipts going to reduce the cost of construction.

This Court, in *Indian Oil Panipat Power Consortium Ltd v. ITO (2009) 315 ITR 255 (Del)* held that where interest on money received as share capital is temporarily placed in fixed deposit awaiting acquisition of land, a claim that such interest is a capital receipt entitled to be set off against pre-operative expenses, is admissible, as the funds received by the assessee company by the joint venture partners are "inextricably linked" with the setting up of the plant and such interest earned cannot be treated as income from other sources.

It is no doubt correct that the proviso to section 36(1)(iii) of the Act enacts that any amount of the interest paid towards ("in respect of") capital borrowed for acquisition of an asset or for extension of existing business regardless of its capitalization in the books or otherwise, "for any period beginning from the date on which the capital was borrowed for acquisition of the asset till the date on which such asset was first put to use" would not qualify as deduction. However, when the interest is received by the assessee towards interest paid for fixed deposits when the borrowed funds could not be immediately put to use for the purpose for which they were taken, if the receipt is "inextricably linked" to the setting up of the project, it would be capital receipt not liable to tax but ultimately be used to reduce the cost of the project. By the same logic, in this case too, the funds invested by the assessee company and the interest earned were inextricably linked with the setting up of the power plant.

Therefore, the interest earned on fixed deposit of amounts borrowed, could not be treated as revenue receipt. The answer should be given in favour of the assessee.

LD/61/42

CIT, Tamil Nadu
Vs.
Dynavision Ltd.
August 30, 2012 (SC)
[Assessment Year 1987-88]

Section 145 read with 143 of the Income-tax Act, 1961 - Method of Accounting

Levy of excise duty on manufacture of finished product and same is quantified and collected on selling price; thus, no addition could be made where assessee had not included in closing stock element of excise duty

The assessee had been following consistently the method of valuation of closing stock which was "cost or market price whichever is lower." The Assessing Officer while computing the assessment under Section 143(3) found that the assessee had not included in the closing stock the element of excise duty. Accordingly, he added a sum of ₹16,39,000 to the income of the assessee on the ground of undervaluation of closing stock.

The Supreme Court held that the Assessing Officer conceded before the CIT(A) that he revalued the closing stock without making any adjustment to the opening stock. Lastly, though under section 3 of the Central Excise Act, 1944, the levy of excise duty is on the manufacture of the finished product the same is quantified and collected on the value (i.e. selling price). Further in *Chainrup Sampatram vs. CIT, 24 ITR 481* it has been held that the true purpose of crediting the value of unsold stock is to balance the cost of the goods entered on the other side of the account at the time of the purchase, so that on cancelling out of the entries relating to the same stock from both sides of the account would leave only the transactions in which actual sales in the course of the year has taken place and thereby showing the profit or loss actually realized on the year's trading.

Thus, the addition was wrong.

Note: Judgment of the High Court upheld.

LD/61/43

Gujarat Power Corporation Ltd.
Vs.
Assistant CIT
July 30, 2012 (GUJ)
[Assessment Year 2002-2003]

Section 147 read with Section 148 and Section 10(23G) of the Income-tax Act, 1961 - Income escaping assessment

Where entire information and material that Assessing Officer had at his command was reflected from record itself and Assessing Officer had examined such claims in detail, any reopening of assessment of same claims on basis of same material, would amount to a mere change of opinion; reopening was bad in law

A. Whether reopening of assessment within four years where materials were already on record at time of

original assessment, but not examined, is justified or in absence of any new material, such re-assessment would amount to a mere change of opinion?

An assessment previously framed can be reopened within a period of four years if the Assessing Officer has some tangible material at his command on which he has reason to believe that income of the assessee chargeable to tax has escaped assessment. The additional requirement that such escapement of income is due to failure on the part of the assessee to disclose truly and fully all material facts is not there. When the Assessing Officer frames an assessment, but does not visit a certain claim putforth by the assessee, neither accepts nor rejects such claim, in the final order of assessment, it can hardly be stated that the Assessing Officer had formed an opinion with respect to such a claim. It is of course true that such reopening even within a period of four years from the end of relevant assessment year would not be permissible on a mere change of opinion.

When in an assessment framed by the Assessing Officer, if a certain claim of the assessee is not examined, no queries raised, no answers elicited, it can not be stated that merely because the Assessing Officer did not reject such a claim in the final order of assessment, he should be deemed to have expressed an opinion with respect to such a claim and any reopening of an assessment of this nature even within a period of four years from the end of relevant assessment year would amount to change of opinion. In any such case, as long as there is some tangible material on the basis of which the Assessing Officer can form a belief that the income chargeable to tax has escaped assessment, it would be permissible to reopen the assessment in exercise of powers under section 147 of the Act, particularly after the amendments made with effect from 1.4.1989. Such tangible material need not be alien to the record.

Reopening of an assessment within a period of four years from the end of relevant assessment year after 1.4.1989 could be made as long as the same is not based on mere change of opinion. Merely because a certain material which is otherwise tangible and enables the Assessing Officer to form a belief that income chargeable to tax has escaped assessment, formed part of original assessment record, per se would not bar the Assessing Officer from reopening the assessment on the basis of such material. Expression "tangible material" does not mean material alien to the original record.

B. Whether when during course of original assessment, Assessing Officer had examined claim put-forth by assessee raising queries and eliciting assessee's response and at time of framing assessment, did not reject claim without recording reasons, could it be stated that Assessing Officer had formed an opinion and reopening of assessment without any new or additional material, would amount to a mere change of opinion and therefore, barred?

The powers under section 147 of the Act are special powers and peculiar in nature where a quasi-judicial order previously passed after full hearing and which has otherwise become final is subject to

reopening on certain grounds. Ordinarily, a judicial or quasi-judicial order is subject to appeal, revision or even review if statute so permits but not liable to be re-opened by the same authority. Such powers are vested by the Legislature presumably in view of the highly complex nature of assessment proceedings involving large number of assessees concerning multiple questions of claims, deductions and exemptions, which assessments have to be completed in a time frame. To protect the interest of the revenue, therefore, such special provisions are made under section 147 of the Act. However, it must be appreciated that an assessment previously framed after scrutiny when reopened, results into considerable hardship to the assessee. The assessment gets reopened not only qua those grounds which are recorded in the reasons, but also with respect to entire original assessment, of course at the hands of the revenue. This obviously would lead to considerable hardship and uncertainty. It is precisely for this reason that even while recognizing such powers, in special requirements of the statute, certain safeguards are provided by the statute which are zealously guarded by the courts. Interpreting such statutory provisions courts upon courts have held that an assessment previously framed cannot be reopened on a mere change of opinion. It is stated that power to reopening cannot be equated with review.

Once the Assessing Officer notices a certain claim made by the assessee in the return filed, has some doubt about eligibility of such a claim and therefore, raises queries, extracts response from the assessee, thereafter in what manner such claim should be treated in the final order of assessment, is an issue on which the assessee would have no control whatsoever. Whether the Assessing Officer allows such a claim, rejects such a claim or partially allows and partially rejects the claim, are all options available with the Assessing Officer, over which the assessee beyond trying to persuade the Assessing Officer, would have no control whatsoever. Therefore, while framing the assessment, allowing the claim fully or partially, in what manner the assessment order should be framed, is totally beyond the control of the assessee. If the Assessing Officer, therefore, after scrutinizing the claim minutely during the assessment proceedings, does not reject such a claim, but chooses not to give any reasons for such a course of action that he adopts, it can hardly be stated that he did not form an opinion on such a claim. It is not unknown that assessments of larger corporations in the modern day, involve large number of complex claims, voluminous material, numerous exemptions and deductions. If the Assessing Officer is burdened with the responsibility of giving reasons for several claims so made and accepted by him, it would even otherwise cast an unreasonable expectation which within the short frame of time available under law would be too much to expect him to carry. Irrespective of this, in a given case, if the Assessing Officer on his own for reasons best known to him, chooses not to assign reasons for not rejecting the claim of an assessee after thorough scrutiny, it can hardly be stated by the revenue that the Assessing Officer can not be seen to have formed any opinion on such a claim. Such a contention, in our opinion, would be devoid of merits. If a claim made by the assessee in the return is not rejected, it stands allowed. If such a claim is scrutinized by the Assessing Officer during assessment, it means he was convinced about the validity of the claim. His formation of opinion is thus complete. Merely because he chooses not to assign his reasons in the assessment order would not alter this position. It may be a non-reasoned order but not of acceptance of a claim without formation of opinion. Any other view would give arbitrary powers to the Assessing Officer.

In a situation where the Assessing Officer during scrutiny assessment, notices a claim of exemption, deduction or such like made by the assessee, having some *prima facie* doubt raises queries, asking the assessee to satisfy him with respect to such a claim and thereafter, does not make any addition in the final order of assessment, he can be stated to have formed an opinion whether or not in the final order he gives his reasons for not making the addition.

Illustration

The petitioner-assessee put forth his claim for exemption under section 10(23G) of the Act with respect to three different incomes, namely, (1) interest from SSNNL bonds, (2) interest from GIPCL bonds, and (3) capital gain from sale of shares by GPEC. Such claim was supported by the notes forming part of the return of income. It was not as if the Assessing Officer did not notice these claims. In fact, the Assessing Officer asked the assessee to justify all the claims. He called upon the assessee to justify the claim of exemption of capital gain on the sale of shares. He also called upon the assessee to justify the claim of exemption under section 10(23G) vis-a-vis interest earned from SSNNL/GIPCL bonds. The assessee gave detailed reply to the query raised in with respect to capital gain. The assessee, thereafter, contended that such justification would apply with respect to interest on the bonds also. The assessee offered its explanation for claiming exemptions under section 10(23G).

In the final order of assessment, it was not as if the Assessing Officer totally lost sight of such claims. He in fact took into account the fact that the assessee was claiming exemption on the interest income from the bonds. He, therefore, examined as to what extent expenditure for earning such tax free income should be disallowed. In the order of assessment, he gave detailed reasons why a portion of the expenditure relating to earning tax free interest should be disallowed. However, later on the Assessing Officer issued a notice under section 148 for reopening the assessment.

In the reasons which the Assessing Officer recorded for reopening the assessment, he based his case on wrong exemption of interest from SSNNL/GIPCL Bonds claimed under section 10(23G).

The Gujarat High Court held that such a reopening would be based on a mere change of opinion. In the reasons, the Assessing Officer started with the words, "from the records, it can be seen that .....". Entire information and the material that the Assessing Officer, therefore, had at his command was reflected from the record itself. This coupled with the fact that in the original assessment, the Assessing Officer examined such claims in detail, would convince that any reopening of the assessment of same claims on the basis of same material, amounts to a mere change of opinion. The fact that the Assessing Officer did not record reasons for making no disallowance on such

claim of exemption, would be of no consequence. In the result, the notice was issued without jurisdiction. The same, therefore, required to be quashed.

LD/61/44

Jagran Prakashan Limited

Vs.

Deputy Commissioner of Income Tax (TDS)

May 23, 2012 (ALL)

Section 194H of the Income-tax Act, 1961 - Deduction of tax at source - Commission or brokerage

Indian Newspapers Society Rules clearly indicates that advertising agencies render service to advertisers/customers and they are ac-credited by Newspapers Society not as an agent of newspaper; hence, trade discount given to advertising agencies by newspaper does not amount to payment of commission within meaning of Section 194H

The petitioner-assessee is a newspaper which gives 15% trade discount to advertising agencies. According to the Department it is nothing but payment of commission within the meaning of Section 194H *Explanation (i)* and the petitioner was liable to deduct tax at source. The petitioner's contention is that relationship between the petitioner, *i.e.*, newspaper agency and the advertising agency is not on the basis of principal and agent, rather is on the basis of principal to principal. It has been submitted that there is no agreement between the petitioner and the advertising agency from which any assumption can be inferred nor at any point of time the petitioner has employed the advertising agency as its agent. The contention of the department is that advertising agencies are agent of the petitioner since they are bringing advertising business which are services rendered by them to the petitioner and payment of trade discount to the advertising agency is nothing but commission in lieu of services rendered.

The Allahabad High Court held that two conditions, which are required to be fulfilled before holding a person liable for deduction at source, are the payment is received by a person as agent of principal and secondly payment is for services rendered (not being professional services).

The petitioner is a member of Indian Newspapers Society (INS) by whom the advertising agencies are granted accreditation. According to the Rules of INS the advertising agencies while being granted accreditation are required to enter into an agreement. Said rules of INS clearly negate the relationship of principal and agent between the newspaper agency and the advertising agency.

Under the heading "Rules and Regulations Governing Accreditation of Advertising Agencies", Rule 10 clearly indicates that there is no control of newspapers agency on the advertising agency whereas in a relationship of principal and agent principal retains full control over the activities of agent.

When Rule 10 clearly provides that *advertising agency is free from control or interference from any business or person who owns or controls newspaper*, the newspaper agency cannot be treated to be principal and advertising agency as agent.

An agency is a contract of employment for the purpose of bringing another in legal relation with a third party or in other words, the contract between the principal and agent is primarily a contract of employment to bring him into legal relation with a third party or to contract such business as may be going on between him and the third party. In publication of advertisement submitted by advertising agency, the responsibility to make payment of bills of the newspaper is on the advertising agency and there is no responsibility of advertiser to make payment to the newspaper agency and no privity of contract took place between the newspaper agency and the advertiser and had the advertising agency being agent of newspaper agency, the advertiser was to be liable for payment to the newspaper agency.

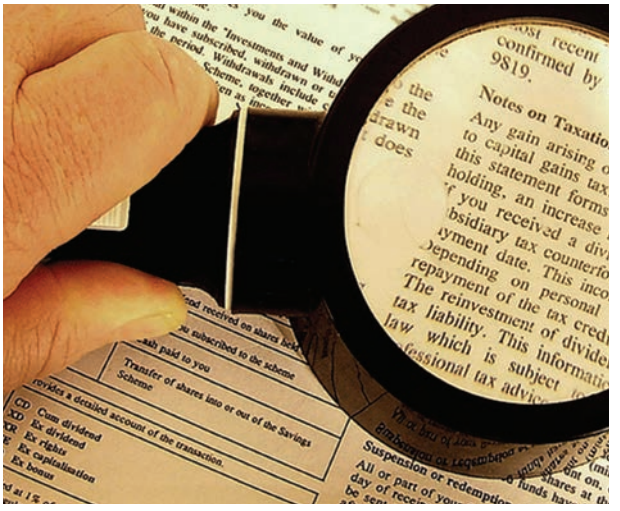
Rule 56(a) of the Rules clearly contemplates that it is the advertising agency which is responsible for payment even if the advertiser has not paid to the advertising agency.

In the form of application, which is provided in Appendix-II to the Rules, advertising agency is required to attach a list of the names and addresses of clients whose advertisement is handled by the advertising agency, which clearly indicates that in fact the advertising agency is working for the advertisers/ clients.

The most important material is format of contract between the advertising agency and the INS, which is in Appendix-III to the Rules. The contents of the first paragraph of the contract clearly indicate that object is *to secure the best advertising service for the advertiser*. Thus, the accreditation of advertising agency is for the object of providing better service to the advertiser and it is not engaged as agent of the newspaper agency and advertising agency, in fact, is running its advertising business and while conducting the said business it acts on behalf of their client i.e. advertiser.

The second precondition, which is required to be fulfilled for applicability of Section 194H of the Act is that the person receiving payment has rendered service to the deductor. A perusal of the INS Rules clearly indicates that advertising agencies are rendering service to the advertisers/customers and they are accredited by the society not as an agent of newspaper agency but to provide service to the advertisers/its clients.

A bare reading of Rule 20 indicates that advertising agencies are rendering service to the advertisers *i.e.* their clients. Column 26 of the application form, as quoted above, which require the advertising agencies to submit the list of names and addresses of clients whose advertisement is handled by them with the letters of appointment issued by the clients (advertisers), clearly mean that advertising agencies act for the advertisers who are their client and they cannot be treated to be an agent of the newspaper agency. The format of agreement in Appendix-III Clause (2) subclause (d), as quoted above, which provides that advertising agency shall retain full trade discount earned as an advertising agency from member publications and it will at no time *pay or otherwise allow any part of such trade discount to any advertiser or representative of any advertiser for whom it may be acting, or has acted as an advertising agency*. Thus, the said clause



clearly indicates that advertising agencies act for the advertisers who are their client and they are not the agent of the News Agency.

Paragraph 4 of the Standard of Practice for Advertising Agencies, provides a rule that no advertising agency shall pay or undertake to pay any part of its commission received from newspaper agency or promise or procure or undertake to procure advertising at a reduce rate or to provide free or partly free any advertising material to the advertiser. The said clause is with different object and has no relevance in finding out the relationship of newspaper and advertising agency as principal and agent. The observation in the assessment order that advertising agency is providing advertisements on the basis of requirement of newspaper, for example, the newspaper do not publish advertisement for alcoholic drinks and thus it is the newspaper which decides that what type of advertisement it will publish and, hence, the advertising agency is acting on behalf of the assessee-newspaper and receiving payment in the name of discount from the gross amount accruing to the assessee-newspaper The fact that advertisement for alcoholic drinks is prohibited is in view of the prohibition contained in the executive orders and statutory provisions to which every newspaper is bound to follow and on the aforesaid factor inference of agency which has been drawn by the respondents is wholly misplaced. The observation that advertisement agency is rendering service to assessee-newspaper is also without any basis and foundation.

Now comes another factor (first factor) which is required to be established for applicability of

Section 194H i.e. as to whether any payment was made to the advertising agency as commission. The case of the petitioner throughout has been that petitioner has been paying a trade discount at the rate of 15% as per Rule 32 of the Rules. The sample bills, which were collected by the department at the time of survey and are part of the assessment order, mention the total amount paid to advertising agency and the discount provided for and the net bill amount. The petitioner's case is that trade discount has been provided by the petitioner throughout as a part of trade practice. The trade discount is claimed to be given in normal business practice which has been recognised in several cases. Thus, the payment is not commission and, hence, the assessee-newspaper has no TDS liability under section 194H.

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Section 201 read with Section 194H of the Income-tax Act, 1961 - Deduction of tax at source - Failure to deduct or pay, consequences of

In event, a person who is responsible to deduct tax at source fails to deduct tax at source, cannot be treated an assessee-in-default unless it is found that payee-assessee has also failed to pay such tax directly and tax which was required to be deducted at source by such deductor, cannot be recovered from deductor ; recovery should be confined only to interest and penalty

Section 4 of the Act is charging section which provides that income tax is chargeable in respect of the total income of the previous year of every person. The charge of the income tax is thus on the income of a person. Person has been defined in Section 2 (31).

The Income-tax Act is an integrated Act delineating a scheme for payment of income tax. For interpreting provisions of Section 201 of the Act, other related provisions have to be looked into to find out the scheme of section 201. Sections 190 and 191 of Chapter XVII under which chapter Section 201 also falls need a closure scrutiny. Section 190(1) provides that tax on income shall be payable by deduction or collection at source or by advance payment. Sub-section (2) of section 190 starts with a negative injunction i.e. *"nothing in this section shall prejudice the charge of tax on such income under the provisions of sub-section (1) of Section 4."* Sub-section (1) of section 4 as noted above, provides that charge of the income tax shall be on the income of a person. Sub-section (2) of Section 190 clearly mandates that despite of mode and manner of collection and recovery of tax i.e. by deduction or collection at source as envisaged under section 190 (1), the charge of payment of income tax is on a person, whose income is to be taxed. Section 191 provides that in the case of income in respect of which provision is not made under this Chapter for deducting income tax at source and where income tax has not been deducted in accordance with the provision of this chapter, income tax shall be payable by the assessee direct. Thus, both the conditions i.e. (i) in the case of income in respect of which provision is not made under chapter XVII for deducting income tax at the time of payment and (ii) in case where income tax has not been deducted in accordance with the provisions of Chapter XVII, the Income tax is payable by the assessee direct. Section, 191, thus re-enforces that primarily the liability of payment of income tax is on the person, whose income is to be taxed as delineated under sub-section (1) of section 4 and sub-section (2) of section 190. The *Explanation* to Section 191 provides that where a deductor who was required to deduct income tax at source does not deduct or after deduction does not pay and where the assessee has also failed to pay such tax directly then such person shall without prejudice to any other consequence be deemed to be an assessee in default within the meaning of subsection (1) of Section 201 in respect of such tax. The *Explanation* to section 191, thus, has to be read into section 201(1).

Sub-section (1) of Section 201 provides that where deductor does not deduct or does not pay after deduction such person shall without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax. The language of the *Explanation* to Section 191 and sub-section (1) of Section 201 is almost similar except with one difference. In *Explanation* to Section 201, the deductor shall be deemed to be an assessee in default where the assessee has also failed to pay such tax directly, whereas in sub-section (1) of Section 201, the above condition is not mentioned. While interpreting the provisions of sections 191 and sub-section (1) of Section 201, a harmonious construction has to be adopted and such interpretation is to be put which gives meaning and purpose to both the provisions. *Explanation* to section 191 specifically mentions *".... be deemed to be an assessee in default within the meaning of sub-section (1) of section 201 in respect of such tax."* The above meaning thus has to be read in sub-section (1) of section 201, which has been specifically provided for. Not repeating the said condition again in section 201 (1) is inconsequential. Thus, deductor who fails to deduct income tax at source shall be deemed to be an assessee in default only when the assessee has also failed to pay such tax directly. Thus, it flows that there is no occasion to treat the deductor as an assessee in default unless the assessee has not paid the tax directly. The deductor cannot be treated an assessee in default till it is found that assessee has also failed to pay such tax directly. Where the Income tax authorities had not adverted to the *Explanation* to Section 191 nor had applied their mind as to whether the assessee has also failed to pay such tax directly. Thus, to declare a deductor, who failed to deduct the tax at source as an assessee in default, condition precedent is that assessee has also failed to pay tax directly. The fact that assessee has failed to pay tax directly is thus, foundational and jurisdictional fact and only after finding that assessee has failed to pay tax directly, deductor can be deemed to be an assessee in default in respect of such tax. It is relevant to notice here that *Explanation* to Section 191 is confined only to the amount of tax which was required to be deducted.

Section 201(1) provides that where any person who is required to deduct tax at source does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, then such person, shall without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax. Section 201(1A) contains a specific provision for payment of simple interest by any such person who does not deduct whole or any part of the tax or after deducting fails to pay the tax. Subsection (2) of Section 201 provides that where tax has not been paid after it is deducted the amount of tax together with simple interest shall be a charge upon all the assets of the person or the company as may be, referred to under sub-section (1). Sub-section (2) thus, although enact a provision that in case where tax after deduction has not been paid by the deductor, the amount of the tax together with the amount of simple interest thereon shall be a charge upon all the assets of the deductor, whereas nothing has been said in sub-section (2) with regard to such charge on a deductor, who fails to deduct the tax. The reason is obvious, in a case where deductor fails to deduct the tax, the consequences are different as compared to in a case where deductor deducts the tax and does not pay to the Government. It is relevant to notice that Section 201(1A) specifically provides for payment of only simple interest when tax has not been deducted or not paid. Sub-section (2) provides for creating a charge on the assets of the deductor, if the tax deducted is not paid. But nothing under section 201 can be read as to mean that when the tax has not been deducted by the deductor, the tax not deducted can be realised from the deductor. No such provision is made under section 201 obviously because the liability to pay income tax is on the assessee direct in whose case, the tax has not been deducted. In the present case, the income tax authorities in proceeding under section 201 apart from directing recovery of interest from the petitioner has also directed for recovery of tax which is alleged to be short deducted, which is beyond the scope of section 201 and is an action of the authorities without jurisdiction. It is clear that wherever the liability to pay tax was fastened on the person who failed to deduct the tax at source a are specific provision was made for that purpose. In a case where tax has not been deducted at source, the short deducted tax cannot be realised from the deductor and the liability to pay such tax shall continue to be with the assessee direct, whose income is to be charged and a person who fails to deduct the tax at source, at best is liable for interest and penalty only.

LD/61/45

NETAPP BV

Vs.

The Authority for Advance Rulings

August 14, 2012 (DEL)

Section 245R of the Income-tax Act, 1961 – Advance Rulings – Procedure on receipt of application

Once an applicant proceeds to file a return, or take a similar step, Authority's jurisdiction to entertain application for advance ruling is taken away, because Income Tax authority concerned would now possess a multitude of statutory powers to examine and rule on return

The First Petitioner had filed its return of income under Section 139(1) on 31-3-2010. The transaction which form the basis of the application before the AAR were entered into on 26-4-2008 and 26.11.2008. The application for advance ruling was filed on 17-6-2010.

The applicants argued that the restriction enacted through Clause (1) of the proviso, only applied to those questions which were raised by the Income Tax Authority and the filing of a return of income did not automatically result in a question being "pending" before the Income Tax Authority. It was contended that unless the assessing authority would specifically raise a question, and for instance, issue notice calling the

assesee to respond to it, the question would not arise, and consequently, the bar would not apply.

The High Court of Delhi held that the proviso to Section 245R(2) creates a bar upon the AAR to admitting an application (for advance ruling); it is also is a jurisdictional bar to the Authority to rule, under Section 245R(4). The proviso to Section 245R(2) of the Act creates a bar to the jurisdiction of the Authority if it is seen that any of the conditions are fulfilled. The rationale for the bar appears to be straightforward; if the applicant wishes to plan its affairs and transactions in advance, it is free to do so to consider the wider tax ramifications. However, once an applicant proceeds to file a return, or take a similar step, the Authority's jurisdiction to entertain the application for advance ruling is taken away, because the Income Tax authority concerned would then be seized of the matter, and would potentially possess a multitude of statutory powers to examine and rule on the return. Conversely, if the authority is approached before an income tax return is filed, or any other income tax authority is approached, the application can be entertained, and the AAR would be exclusively dealing with the matter before it.

LD/61/46

All Cargo Global Logistics Ltd.
Vs.
Deputy CIT, Mumbai
May 21, 2012 (ITAT-MUM-SB)
[Assessment Years 2004-2005 to 2009-2010]

Section 153A read with Section 80-IA of the Income-tax Act, 1961 – Assessment in case of Search of requisition

Where question before CIT(A) had been that income quantified in order passed under Section 153A by disallowing deduction under Section 80IA(4) is against the law as it is based on change of opinion, while question before Tribunal was whether whole of order passed under section 153A is bad in law because Assessing Officer did not have jurisdiction under Section 153A, question raised before Tribunal is qualitatively different from question raised before CIT(A); hence, same could not be admitted

The question before the CIT(A) had been that income quantified in order passed under Section 153A by disallowing deduction under Section 80IA(4) is against the law as it is based on change of opinion. On the other hand, the question before the Tribunal is whether the whole of order passed under Section 153A is bad in law because the Assessing Officer did not have jurisdiction under Section 153A.

The Special Bench of the Mumbai Tribunal held that section 153A starts with non obstante clause in respect of sections 139, 147, 148, 149, 151 and 153; and it provides that where search has been initiated under Section 132 or books of account, other documents or any assets or cash etc. have been requisitioned under Section 132A after 31.5.2003, the Assessing Officer shall proceed in the manner provided in clause (a) and clause (b) of this sub-section. Clause (a) is regarding issue

of notice to such a person to require him to furnish the return of income. The provision clearly empowers the Assessing Officer to issue notice in a case where search is initiated after 31.5.2003. This condition is satisfied in the instant case. Even when the question before the CIT(A) is read widely. The question before the CIT(A) may be in regard to jurisdiction to disallow deduction already granted and in respect of which no material has been found in search. However, the question raised before the Tribunal is an upfront question which debars jurisdiction under Section 153A all together. Thus, the question raised before the Tribunal is qualitatively different from the question raised before the CIT(A). Thus, the same could not be admitted by the Tribunal.

■

Section 240 of the Income-tax Act, 1961 - Refunds – On appeal, etc.

Section 240 is clear that on account of appeal if order of assessment is annulled, amount paid by assessee at time of filing return is not be refunded to assessee

The Revenue raised a plea that barring the jurisdiction of the Assessing Officer in respect of the proceedings under Section 153A are all together bad in law. This would mean that income voluntarily surrendered by the assessee in the return under Section 153A, on which tax has been paid, will have to be refunded to the assessee. This will amount to great prejudice to the revenue as even admitted tax will have to be refunded on the basis of interpretation sought to be placed by the learned Counsel on the statutory provision.

The provision is clear that on account of appeal if the order of assessment is annulled, the amount paid by the assessee at the time of filing the return is not be refunded to the assessee. In the context of the section, the assessment will include reassessment also. Therefore, the prejudice to the revenue, if the ground is admitted, will only be a legal grievance not leading to loss of revenue in so far as returned income is concerned. Accordingly the plea of the Revenue was to be rejected.

■

Section 253 of the Income-tax Act, 1961 - Appellate Tribunal - Appeal to

Question which has not been raised before any of lower authorities and obviously not decided by any one of them, cannot lead to a grievance in respect of which a ground can be validly taken in memorandum of appeal before Tribunal

Where a ground was raised before Tribunal but it was not taken before CIT(A) or Assessing Officer, no order could be said to be available from order of lower authorities.

Section 253(1) uses the words "aggrieved". A person can be aggrieved only if the ground had been raised and it is decided against him. It may also include a case where the ground is raised but has not been decided by the CIT(A). Therefore, section 253(1) bars a ground which was not raised and therefore not decided by the CIT(A). There cannot be any grievance in respect of a matter where it is not raised at all. Further, provision under Section 254(1) under which the Appellate Tribunal is authorised to pass order on the appeal after granting opportunity to both the parties of being heard uses the words "pass such orders thereon as it thinks fit". This is a stage subsequent to filing the appeal. By this time, the question regarding right of the assessee to take certain grounds, additional grounds etc. in respect of the appeal come to an end.

In the light of the fact that the word used in section 263 (1) is "aggrieved", and grievance can arise only if the matter has been taken up before any of the lower authorities on which decision has been rendered or not. However, the question which has not been raised before any of the lower authorities and obviously not decided by any one of them, cannot lead to a grievance in respect of which a ground can be validly taken in the memorandum of appeal. Therefore, such a ground cannot be a ground validly taken as a grievance from the order of lower authorities.

■

Section 253 of the Income-tax Act, 1961 - Appellate Tribunal - Appeal to

If a pure question of law arises for which facts are on record of authorities below, such a question should be allowed to be raised, if it is necessary to do so to assess correct tax liability

The question raised was as to whether scope of assessment u/s 153A encompasses additions, not based on any incriminating material found during course of search. The assessee contended that it had not taken service of any advocate which lead to non-raising of such ground before lower for a. This question is one of law and not one of fact. Therefore, it could be that a proper ground could not be raised in absence of services of an advocate.

The Special Bench of the Mumbai Tribunal held that this constitutes a reasonable cause. Thus, there are reasons to hold that the assessee could not take up this ground before lower authorities for bona-fide reasons. In view of the stated position that all facts are on record, the ground in the memorandum of appeal was to be admitted for decision as an additional ground, but no fresh fact would be entertained or examined while deciding the ground.

LD/61/47

Assistant CIT, Udaipur
Vs.
Gebilal Kanhaialal, HUF
September 4, 2012 (SC)
[Assessment Year 1987-88]

Section 271(1) read with Section 132 of the Income-tax Act, 1961 - Penalty – For concealment of income

Only condition which was required to be fulfilled for getting immunity from levy of penalty after search proceedings got over, was that assessee had to pay tax together with interest in respect of such undisclosed income upto date of payment

Explanation 5 is a deeming provision. It provides that where, in the course of search under Section 132, the assessee is found to be the owner of unaccounted assets and the assessee claims that such assets have been acquired by him by utilizing, wholly or partly, his income for any previous year which has ended before the date of search or which is to end on or after the date of search, then, in such a situation, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall be deemed to have concealed the particulars of his income for the purposes of imposition of penalty under Section 271(1)(c). The only exceptions to such a deeming provision or to such a presumption of concealment are given in sub-clauses (1) and (2) of *Explanation 5*.

Three conditions have got to be satisfied by the assessee for claiming immunity from payment of penalty under clause (2) of *Explanation 5* to Section 271(1)(c). The first condition was that the assessee must make a statement under Section 132(4) in the course of search stating that the unaccounted assets and incriminating documents found from his possession during the search have been acquired out of his income, which has not been disclosed in the return of

income to be furnished before expiry of time specified in Section 139(1). The second condition for availing of the immunity from penalty under Section 271(1)(c) was that the assessee should specify, in his statement under Section 132(4), the manner in which such income stood derived. According to the Department, the assessee was not entitled to immunity under clause (2) as he did not satisfy the third condition for availing the benefit of waiver of penalty under Section 271(1)(c) as the assessee failed to file his return of income on 31st July, 1987 and pay tax thereon particularly when the assessee conceded on August 1, 1987 that there was concealment of income. The third condition under clause (2) was that the assessee had to pay the tax together with interest, if any, in respect of such undisclosed income. However, no time limit for payment of such tax stood prescribed under clause (2). The only requirement stipulated in the third condition was that the assessee has to "pay tax together with interest".

Thus, the only condition which was required to be fulfilled for getting the immunity from levy of penalty, after the search proceedings got over, was that the assessee had to pay the tax together with interest in respect of such undisclosed income upto the date of payment. Clause (2) did not prescribe the time limit within which the assessee should pay tax on income disclosed in the statement under Section 132(4).

Note: Judgment of the High Court upheld. ■