Legal Decisions[1]

Income-tax Act

LD/62/1

CIT-IV

Vs.

Sikandarkhan N. Tunvar

May 2, 2013 (GUJ)

[Assessment Year 2007-2008]

Section 40(a)(ia) of the Income-tax Act, 1961 – Expenses Disallowed – Commission or Brokerage etc. Payable to a Resident

Section 40(a) (ia) would cover not only to the amounts which are payable as on 31st March of a particular year but also which are payable at any time during the year

Section 40(a)(ia) makes disallowance of an expenditure which has otherwise been incurred and is eligible for deduction, on the ground that though tax was required to be deducted at source it was not deducted or if deducted, had not been deposited before the due date. By any intendment or liberal construction of such provision, the liability cannot be fastened if the plain meaning of the section does not so permit.

Word "paid" has been defined in Section 43(2) to mean actually paid or incurred according to the method of accounting, upon the basis of which profits and gains are computed under the head "Profits and Gains of Business or Profession". Such definition is applicable for the purpose of Sections 28 to 41 unless the context otherwise requires. In contrast, term "payable" has not been defined. The word "payable" has been described in Webster's Third New International Unabridged Dictionary as requiring to be paid: capable of being paid: specifying payment to a particular payee at a specified time or occasion or any specified manner. In the context of section 40(a)(ia), the word "payable" would not include "paid". In other words, therefore, an amount which is already paid over ceases to be payable and conversely what is payable cannot be one that is already paid. The Act uses terms "paid" and "payable" at different places in different context differently. For the purpose of Section 40(a)(ia), term "payable" cannot be seen to be including the expression "paid". The term "paid" and "payable" in the context of Section 40(a)(ia) are not used interchangably. In the case of *Birla Cement Works and another v. State of Rajasthan and another, AIR 1994 (SC) 2393*, the Apex Court observed that "the word payable is a descriptive word, which ordinarily means that which must be paid or is due or may be paid but its correct meaning can only be determined if the context in which it is used is kept in view. The word has been frequently understood to mean that which may, can or should be paid and is held equivalent to "due".

Interpretation of provision

If one looks closely to the provision, in question, adverse consequences of not being able to claim deduction on certain payments irrespective of the provisions contained in Sections 30 to 38 of the Act would flow if the following requirements are satisfied:-

(a) There is interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to resident or amounts payable to a contractor or subcontractor being resident for carrying out any work.

(b) These amounts are such on which tax is deductible at source under Chapter XVII-B.

(c) Such tax has not been deducted or after deduction has not been paid on or before due date specified in sub-Section (1) of Section 39.

What this Sub-Section, therefore, requires is that there should be an amount payable in the nature described above, which is such on which tax is deductible at source under Chapter XVII-B but such tax has not been deducted or if deducted not paid before the due date. This provision nowhere requires that the amount which is payable must remain so payable throughout during the year. To reiterate the provision has certain strict and stringent requirements before the unpleasant consequences envisaged therein can be applied. Such requirements are to be interpreted strictly. Such requirements, however, cannot be enlarged by any addition or subtraction of words not used by the legislature. The term used is interest, commission, brokerage etc. is payable to a resident or amounts payable to a contractor or sub-contractor for carrying out any work. The language used is not that such amount must continue to remain payable till the end of the accounting year. Any such interpretation would require reading words which the legislature has not used. No such interpretation would even otherwise be justified because the legislature could not have intended to bring about any such distinction nor the language used in the section brings about any such meaning. If the interpretation as advanced by the assessees

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

is accepted, it would lead to a situation where the assessee who though was required to deduct the tax at source but no such deduction was made or more flagrantly deduction though made is not paid to the Government, would escape the consequence only because the amount was already paid over before the end of the year in contrast to another assessee who would otherwise be in similar situation but in whose case the amount remained payable till the end of the year. There is no logic why the legislature would have desired to bring about such irreconcilable and diverse consequences. This is not the prime basis on which the interpretation is to be given. If the language used by the Parliament conveyed such a meaning, there should not be no hesitation in adopting such an interpretation. The legislature did not desire to bring about an incongruous and seemingly irreconcilable consequences.

Merely because, accounts are closed on the 31st March and the computation of profit and loss is to be judged with reference to such date, does not mean that whether an amount is payable or not must be ascertained on the strength of the position emerging on 31st March.

Issue of causus omisus

The debates in the Parliament are ordinarily not considered as the aids for interpretation of the ultimate provision which may be brought into the statute.

It would all the more be unsafe to refer to or rely upon the drafts, amendments, debates etc. for interpretation of a statutory provision when the language used is not capable of several meanings. In the present case the Tribunal in case of *M/s. Merilyn Shipping & Transports v. ACIT (ITA477/viz/2008 dated 29-03-2012)* fell in a serious error in merely comparing the language used in the draft bill and final enactment to assign a particular meaning to the statutory provision.

The Tribunal committed an error in applying the principle of conscious omission in the present case. Firstly, as already observed, there is serious doubt whether such principle can be applied by comparing the draft presented in Parliament and ultimate legislation which may be passed. Secondly, the statutory provision is amply clear.

In the result, it is to be opined that Section 40(a) (ia) would cover not only to the amounts which are payable as on 31st March of a particular year but also which are payable at any time during the year. Of course, as long as the other requirements of the said provision exist. In that context, the decision of the Special Bench of the Tribunal in the case of *M/s. Merilyn Shipping & Transports v. ACIT (surpa)*, does not lay down correct law.

Note: decision of the Special Bench of the Tribunal in the case of M/s. Merilyn Shipping & Transports v. ACIT (ITA477/viz/2008 dated 29-03-2012), does not lay down correct law.

LD/62/2
CIT, Kolkota-XI
Vs.
Cresent Export Syndicate/Park International
April 3, 2013 (CAL)

Section 40(a)(ia) of the Income-tax Act, 1961 – Expenses Disallowed – Commission or Brokerage etc. Payable to a Resident

In the case of Merilyn Shipping & Transports (ITA477/viz/2008 dated 29-03-2012), the Tribunal had wrongly opined that clause (ia) of section 40 did not apply to the amounts already paid, and it applies only to amounts payable; law was deliberately made harsh to secure compliance of the provisions requiring deductions of tax at source

In the case of Merilyn Shipping & Transports, the Tribunal was of the opinion that clause (ia) of section 40 did not apply to the amounts already paid.

The assessee contended that if the proviso is taken into account, it would lead to the only conclusion that the main provision contained in Clause (ia) relates to a case where the payment is outstanding. There is a possibility of double jeopardy in the event it is held that Clause (ia) is also applicable to those cases where the money has already been paid.

The Calcutta High Court held as follows:

The main thrust of the majority view of the Tribunal in *Merilyn Shipping (Supra)* is based on the fact "that the Legislature has replaced the expression "amounts credited or paid" with the expression 'payable' in the final enactment. Comparison between the pre-amendment and post amendment law is permissible for the purpose of ascertaining the mischief sought to be remedied or the object sought to be achieved by an amendment. But the same comparison between the draft and the enacted law is not permissible. Nor can the draft or the bill be used for the purpose of regulating the meaning and purport of the enacted law. It is the finally enacted law which is the will of the legislature. The Tribunal fell into an error in not realising this aspect of the matter.

The Tribunal held "that where language is clear the intention of the legislature is to be gathered from the language used". Having held so, it was not open to seek to interpret the section on the basis of any comparison between the draft and the section actually enacted nor was it open to speculate as to the effect of the so-called representations made by the professional bodies.

The Tribunal held that "Section 40(a)(ia) of the Act creates a legal fiction by virtue of which even the genuine and admissible expenses claimed by an assessee under the head "income from business and profession" if the assessee does not deduct TDS on such expenses are disallowed".

Having held so was it open to the Tribunal to seek to justify that "this fiction cannot be extended any further and, therefore, cannot be invoked by Assessing Officer to disallow the genuine and reasonable expenditure on the amounts of expenditure already paid"? Does this not amount to deliberately reading something in the law which is not there?

The Tribunal realised the meaning and purport of Section 40(a)(ia) correctly when it held that in case of omission to deduct tax even the genuine and admissible expenses are to be disallowed. But they sought to remove the rigour of the law by holding that the disallowance shall be restricted to the money which is yet to be paid. What the Tribunal by majority did was to supply the *casus omissus* which was not permissible and could only have been done by the Supreme Court in an appropriate case.

The key words used in Section 40(a)(ia) are "on which tax is deductible at source under Chapter XVII –B". If the question is "which expenses are sought to be disallowed?" The answer is bound to be "those expenses on which tax is deductible at source under Chapter XVII –B. Once this is realised nothing turns on the basis of the fact that the legislature used the word 'payable' and not 'paid or credited'. Unless any amount is payable, it can neither be paid nor credited. If an amount has neither been paid nor credited, there can be no occasion for claiming any deduction.

The language used in the draft was unclear and susceptible to giving more than one meaning. By looking at the draft it could be said that the legislature wanted to treat the payments made or credited in favour of a contractor or sub-contractor differently than the payments on account of interest, commission or brokerage, fees for professional services or fees for technical services because the words "amounts credited or paid" were used only in relation to a contractor or sub-contractor. This differential treatment was not intended. Therefore, the legislature provided that the amounts, on which tax is deductible at source under Chapter XVII-B payable on account of interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services or to a contractor or sub-contractor shall not be deducted in computing the income of an assessee

in case he has not deduced, or after deduction has not paid within the specified time. The language used by the legislature in the finally enacted law is clear and unambiguous whereas the language used in the bill was ambiguous.

There can be no denial that the provision in question is harsh. But that is no ground to read the same in a manner which was not intended by the legislature. The submission that the second proviso sought to become effective from 1st April, 2013 should be held to have already become operative prior to the appointed date cannot also be acceded to for the same reason indicated above. The law was deliberately made harsh to secure compliance of the provisions requiring deductions of tax at source. It is not the case of an inadvertent error. For the reasons discussed above, it is to be opined that the majority views expressed in the case of *Merilyn Shipping & Transports (Supra)* are not acceptable.

LD/62/3

Vijay Prakash Agrawal and Others
Vs.
CIT (Central)
April 17, 2013 (ALL)
[Assessment Years 2001-2002 to 2007-2008]

Section 132B read with Sections 244A and 292CC of the Income-tax Act, 1961 – Search & Seizure – Application of assets seized or Requisitioned

Where a joint search warrant is issued in name of petitioners and their firm along with another party residing in same premises where petitioner resided, and Assessing officer treated petitioners as individuals and their business as partnership firm and assessed them separately, merely because a joint search warrant is issued, cash seized from petitioners could not be retained by department on ground that substantial amount of demand was raised against said other party, without establishing any connection of petitioners whatsoever with that party

The petitioner nos. 1, 2 and 3 were residing in property on the ground floor. The petitioner no.4, a partnership firm wherein the petitioner no.1 and son of the petitioner no. 2 were partners, were running a wholesale jewellery business in one room on the first floor of the said property. One "J" with which none of the petitioners had any concern was also residing on the ground floor and has a shop on the ground floor of the said building. The Department issued a search warrant in the name of "J" and his shop "B" including the names of the petitioner nos. 1 and 2 .In pursuance thereof, a search and seizure operation was carried on. There was no warrant of authorisation either in the name of the petitioner no.3 or 4. However, the search party searched the residential accommodations of all the four petitioners and seized cash belonging to them from their respective rooms. The proceedings for block assessment were initiated and the Assessing Authority made certain additions in the returned income of the petitioners by framing separate assessment orders.

Those orders were challenged successfully separately in four appeals before the Appellate Authority. All the appeals were allowed. In the light of the Appellate Orders, the Assessing Authority revised the assessment orders. The amount of taxes which were deposited in pursuance of the assessment orders have been refunded with interest. After completion of all these proceedings, the petitioners applied for return of the cash amount seized by the department in the search operation. The department opposed the refund on ground that substantial demands have been raised against J and its shop "B", therefore, the seized cash could not be released as claimed.

In the writ petition filed by the petitioners the High Court held that;

In the instant case, the search took place on 17.10.2006. In the said search it was not in dispute that the amount of ₹25 lakh as claimed by the petitioners were seized from the petitioners from their respective possession. In view of section 132B(4)(b) the Central Government is liable to pay interest at the rate as provided thereon after the expiry of the period of 120 days to the date of completion of the assessment. The one hundred twenty days

under section 132B shall expire on 16th of February, 2007. The assessments were finally completed after giving effect to the appellate order on 30th of August, 2011. Therefore, the petitioners are entitled to get the interest at the rate as was prevalent at that time on ₹25 lakh, there under.

The only point urged by the department was that the petitioners were not entitled either to get the refund of ₹25 lakh or any interest thereupon in view of the fact that J and B were in arrears of tax. It was stated that a joint warrant of authorisation was drawn against the petitioner nos. 1 and 2 and J and B as also a joint Panchnama. Therefore, the petitioner nos. 1 and 2 were related and connected with J and B. The said argument was wholly misconceived and untenable. The petitioners had come out with the specific case that none of them have any business link or nexus or transaction or interest or investment or share or connection in any manner whatsoever with J and B.

It was true that a joint Panchnama was drawn but it overlooked the facts that separate assessment orders were passed by the Assessing Authority in respect of the four petitioners. The matter was carried in four appeals which were heard and decided by passing separate orders. Merely because a joint Panchnama had been drawn was of little consequence.

Section 292CC has been inserted by the Finance Act, 2012 but has been given a retrospective effect w.e.f. 1st of April, 1976. The object and purpose of introduction of the aforesaid section to validate the joint authorisation as it was held by the High Court with a joint authorisation for search is invalid. To overcome the said difficulty, section 292CC was introduced with retrospective effect. It in no uncertain terms provides that the mention of names of more than one person on such authorisation under section 132 shall not be deemed to construe that it was issued in the name of association or persons or body of individuals consisting of such persons. The aforesaid section has put the things beyond pale of doubt that the mention of names more than one in the warrant of authorisation will not make it in the name of association or persons or body of individuals will not adversely affect an assessee. Meaning thereby, the status of the assessee will not in any manner be changed as the result of joint warrant of authorisation. In the instant case indisputably, the department had treated the petitioner nos. 1, 2 and 3 as individuals and petitioner no.4 as a partnership firm and assessed them accordingly, and separately. Not only that as a result of original assessment order making addition, the demand was paid by the petitioners and refund after the order of the Appellate Court had been granted to the petitioners individually. To put it differently, the stand of the department that as in the warrant of authorisation, the names of the petitioners were also included along with J and B wholly irrelevant so far as assessment and refund of asset or cash was concerned. Except that the department could not point out any connection whatsoever of the petitioners with J and B. The irresistible conclusion was that there was no justification for not refunding the seized cash during the search operation or not paying the interest thereon.

LD/62/4

Vijay Rameshbhai Gupta
Vs.
Assistant CIT), Circle – 2
March 4, 2013 (GUJ)
[Assessment Year 2007-2008]

Section 147 of the Income-tax Act, 1691 - Income Escaping Assessment

If the Assessing Officer has acted only under compulsion of the audit party and not independently, the action of re-opening would be vitiated

Assessment for the year under consideration was originally framed. Such assessment was made after scrutiny. Audit party brought some facts to the notice of the Assessing Officer. The controversy was whether the assessee had discontinued his business of running restaurant and, therefore, the income should be treated as the income from such business or from other sources.

The Assessing Officer was under compulsion from the audit party to issue notice for reopening. After the audit party brought the controversial issue to the notice of the Assessing Officer, he had not agreed to the proposal for re-examination of the issue. Thereupon, he in fact, wrote a letter and gave elaborate reasons why he did not agree to make any addition on the controversial issue. In his letter, the Assessing Officer firmly asserted that the assessee's income from lease was to be assessed as business income and not as income from other sources. Despite his firm assertion, the audit party once again wrote to the *jurisdictional* Commissioner that the reply of the Assessing Officer is not acceptable.

In support of such assertion, the Audit Officer once again referred to and relied upon his earlier communication. In short, he reiterated that this was a case where income had escaped assessment and that remedial action therefore, be taken. It writs large on the face of the record that the Assessing Officer was compelled to issue notice for reopening, though he held a *bona fide* belief that the treatment to the income which he had accorded in the original assessment was as per the correct legal position.

The Gujarat High Court held that by now, it is well settled that even if an issue is brought to the notice of the Assessing Officer by the audit party, it would not preclude the Assessing Officer from acting on such communication as long as the final opinion to take appropriate action is that of the Assessing Officer and not that of the audit party. It is equally well settled, however, that if the Assessing Officer has acted only under compulsion of the audit party and not independently, the action of re-opening would be vitiated.

LD/62/5

UTI Mutual Fund
Vs.
Income Tax Officer – 19(3)(2), Mumbai
March 6, 2013 (BOM)
[Assessment Year 2010-2011]

Section 161 read with Section 177 of the Income-tax Act, 1961 - Representative assessee - Liabilities of

Where a strong prima facie case has been made out, calling upon the Petitioner to deposit would itself occasion undue hardship and where the issue has raised a strong prima face case which requires serious consideration, a requirement of pre-deposit would itself be a matter of hardship

The Petitioner is registered as a mutual fund with the Securities and Exchange Board of India (SEBI) and has contributed to the funds of nine trusts. The trust issued Pass Through Certificates (PTCs) to which the Petitioner has contributed. The Petitioner is a beneficiary of the trusts.

The Reserve Bank guidelines stipulate that banks and other financial institutions can securitise debts by assigning the debts to a bankruptcy remote Special Purpose Vehicle (SPV) for immediate cash payment. The cash flow from the underlying pool of assets is used to service the securities issued by the SPV.

The first trust was declared by IL & FS Trust

Company Limited for the securitisation of loans of ₹80 crore granted to Tata Capital Limited by Yes Bank. The first trust issued PTCs in two series, A1 and A2 which were subscribed to by the Petitioner. The beneficial interest of the Petitioner in the trust is proportionate to the PTCs subscribed. The Petitioner subscribes to the PTCs issued by the trust from separate funds of specified schemes and interest income earned is credited to the scheme from which the PTC investment is made by the Petitioner. Yes Bank Limited has assigned the loans due to it from Tata Capital Limited to the trust. The other trusts are stated to be similar to the trust declared by IL & FS Company Limited.

During relevant year the trusts received interest from the borrower on account of the loans assigned to the trusts. This was distributed to the beneficiaries including the Petitioner which has been reflected as income in the Profit & Loss Account of the Petitioner. The trusts filed returns of income.

The First Respondent passed orders of assessment under Section 143(3) in respect of the trusts, to treat the trusts as Associations Of Persons (AOP) and held the interest income to be income earned under the head "income from business and profession". According to the Assessing Officer, the trusts were a smokescreen whose entity should be disregarded since the trust is an AOP having members in the form of mutual funds. The Assessing Officer *inter alia* held that even if the assessee were to be regarded as a trust, the assessment would be under Section 161(1A) as the trusts are engaged in business and would be chargeable at the maximum marginal rate of tax.

By his communication the Assessing Officer has called upon the Petitioner in its capacity as a contributor and beneficiary of the trusts to pay the outstanding demand to the extent of its share of the investment in the trusts under the provisions of Section 177(3).

The trusts filed applications under Section 220(6) for holding recovery in abeyance. The First Respondent rejected the applications for stay of demand. Applications were stated to be filed before the Commissioner for stay of the recovery of the demand who declined to hold the demand in abeyance, thereby rejecting the applications filed by the trusts.

The Bombay High Court held as follows:

The demand as against the trust is sought to be enforced in the hands of the Petitioner on the ground that it is a contributory and beneficiary and to the extent of its share of investment in the trust.

Section 177(1) provides that where any business or profession carried on by an association of persons has been discontinued or where an association of persons is dissolved, the Assessing Officer shall make an assessment of the total income of the association of persons as if no such discontinuance or dissolution had taken place. Under sub-section (3) every person who was at the time of such discontinuance or dissolution a member of the association of persons shall be jointly and severally liable for the amount of tax, penalty or other sum payable.

There are two Division Bench judgments in *CIT v. Marsons Beneficiary Trust, (1991) 188 ITR 224 (Bom)* and *L.R. Patel Family Trust v. ITO, (2003) 262 ITR 520 (Bom)*, in which it has been held that a beneficiary of a trust cannot be construed as having set up the trust or having authorised the trustees to carry on the business. As the Court noted in the previous judgment, the law laid down by the Division Bench, *prima facie*, indicates that the beneficiaries who are named in the trust as recipients of the income of the trust cannot be considered as an association of persons. If that be the position, *prima facie*, the question as to whether Section 177(3) would apply to the Petitioner raises a serious issue for consideration.

Section 161(1) provides that every representative assessee, as regards the income in respect of which he is a representative assessee, shall be subject to the same duties, responsibilities and liabilities as if the income were income received by or accruing to or in favour of the beneficiary and shall be liable to assessment in his own name in respect of that income; but any such assessment shall be deemed to be made upon him in his representative capacity only and the tax shall be levied upon and recovered from him "in like manner and to the same extent as it

would be leviable upon and recoverable from the person represented by him". The contention of the Petitioner is that under Section 161(1) tax is to be levied on the representative assessee in the like manner and to the same extent as would be leviable upon the person represented by him and since the income of the Petitioner is exempt under Section 10(23D), no tax can be levied or recovered under Section 161(1).

The contention of the Revenue, however, is that sub section (1A) of Section 161 has a *non-obstante* provision under which, where any income in respect of which a person mentioned in Section 160(1)(iv) is liable as a representative assessee consists of or includes profits and gains of business, tax shall be charged on the whole of the income in respect of which such person is so liable at the maximum marginal rate. The issue which would fall for determination is as to whether Section 161(1A) lays down only the rate of tax without affecting the basic principle underlying Section 161(1) viz. that tax would be levied upon and recovered from the representative assessee in the like manner and to the same extent as would be leviable upon the person represented by him or whether the *non-obstante* provision would over ride sub Section 1 in its entirety.

The contention of the Petitioner, *prima facie*, cannot be rejected out of hand particularly having regard to the fact that the earlier judgment of this Court for Assessment Year 2009-10 also took the same position. Moreover, the issue as to whether the income in question is business income is a matter which would have to be determined. Finally, on this aspect of the matter, it may be necessary also to note the submission of the Petitioner with reference to the provisions of Section 61 which stipulate that all income arising to any person by virtue of a revocable transfer of assets shall be chargeable to income tax as the income of the transferor and shall be included in his total income. Section 63(a)(i) stipulates when a transfer shall be deemed to be revocable and the contention of the Petitioner is that in the case of a revocable transfer of assets, the income as in the present case would be income in the hands of the transferor which is exempt under Section 10(23D).

The Finance Bill, 2013 has proposed to set up a new dispensation in the form of Chapter XII EA with a view to providing a special tax regime to facilitate the securitisation process. The explanatory memorandum accompanying the Finance Bill has adverted to the rationale for the proposed amendment as follows:

"**Taxation of Securitisation**

Section 161 of the Income-tax Act provides that in case of a trust if its income consists of or includes profits and gains of business then income of such trust shall be taxed at the maximum marginal rate in the hands of trust.

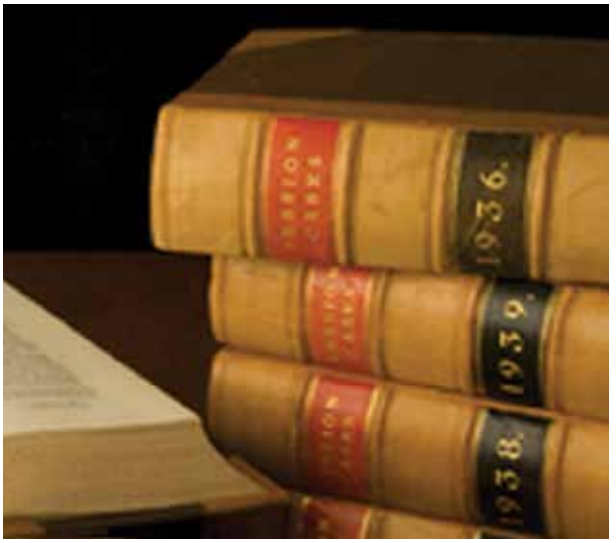
The special purpose entities set up in the form of trust to undertake securitisation activities were facing problem due to lack of special dispensation in respect of taxation under the Income-tax Act. The taxation at the level of trust due to existing provisions was considered to be restrictive particularly where the investors in the trust are persons which are exempt from taxation under the provisions of the Income-tax Act like Mutual Funds.

In order to facilitate the securitisation process, it is proposed to provide a special taxation regime in respect of taxation of income of securitisation entities, set up as a trust, from the activity of securitisation. It is proposed to amend section 10 and also insert a new Chapter XII-EA for providing a special tax regime.

This amendment will take effect from 1st June, 2013."

Prima facie, at this stage, the setting up of a special purpose vehicle in the form of a trust for carrying out securitisation activities cannot be regarded as a smokescreen.

Mutual Funds such as the Petitioner are governed by the regulatory provisions of the Mutual Fund Regulations made by SEBI. As noted earlier, the



guidelines issued by the Reserve Bank of India on the securitisation of assets in fact contemplate the setting up of special purpose vehicles as an intrinsic element of the securitisation process.

Therefore, a *prima facie* case raising serious triable issues has been made out for stay of the enforcement of the demand in the hands of the Petitioner in pursuance of the impugned notices dated 25th February 2013.

Where a strong *prima facie* case has been made out, calling upon the Petitioner to deposit would itself occasion undue hardship. Where the issue has raised a strong *prima facie* case which requires serious consideration as in the present case, a requirement of predeposit would itself be a matter of hardship. Finally, we express our serious disapproval of the manner in which the Revenue has sought to brush aside a binding decision of this Court in the case of the assessee on the issue of a stay on enforcement for the previous year. The rule of law has an abiding value in our legal regime. No public authority, including the Revenue, can ignore the principle of precedent. Certainty in tax administration is of cardinal importance and its absence undermines public confidence.

For these reasons, pending the disposal of the appeals which have been filed by the trusts, no coercive steps shall be taken against the assessee for the recovery of the demand.

LD/62/6
HDFC Bank Limited
Vs.
Assistant CIT, 2(3), Mumbai
April 4, 2013 (BOM)
[Assessment Year 2010-2011]

Section 237 of the Income-tax Act, 1961- Refunds

Once an issue has been covered in favour of the assessee in respect of another assessment year on the same point, it was wholly arbitrary on the part of the department to proceed to make an adjustment of the refund merely because it is in possession of the funds belonging to the assessee to which the assessee is legitimately entitled to and has been granted a refund for earlier assessment years

An order of assessment had been passed for Assessment Year 2010-11. The total disallowance on five different heads was ₹3875.82 crore. The tax and interest payable thereon was ₹1719.65 crore. By the impugned order, while disposing of an application for a stay of demand for the amount of ₹1719.65 crore arising out of an order dated 31st January 2013 passed under Section 143(3) for Assessment Year 2010-11, the assessee has been called upon to deposit an amount of ₹377.65 crore. This is apart from an adjustment which has been effected by the department in respect of two refunds respectively in the amount of ₹49.56 crore payable to the assessee for Assessment Year 2008-09 and an amount of ₹518.30 crore payable for Assessment Year 2009-10.

The impugned order was passed declining to grant a stay of recovery proceeds on the basis that, both on the issue of broken period interest and amortisation of premium, there was a decision of the CIT (Appeals) in favour of the assessee for Assessment Year 2009-10. Yet what the department had done was to make an adjustment of the demand on these two grounds against the refunds which had been allowed to the assessee (both existing and subsequent). The impugned order suggested that in view of the fact that the issue wss covered in favour of the assessee, it would not be treated as an assessee in default in respect of the demand arising out of the two issues. An adjustment had been made only on the ground that the department was in appeal before the Tribunal for Assessment Year 2009-10. For Assessment Year 2008-2009, a refund of ₹49.56 crore had been sanctioned to the assessee. Similarly for Assessment Year 2009-10, there was a refund of ₹518.30 crore in favour of the assessee. These refunds had been adjusted against the demand for Assessment Year 2010-11 even though the impugned order concedes that the issue was covered by a decision of the CIT (Appeals) in favour of the assessee.

Another item of disallowance was in respect of the exemption which was claimed by the assessee under Section 10(35A) from dividend income received from mutual fund units. The assessing officer made a disallowance on the ground that in order to avail of the exemption, the mutual fund must be registered with SEBI and the dividend which was distributed should suffer dividend distribution tax under Section 115R. A disallowance was made only on the ground that the assessee had not produced material to establish that dividend distribution tax had been paid by the mutual funds in question.

The Bombay High Court held as follows:

The manner in which and the ground on which

an adjustment of the refund was made is arbitrary and contrary to law. The impugned order dated 18 March 2013 accepts the position that both on the disallowance of broken period interest and the disallowance of amortisation of premium, there is a decision of the CIT (Appeals) in favour of the asssessee. The impugned order, therefore, states that the assessee would not be treated as an assessee in default. Yet the department has proceeded to adjust the refund due and payable to the assessee of ₹49.56 crore for Assessment Year 2008-09 and of ₹518.30 crore for Assessment Year 2009-10 merely on the ground that the department has filed an appeal before the Tribunal against the decision of the CIT (Appeals). The adjustment of a refund is a mode of effecting recovery. Once an issue has been covered in favour of the assessee in respect of another assessment year on the same point, it was wholly arbitrary on the part of the department to proceed to make an adjustment of the refund. If the adjustment was not made, there can be no manner of doubt that the assessee would have been entitled to a stay on the recovery of the demand. The demand cannot be adjusted by the department in this manner merely because it is in possession of the funds belonging to the assessee to which the assessee is legitimately entitled to and has been granted a refund for Assessment Years 2008-09 and 2009-10. The making of an adjustment in these facts is totally arbitrary and contrary to law. As a matter of fact, the assessee has contended that it was also governed by the order of the Tribunal on both the issues. Even this aspect has not been considered by the assessing officer.

Similarly, on the disallowance of the exemption on dividend income, the assessee produced certificates of confirmation from the mutual funds to the effect that dividend distribution tax has been paid. The assessing officer was apprised of the fact that in a similar situation for Assessment Year 2011-12, the claim of the assessee was allowed upon the production of confirmations from the mutual funds. *Prima facie* there was sufficient material before the assessing officer to indicate that the mutual funds which are registered with SEBI fall within the purview of Section 10(23D) and the assessee was entitled to an exemption under Section 10(35A).

Consequently, the assessee has made out a strong *prima facie* case for a stay of the recovery of the demand in respect of the aforesaid three items viz.; (i) Disallowance of broken period interest; (ii) Disallowance of amortisation of premium, and (iii) Disallowance of exemption on dividend income from the mutual fund units. The recovery of the demand on these three heads has to be stayed in view of a strong *prima facie* case being made out.

LD/62/7

Commissioner of Income-Tax-III
Vs.
Samara India Pvt. Ltd.
May 10, 2013 (DEL)
[Assessment Year 2004-05]

Section 245 of the Income-tax Act, 1961 – Refunds – Set off of tax

In order to obtain a deduction in relation to bad debts, it is not necessary for the assessee to establish that the debt, in fact, has become irrecoverable; it is enough if the bad debts is written off as irrecoverable in the accounts of the assessee

The assessee had taken certain property on lease from three landowners. The lessors were required to build a warehouse cum workshop and hand over the same to the assessee. In this regard, the assessee advanced certain sums to the lessors which were liable to be adjusted against monthly rent. The workshop was demolished by the Delhi Development Authority as the land which was subject matter of the lease agreement, in fact, belonged to the Delhi Development Authority and not the lessors. The assessee, thereafter, filed a suit for recovery of the sums advanced by the assesse to the lessors. The assessee has written off the sum as irrecoverable which the revenue authorities declined.

The Delhi High Court held as follows:

The assessee had paid a sum of ₹33,82,289/- as advance which was to be adjusted against lease rents. The assessee had come to a conclusion that chances of recovery, of the amounts claimed from the lessors, in the near future were remote and had therefore written off the amount as irrecoverable in the previous year relevant to the assessment year 2004-2005. For an assessee to claim deduction in relation to the bad debts it is now no longer necessary for the assessee to establish that the debt had become irrecoverable and it is sufficient if the assessee forms such an opinion and writes off the debt as irrecoverable in its accounts. The decision of the Supreme Court in the case of the *T.R.F Ltd. Vs. CIT, 323 ITR 397 (SC)* squarely covers the issue. The Supreme Court held that in order to obtain a

deduction in relation to bad debts, it is not necessary for the assessee to establish that the debt, in fact, has become irrecoverable; it is enough if the bad debts is written off as irrecoverable in the accounts of the assessee.

LD/62/8
CIT-III, Thane
Vs.
Sevak Pharma Pvt. Ltd.
March 23, 2013 (BOM)
[Assessment Year 2004-05]

Section 254 of the Income-tax Act, 1961 - Appellate Tribunal – Orders of

Instruction No. 3 of 2011 will apply to the pending appeals also and where tax effect is less than ₹3 lakh, appeal could not be admitted

The Tribunal dismissed the revenue's appeal having as the tax effect was less than ₹3 lakh. This was in view of the CBDT instructions No.3/2011 dated 9/2/2011 which had revised the monetary limit for filing an appeal to Tribunal to ₹3 lakh following the decision of this Court in the matter of *CIT v. Madhukar Inamdar (HUF) 318 ITR 149*. The revenue thereafter moved a Misc. Application for rectification of the said order before the Tribunal. The grievance of the Revenue is that the Tribunal ought to have entertained the appeal by following the decision of the Apex Court in the matter of *CIT v. Surya Herbal Ltd., order Dated 29-8-2011* where it was held that the CBDT instructions No. 3/2011 would not apply *ipso facto*.

The Bombay High Court held as follows:

The revenue had not been able to point out any of circumstance as laid down by the Suprme Court in the matter of *Surya Herbal Ltd. (supra)* being applicable to this case which would lead to non application of CBDT Instructions No. 3/2011. In the above circumstances, there was no reason to entertain the proposed question of law.

Moreover, an appeal from an order dismissing a Misc. Application for rectification is not maintainable as held by this Court in the matter of *Chem Amit v/s. ACIT, 272 ITR 397*.

Accordingly, the instant appeal was dismissed. ■