Legal Decisions[1]

Income-tax Act

LD/62/22

CIT-I
vs.
Friends and Friends Shipping Pvt Ltd
and
CIT-III
Vs.
Panchmahal Steel Ltd.
March 28, 2013 (GUJ)

Section 43(5) of the Income-tax Act, 1961 - Speculative transactions

Loss on account of charges paid to banks by an exporter on cancellation of forward contracts (entered into by assessee with the Bankers to hedge against any loss arising out of fluctuation in foreign currency) cannot be said to be speculative loss

The assessee is an exporter and not a dealer in foreign exchange. For the purpose of hedging the loss due to fluctuation in foreign exchange while implementing the export contracts, the assessee had entered into forward contract with the banks. In some cases, the export could not be executed and the assessee had to pay certain charges to the Bank and thereby incurred certain expenses. These expenses the assessee claimed by way of expenditure towards business.

The Gujarat High Court held that the transaction cannot be stated to be in speculation as to cover under sub-Section (5) of Section 43 of the Act and, therefore, loss on account of charges paid to banks on cancellation of forward contracts could not be said to be speculative loss.

LD/62/23

Fateh Chand Charitable Trust
vs.
CIT
May 5, 2006 (ALL)
[Assessment Year 2006-07]

Section 148 of the Income-tax Act, 1961 - Income escaping assessment - Issue of notice

Where Assessing Officer in assessment order failed to express any opinion accepting genuineness of donations received by assessee, reassessment notice issued under Section 148 on basis of prima facie enquiry that donation given by donor to assessee was in nature of accommodation entries and fictitious as donor had no financial capacity to give such donation , it would not be said that said notice was given on basis of change of opinion

The Assessee, charitable trust was registered under Section 12A. For the relevant assessment year the assessee filed its return declaring nil income. Proceedings for assessment under Section 143(3) were initiated for the relevant Assessment Year. During the course of the assessment proceedings, the assessee revised its return of income and assessment was completed. Further proceedings under Section 12A for cancellation of registration of the assessee as charitable trust was also undertaken by the Commissioner who subsequently by the order dated 25.1.2008 dropped it. Thereafter the assessee was served with impugned notice under Section 148 on ground that one donor (NJVS) who was alleged to have given donation to the assessee had no financial capacity to make such a huge donation and the transaction was in the nature of accommodation entries and therefore income of the assessee had escaped assessment.

The High Court held that the assessment order though had been passed under Section 143(3) but it contains hardly any discussion on the relevant issues. It did not deal with any relevant issue, such as from whom the donor (NJVS) received such a huge donation.

It was a shocking to note that as a matter of fact, the assessment order was no assessment order in the eyes of law. There was not even a whisper with regard to the receipt of donation from NJVS. It was really not understandable under what circumstances the said assessment order came into existence. The assessment order was bereft of any discussion with regard to the genuineness of the donation given by NJVS or the creditworthiness of NJVS to part with such a huge amount as donation. It was no assessment order in the eyes of law. It lacks any discussion with regard to the material facts and issues which were required to be addressed by the Assessing Authority. The Assessing Authority having failed to express any opinion accepting the genuineness of the donations it is difficult to accept the submission of the assessee that the reassessment

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

notice has been given on the basis of the change of opinion.

The financial capacity of NJVS to donate a huge sum to the assessee was material and relevant. Noticeably, the said issue was not taken into consideration by the Assessing Officer while framing the assessment order. It appeared that the Assessing Officer had made superficial or cosmetic inquiry by deputing an inspector to find out the bank transaction. No attempt was made by the Assessing Officer to make inquiry with regard to the financial soundness of NJVS. Nor the NJVS was asked to produce the account books or the documents in support of its financial capacity to give donations in question. The department on making inquiries got material on the above issue against the assessee. It couldn't be said that the material received by the department on the basis of inquiry had no nexus or was not relevant to the dispute as to whether the income of the assessee had escaped the assessment or not.

In view of decision of Supreme Court in *Assistant Commissioner of Income Tax vs. Rajesh Jhaveri Stock Brokers Pvt. Limited, (2007) 291 ITR 500* the existence of reason to believe that the income of the assessee has escaped the assessment is sufficient. In the case on hand, the Assessing Authority had recorded the reasons in great detail. It could not be said even for a moment that the satisfaction recorded by the Assessing Authority that the income had escaped the assessment in any manner was not in accordance with law.

The assessee contended that its case would fall within the *proviso* to Section 147 and as the proceedings were initiated according to the assessee after a period of four years from the end of the Assessment Year 2006-2007, the proceeding was bad as the assessee had disclosed all the material facts during the course of the assessment proceedings. The said argument was misconceived and preceded on the wrong footing that four years period from the end of the Assessment Year 2006-2007 will come to an end on 31st of March, 2010. The phrase used in the proviso is 'after the expiry of four years from the end of the relevant Assessment Year'. Clearly, it postulates the starting up of four years period will be from the end of the Assessment Year i.e. for the Assessment Year 2006-2007, the Assessment Year will expire on 31st of March, 2007 and four years period from that date expires on 31st of March, 2011. Admittedly, the impugned notice was dated 19th April, 2010 and it was within the period of four years from the end of the Assessment Year 2006-2007 and was clearly within time.

In the case on hand, the assessment order was stereotype order and lacks material discussion on relevant issues. As a matter of fact, the assessment order was no order in the eyes of law. When the amount of taxable income and of tax payable thereon were not ascertained at all by the Assessing Officer, then, obviously it cannot be said that the Assessing Officer has formed any opinion with regard to the taxable income and of the tax payable and consequently, there would not arise any question of mere change of opinion.

In the case on hand, on inquiry made by the Additional Commissioner it was unearthed that *prima facie* the donation given by the NJVS to the assessee was in the nature of accommodation entries and fictitious. Thereafter, the assessee's Assessing Officer had recorded his satisfaction that the income of the assessee had escaped assessment. By no stretch of imagination, the said inquiry could be said to have no nexus with the escapement of the assessee's income

It was shocking to note that the Commissioner had dropped the proceedings for cancellation of registration without assigning any reason. The order being bereft of any reason could not be treated an order in the eyes of law. One fails to understand what impelled him to do so. The order being bereft of any reason was no order in the eyes of law and was liable to be ignored being illegal and void.

The income tax authorities are required to administer the Act. The right to administer cannot obviously include the right to mal-administer.

It was found that the then Assessing Officer, the Additional Commissioner of Income Tax, the then Commissioner of Income Tax, who passed the order dropping proceeding of cancellation of registration under Section 12A have abdicated their duties. The Court in the exercise of supervisory jurisdiction under Articles 226 and 227 of the Constitution of India cannot be a mute spectator. Such actions on the part of the department not only bring disrepute to the department but also encourages the dishonest assessee and promotes the nefarious activities which not only causes loss to revenue but also promotes dishonestly. An honest tax payer feels cheated.

There was no merit in the writ petition. The writ petition was dismissed.

Companies Act

LD/62/24

Dinesh Saini

vs.

Union of India

July 23, 2013 (DEL)

Section 210 of the Companies Act, 1956 - Annual Accounts and Balance Sheet

It cannot be said that the decision to extend the accounting year for a period upto three months can only be taken by the company before the end of the financial year or at best before the period by which the financial year is to be extended, expires; it can be extended even thereafter

By way of resolution dated 11.08.2011 the company decided to extend the accounting year 2010-11 by three months so as to end the said year on 30.06.2011. Consequently, it became eligible to hold the Annual General Meeting, for the purpose of considering the account and balance sheet, on or before 31.12.2011.

The contention of the petitioner was that the decision to extend the accounting year for a period upto three months can be taken by the company before the end of the financial year or at best before the period by which the financial year is to be extended, expires and not thereafter.

The High Court of Delhi held as follows:

The provisions of Section 210 of the Companies Act does not require the company to take decision to extend the financial year, either by the end of the financial year or within the time period by which the financial year is to be extended. The decision to extend the financial year, therefore, can be taken at any time though the period cannot be extended by more than three months without special approval of the Registrar of Companies. To take an example, if an company is expecting to finalise its accounts and balance sheet in time and towards the fag end of the financial year, it finds that for some reason or the other, it shall not be in a position to finalise the accounts and balance sheet by the end of the financial

year, in case the contention of the learned counsel for the petitioner is extended, it will have to convene a Board meeting on or before the end of the financial year. Considering that, sometimes, there may be a last minute glitch in finalisation of accounts and balance sheet, the need to extend the accounting year may arise say on 29th or 30th of the March in a case where the financial year ends on 31st March, 2013. It may not be possible for every company to convene the Board Meeting at such a short notice. Therefore, it would be unrealistic to take a view that in every case, the company must take decision to extend the financial year, before the financial year or the period by which the financial year is sought to be extended, expires. Neither there is such requirement laid down in Section 210 nor there is any necessity to read such a requirement in the provisions of the Act.

DRT Act

LD/62/25

Hill Properties Ltd.
vs.
Union Bank of India
September 11, 2013 (SC)

Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 – Enforcement of Security Interest

A flat owner is a member of Society or Company and, therefore, he is bound by the laws or Articles of Association of the Company, but the species of his right over the flat is exclusively that of his; neither the Companies Act nor any other statute make any provision prohibiting the transfer of species of interest to third parties or to avail of loan for the flat owners' benefit

The Appellant claimed to be the owner of a flat. R-5 was the shareholder of the Appellant Company holding one "A" equity share. The flat was allotted to R-5. R-5 created an equitable mortgage to secure dues of R-2 to R-1 Bank of India by depositing Share Certificate of the said flat. R-1 bank filed suit for recovery of the dues and also for enforcement of the security. The suit was later transferred to the DRT. The DRT passed an order of attachment in respect of the flat in question. The question arose as to whether the property which was mortgaged to R-1 bank and the right of R-5 upon it could be attached and sold in execution of a decree.

The Supreme Court of India held as follows:

The right, title, interest over a flat conveyed is a species of property, whether that right has been accrued under the provisions of the Articles of Association of a Company or through the bye-laws of a Cooperative Society.

Flats are being purchased by people by either becoming members of the Cooperative Society or shareholders of the Company and the flat owners have an independent right as well as the collective right over the flat complex. Flat owners' right to dispose of its flat is also well recognised, and one can sell, donate, leave by will or let out or hypothecate his right. These rights are even statutorily recognised by many State Legislatures by enacting Apartment Ownership Acts. Such a legislation exists in the State of Maharashtra as well.

Most of the flat owners purchase the flat by availing of loan from various banking institutions by mortgaging their rights over the purchased flat. By purchasing the flat, the purchaser, over and above his species of right over the flat, will also have undivided interest in the common areas and facilities, in the percentage as prescribed. Flat owners will also have the right to use the common areas and facilities in accordance with the purpose for which they are intended. It is too late in the day to contend that flat owners cannot sell, let, hypothecate or mortgage their flat for availing of loan without permission of the builder, Society or the Company.

So far as a builder is concerned, the flat owner should pay the price of the flat. So far as the Society or Company in which the flat owner is a member, he is bound by the laws or Articles of Association of the Company, but the species of his right over the flat is exclusively that of his. That right is always transferable and heritable. Of course, they will have charge over the flat if any amount is due to them upon the flat.

Neither the Companies Act nor any other statute makes any provision prohibiting the transfer of species of interest to third parties or to avail of loan for the flat owners' benefit. A legal bar on the saleability or transferability of such a species of interest will create chaos and confusion. The right or interest to occupy any such flat is a species of property and hence has a stamp of transferability and consequently no error was found with the warrant of attachment issued by the DRT on the flat in question.

SEBI

LD/62/26

Rose Valley Real Estate & Construction Ltd.
vs.
Union of India
July 23, 2013 (CAL)

Section 11AA of the Securities and Exchange Board of India Act, 1992 read with Regulations 2 and 75 of the SEBI (Collective Investment Schemes) Regulations, 1999 – Power and Functions of Board - Collective Investment Schemes

The net of coverage had to be spread wide and high to check each and every attempt to loot the hard earned money of the aam aadmi and the legislature deliberately intended the legislation to be open-ended to ensure that people with limited financial means are not ruined in the process of trying to get rich quickly and at the same time, no company would have the freedom to fleece, and thus Provisions of Section 11AA do not suffer from any over-breadth

It was alleged that Section 11AA is so wide that businesses of diverse nature may be caught in the net and in the absence of adequate guidelines, there is likelihood of abuse of discretionary power.

The High Court of Calcutta held as follows:

The legislation is open-ended, but one has to pose a question here as to whether there was any valid reason for such open-ended legislation. It would be quite reasonable to presume that the legislature deliberately intended the legislation to be open-ended to ensure that people with limited financial means are not ruined in the process of trying to get rich quickly and at the same time, no company would have the freedom to fleece. This being the object of the Securities Amendment Act, 1999, it is not only the duty of the judiciary to show deference to the legislative judgment but to zealously thwart any attempt by any company to wriggle out of the regulatory mechanism by ingenious legal arguments.

Introduction of Section 11AA has been upheld not only on the ground of competence of the Parliament but the Supreme Court found it to be a step in the right direction for saving the gullible investors from falling prey to unregulated and uncontrolled schemes leading to their ruin. The reason for devising exclusionary operation of activities of certain classes, as in sub-Section (3) of Section11AA, has also been clearly discussed as evident from paragraph 39 thereof and I see no reason to dilate thereon.

The charge of excessive delegation of essential legislative functions is equally without merit. As regards laying down of principles or guiding norms, law seems to be well-settled that it is not essential that the very section in the statute which confers the power should also lay down the rules of guidance, or the policy for the administrator to follow. If the same can be gathered from the preamble or the long title of the statute and other provisions therein, the discretion would not be regarded as uncontrolled or unguided and the statute in question will not be invalid. At times, even vague policy statements to guide administrative discretion have been held by the courts as complying with Article 14. It is to be held that the Collective Investment Scheme Regulations (CIS Regulations) viewed in the light of the object that the SEBI Act after its amendment seeks to achieve, in view of the principles laid down in paragraph 17 of *Jyoti Pershad vs. Administrator for the Union Territory of Delhi*, *AIR 1961 SC 1602,* have to be upheld.

Besides, it appears that the CIS Regulations were duly placed before the Lok Sabha on December 10, 1999 and the Rajya Sabha on December 14, 1999 in accordance with the statutory mandate in Section 31 of the SEBI Act. If indeed the SEBI, as delegate, had transgressed the permissible limits, the Parliament had the authority to intervene to set things right. No modification having been suggested by the Parliament, it is clear that the CIS Regulations were found to be in order. Abdication of authority by the Parliament, on facts and in the circumstances, also does not arise. The decision in *Kerala SEBI vs. Indian Aluminium Co. Ltd, [1976] 1 SCC 466* does not come to the rescue of the petitioners since the terms of the CIS Regulations are neither unreasonable nor unworkable.

In final analysis, the impugned provisions do not suffer from any over-breadth. The net of coverage had to be spread wide and high to check each and every attempt to loot the hard earned money of the aam aadmi for one's personal wrongful gain and so long as abuse of discretionary power is not demonstrated, none can expect any relief.

LD/62/27

Ehsan Khalid
vs.
Union of India
August 5, 2013 (SC)

Regulation 30 of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 - Price and Price Band

If after following the ICDR and on taking into consideration the relevant methodologies of valuation for sale of equity capital the price band of ₹226-245 per share was fixed, it cannot be said that the price band so fixed was unreasonable or sale of 10% equity capital by CIL was unfair

The issue was with regard to disinvestment of 10% equity of Coal India Limited (CIL) in October 2010. It is alleged that powerful financial institutes usurped the natural resources only on payment of ₹15,200 Crore and caused loss to the exchequer of ₹1.75 Lakh Crore to the nation.

The petitioner alleges that the assets valuation methodology was not adopted which is the most appropriate methodology of valuation.

The Supreme Court of India held as follows:

Three valuation methodologies, viz, 1. EV (Enterprise Value)/ EBITDA (Earnings before Interest, Tax, Depreciation and Amortisation); 2. Price to Earnings (Ration of Market price to earning per share of a company) and 3. Price to Book (Ratio of current market price to book value of each share of the company).

What was involved in the present case was not the sale of assets but sale of equity capital. If after following the ICDR Regulations and on taking into consideration the relevant methodologies of valuation for sale of equity capital the price band of ₹226-245 per share was fixed, it cannot be said that the price band so fixed was unreasonable or sale of 10% equity capital by CIL was unfair.

LD/62/28

GM, Sri Siddeshwara Co-operative Bank Ltd.
vs.
Sri Ikbal
August 22, 2013 (SC)

Rule 9 of Security Interest (Enforcement) Rules, 2002 read with Section 13 of the Securitisation And Reconstruction of Financial Assets And Enforcement of Security Interest Act, 2002 - Time of Sale, Issue of Sale Certificate and delivery of Possession, etc.

Where in case of auction sale, 25% of sale consideration was paid on day of auction, for balance amount of 75% to be paid within 15 days, time limit may be extended by written agreement

For the purposes of Rule 9(4), the expression "written agreement" means nothing more than a manifestation of mutual assent in writing

The borrower of the housing loan defaulted in payment. The bank sold the mortgaged property in auction sale. At the time of auction sale the borrower was present. He agreed that bid given by the auction purchaser for ₹8.50 lakh which was highest bid be accepted as the auction purchaser happened to be his known person. The borrower expressly gave consent in writing that the balance sale price may be accepted from the auction purchaser later on and sale certificate be issued to the auction purchaser. The relevant letter sent by the borrower to the bank has been accepted by the bank for extension of time up to 13.11.2006. The auction purchaser made the payment of the balance purchase price forthwith on that day, i.e., 13.11.2006. However, the borrower now sought to quash the sale.

The Supreme Court of India held as follows:

A reading of sub-rule (1) of Rule 9 makes it manifest that the provision is mandatory. The plain language of Rule 9(1) suggests this. Similarly, Rule 9(3) which provides that the purchaser shall pay a deposit of 25% of the amount of the sale price on the sale of immovable property also indicates that the said provision is mandatory in nature. As regards balance amount of purchase price, sub-rule (4) provides that the said amount shall be paid by the purchaser on or before the fifteenth day of confirmation of sale of immovable property or such extended period as may be agreed upon in writing between the parties. The period of fifteen days in Rule 9(4) is not that sacrosanct and it is extendable if there is a written agreement between the parties for such extension. What is the meaning of the expression 'written agreement between the parties' in Rule 9(4)? The Rules do not prescribe any particular form for such agreement except that it must be in writing. The use of term 'written agreement' means a mutual understanding or an arrangement about relative rights and duties by the parties. For the purposes of Rule 9(4), the expression "written agreement" means nothing more than a manifestation of mutual assent in writing. The word 'parties' for the purposes of Rule 9(4) we think must mean the secured creditor, borrower and auction purchaser.

Thus, there was a written agreement between the borrower and the bank for extension of time up to 13.11.2006. The auction purchaser made the payment of the balance purchase price forthwith on that day, i.e., 13.11.2006. This indicates that he was impliedly a party to the written agreement between the Bank and the borrower. In the circumstances, there is no reason why the condition in Rule 9(4) viz. "such extended period as may be agreed upon in writing between the parties" be not treated as substantially satisfied. The learned Single Judge was clearly in error in holding that the letter dated 13.11.2006 written by the borrower to the Bank cannot be construed as written agreement falling under Rule 9(4).

There is no doubt that Rule 9(1) is mandatory but this provision is definitely for the benefit of the borrower. Similarly, Rule 9(3) and Rule 9(4) are for the benefit of the secured creditor (or in any case for the benefit of the borrower). It is settled position in law that even if a provision is mandatory, it can always be waived by a party (or parties) for whose benefit such provision has been made. The provision in Rule 9(1) being for the benefit of the borrower and the provisions contained in Rule 9(3) and Rule 9(4) being for the benefit of the secured creditor (or for that matter for the benefit of the borrower), the secured creditor and the borrower can lawfully waive their right. These provisions neither expressly nor contextually indicate otherwise. Obviously, the question whether there is waiver or not depends on facts of each case and no hard and fast rule can be laid down in this regard.

The letter dated 13.11.2006 sent by the borrower to the Bank leaves no manner of doubt that the borrower had waived his right under Rule 9(1) or for that matter under Rule 9(3) and Rule 9(4) as well. ■