Legal Decisions[1]

Income-tax Act

LD/62/69

Endemol India (P.) Ltd., In re

19th February, 2014 (AAR)

Section 9, read with Section 194C and Section 195, of the Income-tax Act, 1961 – Income – Deemed to be accrued or arise in India

Line production service in respect of TV reality show such as installing equipments, arranging sets, crew members, safety security and transportation service fall within purview of term work under Section 194C and, hence, payment made to non-resident for providing such services outside India would not, in absence of a PE of non-resident in, taxable in India

The applicant is engaged in the business of producing and distributing television programs. It mainly produces reality shows. As per the format of a stunt operation program, the shooting took place primarily in Brazil. The applicant engaged a Brazilian company Utopia Films for providing line production services which would include (*a*) Arranging for crew and support personnel as may be requisitioned; (*b*) Arranging for props and other set production materials; (*c*) Arranging for safety, security and transportation; (*d*) Arranging for filming and other equipments as may be requisitioned.

The anchor and the participants of the show are engaged and paid separately by the applicant and is not the responsibility of Utopia Films. Accordingly, there is no payment made by Utopia Films in this regard.

Utopia Films would provide the entire scope of services to the applicant outside India. Utopia Films has been engaged for a particular season of a reality TV series and there is no continuity of relationship.

The Authority for Advance Rulings held as follows:

The services provided by the non-resident companies to the applicant company are line production services. In the applicant's own case in AAR No. 1083 it has been already held that the payments of similar nature are specifically characterised as work for the purpose of Section 194C by virtue of *Explanation* to that Section. Following said ruling in the applicants own case, it is to be held that the payments made by the applicant to the non-resident company specifically falls under the definition of work under Section 194C of the Act and they will not be taxable without Permanent Establishment in India. Consequently, the payment will not suffer withholding of tax under Section 195 of the Act.

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

Legal Update

LD/62/70
CIT, Ujjain
vs.
Dawoodi Bohara Jamat
20th February, 2014 (SC)

Section 13, read with section 11 and 12A, of the Income-tax Act, 1961 – Charitable/Religious/ Institutions – Denial of Exemptions

Where the activities of the assessee Dawoodi Bohara community trust were both charitable and religious of, but same were not exclusively meant for a particular religious community of Dawoodi Bohara meaning thereby that the objects did not channel the benefits to any community if not the Dawoodi Bohra Community, it cannot be held that Section 13(1)(b) would be attracted to the assessee-trust and thereby, it would be eligible to claim exemption under Section 11

If the primary or predominant object of an institution is charitable, any other object which might not be charitable but which is ancillary or incidental to the dominant purpose would not prevent the institution from being a valid charitable trust. This Court in several decisions has reiterated the test of predominant purpose.

A religious purpose would be one relating to a particular religion and broadly would encompass objects relating to observance of rituals and ceremonies, propagation of tenets of the religion and other allied activities of the religious community. An example of such would entail activities such as the dance performances (Garba) or distribution of food specifically for people on fast during the Hindu festivities of Navratri.

In certain cases, the activities of the trust may contain elements of both: religious and charitable and thus, both the purposes may be over lapping. More so when the religious activity carried on by a particular section of people would be a charitable activity for or towards other members of the community and also public at large. For example, the practice of optional charity in the form of *Khairat* or *Sadaquah* under Mohammadan Law would be covered under both charitable as well as religious purpose. Further, while providing food and fodder to animals especially cow is religious activity for Hindus, it would be charitable in respect to non-Hindus as well. Similarly, service of water to the thirsty would find mention as religious activity in sacred texts and at the same time would qualify as a charitable activity.

Unquestionably, some of the objects of the assessee trust which provide for the activities completely religious in nature and restricted to the specific community of the assessee-trust are objects with religious purpose only. However, in respect to the other objects, in our view the fact that the said objects trace their source to the Holy Quran and resolve to abide by the path of godliness shown by Allah would not be sufficient to conclude that the entire purpose and activities of the trust would be purely religious in colour. The objects reflect the intent of the trust as observance of the tenets of Islam, but do not restrict the activities of the trust to religious obligations only and for the benefit of the members of the community.

The provision of food to the public on religious days of the community, the establishment of Madarsa and organisations for dissemination of religious education and rendering assistance to the needy and poor for religious activities would reflect the essence of charity. The objects providing for arrangement for *nyaz* and *majlis* (lunch and dinner) on the religious occasion of the birth anniversary and *Urs Mubarak* of the Saints of the Dawoodji Bohra community and for arrangement of lunch and dinner on religious occasions and auspicious days of the Dawoodi Bohra community, respectively. *Nyaz* refers to the food a person makes and offers to others on any particular occasion on the occasion of the death of a saint and *Majhlis* implies a place of gathering or meeting. The activity of providing for food on certain specific occasions and other religious and auspicious events of the Dawoodi Bohra community do not restrict the benefit to the members of the community. Neither the religious tenets nor the objects as expressed limit the service of food on the said occasions only to the members of the specific community. Thus, the activity of *Nyaz* performed by the assessee-trust does not delineate a separate class but extends the benefit of free service of food to public at large irrespective of their religion, caste or sect and thereby qualifies as a charitable purpose which would entail general public utility.

Further, establishment of *Madarsa* or institutions to impart religious education to the masses would qualify as a charitable purpose qualifying under the head of education under the provisions of Section 2(15) of the Act. The institutions established to spread religious awareness by means of education though established to promote and further religious thought could not be restricted to religious purposes. The House of Lords in *Barralet vs. IR, 54 TC 446*, has observed that "the study and dissemination of ethical principles and the cultivation of rational religious sentiment" would fall in the category of educational purposes. The *Madarsa* as a Mohommedan institution of teaching does not confine instruction to only dissipation of religious teachings but also contributes to the holistic education of an individual. Therefore, it cannot be said that such object would embody a restrictive purpose of religious

activities only. Similarly, assistance by the assessee-trust to the needy and poor for religious activities would not divest the trust of its altruist character.

Therefore, the objects of the trust exhibit the dual tenor of religious and charitable purposes and activities. Section 11 of the Act shelters such trust with composite objects to claim exemption from tax as a religious and charitable trust subject to provisions of Section 13. The activities of the trust under such objects would therefore be entitled to exemption accordingly. It becomes amply clear from the language employed in the provisions that Section 13 is in the nature of an exemption from applicability of Sections 11 or 12 and the examination of its applicability would only arise at the stage of claim under Sections 11 or 12. Thus, where the income of a trust is eligible for exemption under Section 11, the eligibility for claiming exemption ought to be tested on the touchstone of the provisions of Section 13. It being established that the assessee trust is a public charitable and religious trust eligible for claiming exemption under Section 11, it becomes relevant to test it on the anvil of Section 13.

From the phraseology in clause (b) of section 13(1), it could be inferred that the Legislature intended to include only the trusts established for charitable purposes. That however does not mean that if a trust is a composite one, that is one for both religious and charitable purposes, then it would not be covered by clause (b). What is intended to be excluded from being eligible for exemption under Section 11 is a trust for charitable purpose which is established for the benefit of any particular religious community or caste.

Such trusts with composite objects would not be expelled out of the purview of Section 13(1)(b) *per se*. The Section requires it to be established that such charitable purpose is not for the benefit of a particular religious community or caste. That is to say, it needs to be examined whether such religious-charitable activity carried on by the trust only benefits a certain particular religious community or class or serves across the communities and for society at large.

The section of community sought to be benefited must be either sufficiently defined or identifiable by a common quality of a public or impersonal nature.

In the present case, the objects of the assessee-trust are based on religious tenets under Quran according to religious faith of Islam. The perusal of the objects and purposes of the assessee-trust would clearly demonstrate that the activities of the trust though both charitable and religious are not exclusively meant for a particular religious community. The objects do not channel the benefits to any community if not the Dawoodi Bohra Community and thus, would not fall under the provisions of Section 13(1)(b) of the Act.

In that view of the matter, it is to be opined that the assessee-trust is a charitable and religious trust which does not benefit any specific religious community and therefore, it cannot be held that Section 13(1)(b) of the Act would be attracted to the assessee-trust and thereby, it would be eligible to claim exemption under Section 11 of the Act.

Note: Judgment and Order of the Madhya Pradesh High Court at Indore in ITA No. 112 of 2008 dated 22-06-2009, *Upheld*.

LD/62/71

Essae Teraoka Pvt. Ltd

vs.

Deputy Commissioner of Income Tax, Circle 11(3), Bangalore

4th February, 2014 (KAR)

[Assessment Year 2008-09]

Section 36(1)(va) read with Section 43B of the Income-tax Act, 1961 - Employees' contributions to other funds

Even if the employer fails to deduct the employees' contribution on or before the due date, contemplated under the provisions of the PF Act and the PF Scheme, that would not have to be treated as income within the meaning of Section 2(24)(x) liable to tax; if the contribution is made on or before the due date for furnishing the return of income under sub-Section(1) of Section 139 of the Act is made, the employer is entitled for deduction

In the present case, admittedly, though the employer did not deposit the contribution, within the stipulated time, as contemplated by paragraph-30 of the PF Scheme or before the due date under the provisions of the PF scheme/Act, he deposited the contribution to the PF/ESI fund before the due date contemplated under Section 139(1) of the Act. While the assessee claimed deduction, the Revenue denied same.

The High Court of Karnataka held as follows:

Section 36 provides for other deductions. Sub-Section (1), thereof states that the deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the ip.come referred to in Section 28. Clause (va) of sub-Section(1) of the Section 36 of the IT Act. It provides that any sum received by the assessee from any of his employees to which the provisions of sub-clause(x) of Clause(24) of Section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date. In the *explanation* appended to Clause (va) defines "due date". It means the date on or before which the employer is supposed to deposit the "contribution" as contemplated

within the time stipulated under the provisions of the PF Scheme or under the provisions of the ESI Act.

Thus, from bare perusal of Clause(va) of Section 36(1) of the IT Act, it is clear that any sum received by the assessee-employer from any of his employees towards the employees' contribution as contemplated by sub-para (1) of paragraph-29 of the PF Scheme and if it is deposited with relevant provident fund or fund under the provisions of ESI Act, the assessee is straightaway entitled for deduction as contemplated by Section 36(1)(va) of the IT Act, without any difficulty whatsoever, if he deposits employees' as well as his own contribution within the time stipulated under the provisions of PF Act and the PF Scheme/ESI Act.

Section 43-B of the IT Act provides for certain deductions to be allowable only on actual payment. From bare perusal of Section 43B, it is dear that under the provision, for IT Act, an extension is given to the employer to make payment of contribution to provident fund or any other fund till the "due date" applicable for furnishing the return of income under sub-Section (1) of Section 139 of the IT Act in respect of the previous year in which the liability to pay such sum was incurred and the evidence of such payment is furnished by the assessee along with such return. In short, this provision states, notwithstanding anything contained in any other provision contained in this Act, a deduction otherwise allowable in this Act in respect of any sum payable by the assessee as an employer by way of contribution to any fund such as provident fund shall be allowed if it is paid on or before the due date as contemplated under Section 139(1) of the IT Act. This provision has nothing to do with the consequences, provided for under the PF Act/PF Scheme/ESI Act, for not depositing the "contribution" on or before the due dates therein.

Section 6 of the PF Act provides for contributions and matters which may be provided for in Schemes. Paragraph-29 of the PF Scheme states what is "Contribution". The expression "contribution" is also defined under the PF Act by Section 2(c) of the PF Act, which means a contribution payable in respect of a member under the Scheme or the contribution payable in respect of an employee to whom the Insurance Scheme applies. If this definition is read with sub-para(1) of paragraph-29 in Chapter-V of the PF Scheme, it would mean that the contributions payable by the employer under the Scheme shall be at a particular rate and the contribution payable by the assessee shall be equal to the contribution payable by the employer.

Paragraph-30 of the PF Scheme provides for payment of contributions. Sub-para(1) of paragraph-30 states that the employer shall, in the first instance, pay both the contribution payable by himself (in this Scheme referred to as the employer's contribution) and also, on behalf of the member employed by him directly or by or through a contractor, the contribution payable by such member (in this Scheme referred to as the member's contribution).

From bare perusal of sub-para(1) of paragraph-30, it is clear that the word "contribution" is used not only-to mean contribution of the employer but also contribution to be made on behalf of the member employed by the employer directly.

Paragraph-38 of the PF Scheme provides for Mode of payment of contributions. As provided in sub-para(1), the employer shall, before paying the member, his wages, deduct his contribution from his wages and deposit the same together with his own contribution and other charges as stipulated therein with the provident fund or the fund under the ESI Act within fifteen days of the closure of every month pay. It is clear that the word "contribution" used in Clause(b) of Section 43-B of the IT Act means the contribution of the employer and the employee. That being so, if the contribution is made on or before the due date for furnishing the return of income under sub-Section(1) of Section 139 of the IT Act is made, the employer is entitled for deduction.

The submission of the Revenue that if the employer fails to deduct the employees' contribution on or before the due date, contemplated under the provisions of the PF Act and the PF Scheme, that would not have to be treated as income within the meaning of Section 2(24)(x) of the IT Act and in which case,the assessee is liable to pay tax on the said amount treating that as his income, deserves to be rejected.

LD/62/72

Union of India, Through Director of Income Tax
vs.
Tata Chemicals Ltd.
26th February, 2014 (SC)
[Assessment Year 1997-98]

Setion 244A, read with section 240, of the Income-tax Act, 1961 – Refunds – Interest On

Where Assessing Officer passed an order under Section 195(2) directing the resident/deductor to deduct tax at a particular rate on payment to foreign company, but Commissioner (Appeals) found that the reimbursement of expenses is not a part of the income for deduction of tax at source under Section 195 and accordingly, directed the refund of the tax that was deducted and paid over to the Revenue, interest requires to be paid on such refunds from the date of payment of such tax

The resident/deductor approached the Income Tax Officer under Section 195 (2) requesting him

to provide information/determination as to what percentage of tax should be withheld from the amounts payable to the foreign company. On the request so made, the Assessing Officer/Income Tax Officer had determined and passed Special order under Section 195 (2) of the Act directing the resident/deductor to deduct/withhold tax at the rate of 20% before remitting aforesaid amounts to foreign company. The resident/deductor had appealed against the said order, but had deposited the tax as directed by the assessing officer by the aforesaid order in accordance with the provisions of Section 200. When the resident/deductor succeeded in the appeal, a direction was issued by the appellate authority for refund of tax so paid. In observance of the same, the assessing authority had granted the refund of the tax amount under Section 240, but declined to grant interest on the said refund amount.

The Supreme Court held as follows:

The refund becomes due when tax deducted at source, advance tax paid, self assessment tax paid and tax paid on regular assessment exceeds tax chargeable for the year as a result of an order passed in appeal or other proceedings under the Act. When refund is of any advance tax (including tax deducted/collected at source), interest is payable for the period starting from the first day of the assessment year to the date of grant of refund. No interest is, however, payable if the excess payment is less than 10% of tax determined under Section 143(1) or on regular assessment. No interest is payable for the period for which the proceedings resulting in the refund are delayed for the reasons attributable to the assessee (wholly or partly). The rate of interest and entitlement to interest on excess tax are determined by the statutory provisions of the Act. Interest payment is a statutory obligation and non-discretionary in nature to the assessee. In tune with the aforesaid general principle, Section 244A is drafted and enacted. The language employed in Section 244A of the Act is clear and plain. It grants substantive right of interest and is not procedural. The principles for grant of interest are the same as under the provisions of Section 244 applicable to assessments before 01-04-1989, albeit with clarity of application as contained in Section 244A.

The Department has also issued Circular clarifying the purpose and object of introducing Section 244A of the Act to replace Sections 214, 243 and 244 of the Act. It is clarified therein, that, since there was some lacunae in the earlier provisions with regard to non-payment of

interest by the revenue to the assessee for the money remaining with the Government, the said Section is introduced for payment of interest by the Department for delay in grant of refunds. A general right exists in the State to refund any tax collected for its purpose, and a corresponding right exists to refund to individuals any sum paid by them as taxes which are found to have been wrongfully exacted or are believed to be, for any reason, inequitable. The statutory obligation to refund carried with it the right to interest also. This is true in the case of assessee under the Act.

The question before us is, whether the resident/ deductor is also entitled to interest on refund of excess deduction or erroneous deduction of tax at source under Section 195 of the Act.

What the deductor/resident primarily contend is that, what has been deposited by him is a tax, may be for and on behalf of non-resident/foreign company and when the beneficial circular provides for refund of tax to the deductor under certain circumstances, the refund of tax should carry interest.

Section 240 of the Act provides for refund of any amount that becomes due to an assessee as a result of an order in appeal or any other proceedings under the Act. The phrase "other proceedings under the Act" is of wide amplitude. This Court has observed, that, the other proceedings under the Act would include orders passed under Section 154 (rectification proceedings), orders passed by the High Court or Supreme Court under Section 260 (in reference), or order passed by the Commissioner in revision applications under Section 263 or in an application under Section 273A.

A "tax refund" is a refund of taxes when the tax liability is less than the tax paid. In the present fact scenario, the amount paid by the resident/ deductor was retained by the Government till a direction was issued by the appellate authority to refund the same. When the said amount is refunded it should carry interest in the matter of course. As held by the Courts while awarding interest, it is a kind of compensation of use and retention of the money collected unauthorisedly by the Department. When the collection is illegal, there is corresponding obligation on the revenue to refund such amount with interest in as much as they have retained and enjoyed the money deposited. Even the Department has understood the object behind insertion of Section 244A, as that, an assessee is entitled to payment of interest for money remaining with the Government which would be refunded. There is no reason to restrict the same to an assessee only without extending the similar benefit to a resident/deductor who has deducted tax at source and deposited the same before remitting the amount payable to a non-resident/ foreign company.

Providing for payment of interest in case of refund of amounts paid as tax or deemed tax or advance tax is a method now statutorily adopted by fiscal legislation to ensure that the aforesaid amount of tax which has been duly paid in prescribed time and provisions in that behalf form part of the recovery machinery provided in a taxing Statute. Refund due and payable to the assessee is debt-owed and payable by the Revenue. The Government, there being no express statutory provision for payment of interest on the refund of excess amount/tax collected by the Revenue, cannot shrug off its apparent obligation to reimburse the deductor's lawful monies with the accrued interest for the period of undue retention of such monies.

The State having received the money without right, and having retained and used it, is bound to make the party good, just as an individual would be under like circumstances. The obligation to refund money received and retained without right implies and carries with it the right to interest. Whenever money has been received by a party which *ex ae quo et bono* ought to be refunded, the right to interest follows, as a matter of course.

In the present case, it is not in doubt that the payment of tax made by resident/depositor is in excess and the department chooses to refund the excess payment of tax to the depositor. The interest requires to be paid on such refunds.

The question is from what date interest is payable. Since the present case does not fall either under clause (a) or (b) of Section 244A of the Act. In the absence of an express provision as contained in clause (a), it cannot be said that the interest is payable from the 1st of April of the assessment year. Simultaneously, since the said payment is not made pursuant to a notice issued under Section 156 of the Act, *Explanation* to clause (b) has no application. In such cases, as the opening words of clause (b) specifically referred to "as in any other case", the interest is payable from the date of payment of tax. The sequel of our discussion is the resident/deductor is entitled not only the refund of tax deposited under Section 195(2) of the Act, but has to be refunded with interest from the date of payment of such tax.

LD/62/73

Sasi Enterprises

vs.

Assistant CIT

30th January, 2014 (SC)

[Assessment Years 1991-92 and 1992-93]

Section 276CC of the Income-tax Act, 1961– Offences and Prosecutions – Failure to furnish return of income

Benefit of proviso is available only to voluntary filing

of return as required under Section 139(1) and would not apply after detection of the failure to file the return and after a notice under Section 142(1)(i) or 148 is issued calling for filing of the return of income and therefore, envisages the filing of even belated return before the detection or discovery of the failure and issuance of notices under Section 142 or 148

The expression "whichever is earlier" has to be read with the time if allowed under sub-section (1) to Section 139 or within the time allowed under notice issued under sub-section (1) of Section 142, whichever is earlier

Offence under Section 276CC is attracted on failure to comply with the provisions of Section 139(1) or failure to respond to the notice issued under Section 142 or Section 148 of the Act within the time limit specified therein

The question is on whom the burden lies, either on the prosecution or the assessee, under Section 278E to prove whether the assessee has or has not committed willful default in filing the returns it is held that the Court in a prosecution of offence, like Section 276CC has to presume the existence of mens rea and it is for the accused to prove the contrary and that too beyond reasonable doubt

The assessee firm, did not file any returns for the assessment year 1991-92 and 1992-93, for which the firm and its partners are being prosecuted under Section 276 CC of the Act. Two partners also did not file returns for the assessment year 1993-94 and, hence, they were being prosecuted for that breach (in their individual capacity) separately but not for the assessment years 1991-92 or 1992-93 and their returns have been filed as individual assessee by them for the assessment years 1991-92 and 1992-93, though belatedly on 20-11-1994 and 23-02-1994 respectively. In those returns it was mentioned that accounts of the firm had not been finalised and no returns of the firm had been filed.

The Assistant Commissioner of Income Tax in his complaint stated that the accused persons did not bother to file the returns even before the end of the respective assessment years, nor had they filed any return at the outer statutory limit prescribed under

Section 139(4) of the Act, *i.e.*, at the end of March of the assessment year. It was also pointed out that a survey was conducted in respect of the firm under Section 133A on 25-08-1992 and following that a notice under Section 148 was served on the partnership firm on 15-02-1994 to file the return of income tax for the years in question. Though notice was served on 16-02-1994, no return was filed within the time granted in the notice. Neither return was filed, nor were particulars of the income furnished. For the assessment year 1991-92, it was stated that pre-assessment notice was served on 18-12-1995, notice under Section 142(1)(ii) giving opportunities was also issued on 20-07-1995. The department made the best judgment assessment for the assessment year 1991-92 under Section 144 on a total income of ₹5,84,860/- on 08.02.1996 and tax was determined as ₹3,02,434 and demand notice for ₹9,95,388 was issued as tax and interest payable on 08-02-1996.

The Supreme Court held as follows:

The constitutional validity of Section 276CC, was upheld by the Karnataka High Court in *Sonarome Chemicals (P.) Ltd. vs. Union of India [2000] 242 ITR 39* holding that it does not violate Article 14 of 21 of the Constitution. Section punishes the person who "willfully fails to furnish the return of income in time". The explanation willful default, as observed by Wilber Force J. in *Wellington vs. Reynold* [1962] 40 TC 209 is "some deliberate or intentional failure to do what the tax payer ought to have done, knowing that to omit to do so was wrong". The assessee is bound to file the return under Section 139(1) of the Act on or before the due date. The outer limit is fixed for filing of return as 31st August of the assessment year, over and above, in the present case, not only return was not filed within the due date prescribed under Section 139(1) of the Act, but also the time prescribed under Section 142 and 148 of the Act and the further opportunity given to file the return in the prescribed time was also not availed of.

Section 276CC applies to situations where an assessee has failed to file a return of income as required under Section 139 of the Act or in response to notices issued to the assessee under Section 142 or Section 148 of the Act. The proviso to Section 276CC gives some relief to genuine assesses. The *proviso* to Section 276CC gives further time till the end of the assessment year to furnish return to avoid prosecution. In other words, even though the due date would be 31st August of the assessment year as per Section 139(1) of the Act, an assessee gets further seven months' time to complete and file the return and such a return though belated, may not attract prosecution of the assessee. Similarly, the *proviso* in clause ii(b) to Section 276CC also provides that if the tax payable determined by regular assessment has reduced by advance tax paid and tax deducted at source does not exceed ₹3,000/- such an assessee shall not be prosecuted for not furnishing the return under Section 139(1) of the Act. Resultantly, the *proviso* under Section 276CC takes care of genuine assesses who either file the returns belatedly but within the end of the assessment year or those who have paid substantial amounts of their tax dues by pre-paid taxes, from the rigor of the prosecution under Section 276CC of the Act.

Section 276CC, it may be noted, takes in sub-Section (1) of Section 139, Section 142(1)(i) and Section 148. But, the *proviso* to Section 276CC takes in only sub-Section (1) of Section 139 of the Act and the provisions of Section 142(1)(i) or 148 are conspicuously absent. Consequently, the benefit of *proviso* is available only to voluntary filing of return as required under Section 139(1) of the Act. In other words, the *proviso* would not apply after detection of the failure to file the return and after a notice under Section 142(1)(i) or 148 of the Act is issued calling for filing of the return of income. *Proviso*, therefore, envisages the filing of even belated return before the detection or discovery of the failure and issuance of notices under Section 142 or 148 of the Act.

In sub-Section (4) to Section 139 the legislature has used an expression "whichever is earlier". Both Section 139(1) and sub-Section (1) of Section 142 are referred to in sub-Section (4) to Section 139, which specify time limit. Therefore, the expression "whichever is earlier" has to be read with the time if allowed under sub-Section (1) to Section 139 or within the time allowed under notice issued under sub-Section (1) of Section 142, whichever is earlier. So far as the present case is concerned, it is already noticed that the assessee had not filed the return either within the time allowed under sub-Section (1) to Section 139 or within the time allowed under notices issued under sub-Section (1) to Section 142.

On failure to file the returns by the appellants, Income-tax Department made a best judgment assessment under Section 144 of the Act and later show cause notices were issued for initiating prosecution under Section 276CC of the Act. *Proviso* to Section 276CC nowhere states that the offence under Section 276CC has not been committed by the categories of assesses who fall within the scope of that *proviso*, but it is stated that such a person shall not be proceeded against. In other words, it only provides that under specific circumstances subject to the *proviso*, prosecution may not be initiated. An assessee who comes within clause 2(b) to the *proviso*, no doubt has

also committed the offence under Section 276CC, but is exempted from prosecution since the tax falls below ₹3,000/-. Such an assessee may file belated return before the detection and avail the benefit of the *proviso*. *Proviso* cannot control the main section, it only confers some benefit to certain categories of assesses. In short, the offence under Section 276CC is attracted on failure to comply with the provisions of Section 139(1) or failure to respond to the notice issued under Section 142 or Section 148 of the Act within the time limit specified therein.

There is no basis in the contention of the appellant that pendency of the appellate proceedings is a relevant factor for not initiating prosecution proceedings under Section 276CC of the Act. Section 276CC contemplates that an offence is committed on the non-filing of the return and it is totally unrelated to the pendency of assessment proceedings except for second part of the offence for determination of the sentence of the offence, the department may resort to best judgment assessment or otherwise to past years to determine the extent of the breach. The language of Section 276CC, is clear so also the legislative intention. It is trite law that as already held by this Court in *B. Permanand vs. Mohan Koikal, [2011] 4 SCC 266* that "the language employed in a statute is the determinative factor of the legislative intent. It is well settled principle of law that a court cannot read anything into a statutory provision which is plain and unambiguous". If it was the intention of the legislature to hold up the prosecution proceedings till the assessment proceedings are completed by way of appeal or otherwise the same would have been provided in Section 276CC itself. Therefore, the contention of the appellant that no prosecution could be initiated till the culmination of assessment proceedings, especially in a case where the appellant had not filed the return as per Section 139(1) of the Act or following the notices issued under Section 142 or Section 148 does not arise.

The declaration or statement made in the individual returns by partners that the accounts of the firm are not finalised, hence no return has been filed by the firm, will not absolve the firm in filing the 'statutory

return under section 139(1) of the Act. The firm is independently required to file the return and merely because there has been a best judgment assessment under Section 144 would not nullify the liability of the firm to file the return as per Section 139(1) of the Act. Appellants' contention that since they had in their individual returns indicated that the firm's accounts had not been finalised, hence no returns were filed, would mean that failure to file return was not willful, cannot be accepted.

Section 278E deals with the presumption as to culpable mental state, which was inserted by the Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986. The question is on whom the burden lies, either on the prosecution or the assessee, under Section 278E to prove whether the assessee has or has not committed willful default in filing the returns. Court in a prosecution of offence, like Section 276CC has to presume the existence of *mens rea* and it is for the accused to prove the contrary and that too beyond reasonable doubt. Resultantly, the appellants have to prove the circumstances which prevented them from filing the returns as per Section 139(1) or in response to notices under Sections 142 and 148 of the Act.

Therefore, no reason was found to interfere with the order passed by the High Court. The appeals, therefore, lack merits and the same are dismissed and the Criminal Court is directed to complete the trial within four months from the date of receipt of this Judgment.

Note: Order of Madras High Court in Crl. R. C. Nos. 781 to 786 of 2006, dated 21-12-2006, *Upheld*.

Customs

LD/62/74

International Conveyors Ltd. vs. Commissioner of Central Excise & Customs

25th February, 2014 (SC)

Section 27, read with section 28 and 129A, of the Customs Act, 1962 – Refunds - Unjust Enrichment

Where, on demand raised by Revenue, amount of duty was paid by manufacturer and said amount of duty had not been passed over or recovered from purchasers, refund could not be denied to manufacturer on ground of unjust enrichment

The appellant was a manufacturer of PVC Coal Conveyor Belting made from imported Nylon Yarn. The case put forward by the appellant with regard to the classification of the goods imported by it. The amount which had been demanded by the Revenue had been paid by the appellant under protest. The appellant sought for refund of the amount deposited upon production of evidence of end-use of the imported yarn in the manufacturing of belting to the satisfaction of the concerned Assistant Collector. On writ, the High Court had directed the Revenue to take appropriate action for making payment of the refund. However, now, the Assistant Collector of Central Excise sought to reject the claim of refund on the ground of *unjust enrichment* as the amount of tax was alleged to have been recovered by the appellant from the companies to whom the goods had been supplied by the appellant. The Deputy Collector, Central Excise and Customs passed a final order concluding that the amount of duty claimed by way of refund had not been collected by the appellant from the above named two buyers who had purchased conveyor belting from the appellant. However after some more proceedings, once again the appellant was asked to pay the amount which had already been refunded to it. The said order was challenged by the appellant before the Tribunal and the Tribunal dismissed the said appeal which has been challenged by the appellant in this appeal.

The Supreme Court held as follows:

The amount of duty paid by the appellant had never been passed over to the purchasers and the said fact has been duly recorded by the Deputy Collector, Central Excise and Customs. The said finding has attained finality as nobody challenged the said order. There is no question of demanding the said amount again, especially when the facts which had been disputed by the Revenue before the Tribunal had already been admitted in the proceedings which had been initiated by the Deputy Collector, Central Excise and Customs. Without disturbing the findings arrived at by the Deputy Collector, Central Excise and Customs, the Revenue could not have come to an altogether different conclusion on facts. Due efforts were made to find out whether the amount of duty had been passed over to the purchasers, who are either government Companies or Corporations controlled by the Government. It has been clearly stated in the aforestated order of the Deputy Collector, Central Excise and Customs that even the purchasers had admitted the fact that the amount of duty paid by the appellant had not been passed over to the said purchasers or in other words, or the said amount of duty had not been recovered from the said purchasers.

The refund claim of appellant could not be denied.

Note: International Conveyors Ltd. vs. CCE & C, 2004 (178) ELT 858 (Mum.) *reversed*. ■