Select Legal Decisions

DIRECT TAXES

1. ***CIT v. Kwality Biscuits Ltd. (2006) 284 ITR 434 (SC)***

   The Supreme Court upheld the decision of the Karnataka High Court that interest is not leviable under sections 234B and 234C, in the case of assessment of a company on the basis of book profits under section 115J (now, section 115JB). This is because the entire exercise of computing income under section 115J can only be done at the end of the financial year, and the provisions of sections 207, 208, 209 and 210 cannot be made applicable until and unless the accounts are audited and the balance-sheet is prepared.

2. ***Goetze (India) Ltd. v. CIT (2006) 284 ITR 323 (SC)***

   The assessee filed its return of income for the relevant assessment year without claiming a particular deduction. Later on, it sought to claim the deduction by way of a letter addressed to the Assessing Officer. The deduction was disallowed by the Assessing Officer on the ground that there was no provision under the Act to make amendment in the return of income by making an application at the assessment stage without revising the return.

   The assessee had relied upon the decision of the Apex court in National Thermal Power Company Ltd. v. CIT (1998) 229 ITR 383, to contend that it was open to the assessee to raise the points of law even before the Appellate Tribunal. In that case, it was held that the Tribunal had jurisdiction to examine a question of law (raised for the first time), which arose from the facts as found by the income-tax authorities and which have a bearing on the tax liability of the assessee.

   The Supreme Court held that this decision does not in any way relate to the power of the Assessing Officer to entertain a claim for deduction otherwise than by filing a revised return. Therefore, the assessee can claim deduction only by filing a revised return. The Supreme Court further clarified that the issue in this case is limited to the power of the assessing authority and does not impinge on the power of the Income-tax Appellate Tribunal under section 254.

3. ***CIT v. Anil M. Gehi (2006) 284 ITR 338 (Bom.)***

   The assessee was engaged in smuggling business. Foreign currency equivalent to Rs.4,56,980 seized from his custody was the amount involved in the smuggling activity. The High Court observed that confiscation of the amount was, therefore, business loss suffered by the assessee in conducting his business of smuggling. It was not the case of assessee carrying on some other business for which foreign currency was illegally transported out of India. The confiscation of foreign currency equivalent to Rs.4,56,980 was a loss of stock-in-trade of the assessee. When such amount is brought to tax as income of the assessee under section 69A, he is entitled to the benefit of treating the amount confiscated from him as a business loss.

4. ***CIT v. Ganeshi Lal Ram Krishna (2006) 154 Taxman 238 (All.)***

   The respondent-firm engaged in execution of the civil contract work failed to get its accounts audited and obtain audit report in

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terms of section 44AB within the specified time. The Income-tax Officer completed the assessment but failed to initiate penalty proceedings under section 271B for the firm's failure to obtain audit report within the specified time. The High Court held that failure to initiate penalty proceedings does render the order of the assessing authority erroneous and prejudicial to the interest of revenue. Therefore, notice under section 263 can be issued in such a case.

5. CIT v. K.K. Spun Pipe (2006) 284 ITR 0301 (P&H)

The assessee filed its return after the specified due date for the relevant assessment years under section 139(4). It filed its returns along with the audit reports under section 44AB. The Assessing Officer levied penalty under section 271B for failure on the part of the assessee to file audit reports along with the return of income within the due date for filing return under section 139(1). However, the Tribunal deleted the penalties. The High Court observed that penalty under section 271B was not attracted in this case since the audit report under section 44AB had been obtained on or before the specified date and it was filed along with the return of income under section 139(4) and no notice had been issued to the assessee by the Assessing Officer under section 142(1)(i). Therefore, penalty under section 271B is not attracted in a case where audit report is filed after the due date for filing return of income but before issue of notice by the Assessing Officer under section 142(1)(i).

6. Sundaram Exhibitions (P.) Ltd. v. CIT (2006) 154 Taxman 132 (MP)

The State Government of Madhya Pradesh had granted a subsidy to the assessee, who was engaged in the business of running a cinema house. The High Court observed that the subsidy was not given to the assessee for establishment of business i.e., it was not meant to be used prior to commencement of commercial business so as to partake the nature of capital subsidy in the form of fixed assets. The subsidy was given to the assessee after commencement of business for the purpose of running the business. If the assessee is given any subsidy for running its business, such subsidy is a revenue receipt and can never be regarded as capital.

7. Suman Sehgal v. Union of India (2006) 154 Taxman 195 (Delhi)

The issue under consideration is whether some "proceeding" should be pending against a particular or specified individual for an income-tax authority to exercise the power under section 131(3) to impound and retain any documents produced before it.

The High Court observed that section 131(3) which talks of specific power of impounding is expressly subject to the rules framed under section 131(1) or 131(1A). Section 131(1) makes specific reference to four situations – discovery, production of evidence, issuing commissions etc. Section 131(1A) makes a specific reference to investigation and enquiry. The subsequent specific power of impounding under section 131(3) is expressly subject to the rules framed under section 131(1) or 131(1A). Therefore, the Parliament intended the power to impound to be adjunct and concomitant to the express powers indicated in sections 131(1) and 131(1A) and hence there should be no distinction drawn between investigation and proceeding. The High Court also observed that, from another perspective of viewing, even an investigation or enquiry is, in broad terms, a proceeding.

Therefore, the High Court held that for exercise of power under section 131(3) by the income-tax authorities to impound and retain documents, it is not necessary that a "proceeding" should be pending against a particular or specified individual. Such power can be exercised even in case of investigation and enquiry.

8. CIT v. Deutsche Bank A.G. (2006) 284 ITR 463 (Bom.)

Section 44C restricts allowance of deduction for head office expenditure to the least of the three (now, two) parameters stated therein. The assessee, a foreign bank, claimed the full amount of head office expenses as deduction on the ground that section 44C was not applicable as one of the parameters was not attracted. The High Court concurred with the assessee's view and held that in the absence of one of the parameters, the entire section 44C stood ruled out. Therefore, the entire head office expenditure was allowable under section 37(1), as section 44C was not applicable to the case of the assessee, since, in the absence of one of the parameters, the entire section becomes non-workable.

9. D.D. Shah & Bros. v. Union of India (2006) 283 ITR 486 (Raj.)

The High Court observed that blending of different qualities of tea possessing different chemical and physical composition so as to produce the specific blend of tea does not involve an act of manufacture. The assessee is not a grower of tea and so he cannot be called the producer of tea. Nor is he engaged in manufacture of potable tea from green leaves. Therefore, the assessee is only a trader in tea and not a producer or manufacturer. The High Court held that the expression 'manufactures or produces any article or thing' under section 80-IB(2)(iii) has been used in a generic sense. It does not include any processing of goods, which does not bring out a new or commercially distinct commodity. Blending of different teas by a dealer amounts to processing of tea but falls short of a manufacturing process. Therefore, it does not amount to manufacturing or producing any article or thing within the meaning of section 80-IB.

10. Lakshmi Vilas Bank Ltd. v. CIT (2006) 154 Taxman 301 (Mad.)

The assessee-bank was dealing with the purchase and sale of Government securities. It had always been treating Government securities as its stock-in-trade and accordingly the profit and loss on sale of Government securities had been assessed as its business income/loss. Further, any depreciation/ appreciation in the value of securities at the end of each accounting year, was claimed as deduction/offered as income of the relevant year. This method of accounting was regularly employed by the assessee and accepted by the Department. The Tribunal had also decided the case in favour of the assessee in the earlier years. The High Court observed that in such a case, the Tribunal was not correct in now holding, on identical facts, that the Government securities were held by the assessee as investments/capital assets. Where a method of accounting has been regularly followed by the assessee and accepted by the Tribunal over the years, the Tribunal cannot change its stand later on, when circumstances remain unchanged. The High Court, therefore, held that the bank was entitled to claim deduction on account of fall in the market value of Government securities, which was held by it as stock-in-trade.

11. CIT v. C.F. Thomas (2006) 284 ITR 557 (Ker.)

The assessee owned a commercial building and had leased it at a monthly rent of Rs.5,000 for a period of 20 years against a refundable security of Rs.2 lakhs. The lease was executed through a lease deed which was not registered. Such lease should have been compulsorily registered under the Registration Act, 1908 and Transfer of Property Act, 1882. Therefore, the assessee contended that although the transaction recorded in the said instrument is a lease, however, legally there is no transfer of a capital asset so as to attract capital gains tax.

The High Court observed that the instrument in question i.e. the lease deed was a transaction by way of arrangement having the effect of enabling the enjoyment of immovable property. Such a transaction

was clearly a transfer of a capital asset and any profit or gain arising out of such transfer would definitely generate capital gains. The High Court held that merely because the instrument was compulsorily registrable under the Registration Act, 1908 and Transfer of Property Act, 1882, such transaction had not become anything other than a lease transaction.

12. CIT (Central) Kanpur v. J.K. Cotton Spg. & Wvg. Mills Ltd. (2006) 154 Taxman 142 (All.)

In this case, it has been held that the correct rate of admissibility of depreciation is a debatable issue. Such mistake cannot be the subject-matter of rectification proceedings under section 154 of the Act and it cannot be said that there was an error apparent on the face of record on this issue in the original assessment order.

13. CWT v. T.Girijammal (2006) 284 ITR 482 (Mad.)

In this case, it was held that when additional compensation awarded by the civil court had not been accepted by the State Government and it had preferred an appeal objecting to the enhancement, the said additional compensation received could not be treated as part of the compensation received for the transfer of the land until it is finally determined by the High Court or the Supreme Court. If the appeal of the State is allowed, the assessee is bound to refund the amount and hence, the same cannot be assessed in the assessee's hands before reaching finality. Hence, when the income itself has not accrued or arisen, the question of levying wealth-tax also does not arise, as it is only consequential in nature.

INDIRECT TAXES

1. Super Delicacies (P) Ltd. v. CCEx., New Delhi 2006 (199) ELT 387 (SC)

Notification No. 175/86-CE grants exemption from excise duty to small scale industries provided they do not use the brand name of another person who is not entitled to exemption under that notification. The appellant were using the brand name of the person who was not paying excise duty as his goods were exempt and was not registered with the excise department during the disputed period. The appellant contended that they were eligible to the small-scale exemption under Notification No.175/86 as they were using the brand name of the person who, according to the appellant, was also entitled to the small-scale exemption under the said notification.

The Supreme Court held that merely because the owner of the brand name manufactures goods which are exempt from excise duty, it does not mean that such owner is a small-scale industry entitled to the benefit of the notification. Further, it cannot be presumed that just because the owner of the brand name was not registered during the disputed period, it was a small-scale industry during the period in question.

2. Gujarat Ambuja Exports Ltd. v. Union of India 2006 (199) ELT 798 (Guj.)

A Commissioner is competent to recall an order which is passed in violation of principles of natural justice and can grant opportunity of hearing to petitioner before passing an order.

3. Venus Enterprises v. CCus., Chennai 2006 (199) ELT 405 (Mad.)

Show cause notice under section 28(1) of Customs Act, 1962 can be issued for recovery of short levy in case of goods already assessed and cleared. The contention that when the goods are already cleared, no demand notice can be issued under section 28 without reviewing the order of assessment was rejected by the High Court.

4. Kaur Sain Traders v. Union of India 2006 (199) ELT 224 (Pat.)

Exemption from customs duty does not mean exemption from additional duty. When

goods are exempted from basic customs duty in terms of section 12 of the Customs Act, 1962, it does not mean that they are exempted from additional duty also. Basic customs duty is leviable by virtue of section 12 of the Customs Act, 1962, while additional customs duty is leviable under section 3 of the Customs Tariff Act, 1975.

5. CCus., Kolkata v. Sunil Ghosh 2006 (199) ELT 587 (Cal.)

Passing of a fresh order by considering evidence which is alleged to have been omitted amounts to review and not rectification. A piece of evidence if alleged not to have been considered and a finding has been arrived at; in that event it would not be a mistake rectifiable under section 129B(2) of the Customs Act. This would be a case of review since the entire finding would be changed and the purpose would not be served by amending the order but by replacing the order or substituting the order as a whole.

6. K.R. Raheja Development Corporation v. State of Karnataka 2006 (3) STR 337 (S.C)

Construction of residential and commercial complex is liable to turnover tax under Karnataka Sales Tax Act. Under Karnataka Sales Tax Act, the definition of works contract is very wide. It includes any agreement for carrying out, either for cash or for deferred payment or for any other valuable consideration, the building and construction of any moveable and immovable property. Thus every agreement wherein construction of a building takes place is covered under works contract. The definition does not stipulate that the construction should be on behalf of the owner of the property or that the construction cannot be done by the owner of the property. Thus, an agreement for construction entered into by owner of property on behalf of anybody else is also included in works contract. However, an agreement made after the completion of construction is not a works contract.

7. Airlines Agents Association v. Union of India 2006 (3) STR 3 (Mad.)

As per erstwhile section 67(k), the value of taxable services in relation to service provided by an air travel agent to a customer shall be the gross amount charged by such agents from the customer for services in relation to he booking of passage for travel by air excluding the air fare but including the commission, if any, received from the airline in relation to such booking.

The petitioners' argued that the commission received from the airlines by the air travel agent should not be taken as a measure for imposing the levy on a different service of booking tickets for air travel rendered to the customer by the agent.

The High Court stated that the measure of tax (i.e., the valuation of taxable services for charging service tax) provided by erstwhile section 67(k) of Finance Act, 1994 cannot be said to be totally unconnected with the services offered by the air travel agents which is the main subject of tax. The air travel agents do not get any fixed commission or income from the airlines. They get the commission only when they book the tickets, thereby providing service to the customers. Hence, their commission is entirely dependent on and connected with the tickets booked for the customers by them. The provisions of section 67(k) does not in any manner alter the nature of tax and does not shift it from the service rendered to the customer to the service rendered to the airlines.

Rule 6(7) of Service Tax Rules, 1994 provides an option to the air travel agent to pay a specified percentage of basic fare towards the discharge of their service tax liability instead of paying service tax at the rate specified in section 66. The High Court elaborated that the alternative mode of levy on basic fare of passage for travel by air vide Rule 6(7) of Service Tax Rules, 1994 is not unconstitutional and does not breach any of the fundamental rights. Rule 6(7) is only

a modality for collection of tax. It cannot be viewed as an independent taxation.

8. *Medpro Pharma Pvt. Ltd. v. CCEx., Chennai 2006 (3) STR 355 (Tri-LB)*

Isolated activity of freight forwarding is also covered under clearing and forwarding operations and is taxable. Clearing and forwarding operations cannot be dissected into 'clearing and forwarding'. Both these activities fall under common category and any service provided in that category attracts service tax.

9. *Larsen Toubro Ltd. v. CCEx., Chennai 2006 (3) STR 321 (Tri-LB)*

Persons engaged in mere procurement of orders on commission basis are not covered in the definition of clearing and forwarding agent as clearing and forwarding activities do not flow directly or indirectly from mere procurement of orders. Activity of procuring orders has been treated separately under business auxiliary service and is independent of clearing and forwarding operations (Services of commission agent have been included in definition of business auxiliary service with effect from 01.07.2003). Expressions 'directly or indirectly' and 'in any manner' in the definition of clearing and forwarding agent are not to be isolated from activity of clearing and forwarding operation. Thus, the CESTAT held that mere booking orders for the principal by an agent on commission basis is not taxable under clearing and forwarding agent's service.

Note : This decision of the large bench of the Tribunal has overruled the decision of the Tribunal in the case of Prabhat Zarda Factory (Pvt.) Ltd. v. Commissioner 2002 (145) E.L.T. 222 (Tri).

10. *CCEx., Kolkata -I. v. Chandra Nath Pyne 2006 (3) STR 177 (Tri- Kolkata)*

Ratio of judgement applicable in respect of penalties under the provisions of central excise law cannot be made applicable under service tax legislation.

11. *Onkar Travels (P) Ltd. v. CCEx., Jalandhar 2006 (3) STR 164 (Tri-Del.)*

After an assessment is complete, it cannot be claimed subsequently that there was an error and the appellant did not produce relevant records. When an appeal is not filed against finally assessed ST-3 return, a show cause notice cannot be issued under section 74 for rectification. If an appeal is not filed within time under section 85 ibid, opportunity to re-open assessment cannot be read into provisions of section 74 ibid.

12. *CCEx., Chennai v. Agnice Fire Protection 2006 (3) STR 173 (Tri-Chennai)*

Erection and commissioning of fire fighting equipments involve engineering work and require professional skills, and thus, can be brought within the ambit of the term "technical assistance"' rendered by a consulting engineer.

13. *Laxmi Color (P) Ltd. v. CCEx., Jaipur-II 2006 (3) STR 363 (Tri-Del)*

In case of photography service cost of inputs consumed is not allowed as a deduction from the value of taxable service. The Tribunal stated that CBEC clarification dated 07-04-2004 on Notification No. 12/2003-ST was not applicable in this case as value of inputs sold had not been indicated in the bills. The Tribunal has held that the clarification in fact, is beyond the scope of exemption notification no. 12/2003 ST, as this notification exempts 'value' of goods and materials sold by service provider whereas the clarification provides exclusion of inputs 'consumed' while providing the taxable service.

14. *Jason James Clemens 2006 (3) STR 452 AAR*

Advance ruling cannot be sought on a question based on a circular issued by Board as a circular is not a notification within the meaning of clause (d) of sub-section (2) of section 96C.