Summary of Important Case Laws on Direct Taxes for December 2015 Examination

1. BASIC CONCEPTS

1. What is the nature of liquidated damages received by a company from the supplier of plant for failure to supply machinery to the company within the stipulated time a capital receipt or a revenue receipt?

Solution:

Saurashtra Cement Ltd (Supreme Court)

The damages were directly and intimately linked with the procurement of a capital asset i.e., the cement plant, which lead to delay in coming into existence of the profit-making apparatus. It was not a receipt in the course of profit earning process. Therefore, the amount received by the assessee towards compensation for sterilization of the profit earning source, is not in the ordinary course of business, hence it is a capital receipt in the hands of the assessee.

2. What is the nature of grant received by a subsidiary company from its holding company to recoup the losses incurred year after year and to enable it to meet its liabilities -Capital or Revenue?

Solution:

Handicrafts and Handlooms Export Corporation of India Ltd. (High Court)

The High Court, observed that in all the years, it was the case of a 100% holding company coming to the rescue of its subsidiary.(SC), which requires the nature of subsidy to be decided on the basis for which the subsidy was given, the High Court held that grant given by the holding company in this case is in the nature of capital receipt since its purpose is to secure and protect the capital investment made in the subsidiary company.

3. Can power subsidy received by the assessee from the State Government, year after year, on the basis of actual power consumption be treated as a capital receipt?

Solution:

Rassi Cement Ltd. (Andra Pradesh High Court)

The power subsidy received by the assessee from the State Government on the basis of actual power consumption has to be treated as a trading receipt and not as a capital receipt.

4. In case the share capital is raised in a foreign country and repatriated to India on need basis from time to time for approved uses, can the gain arising on the Balance Sheet date due to fluctuation in foreign exchange, in respect of that part of share capital which is to be used as working capital, be treated as a revenue receipt?

Solution:

Jagatjit Industries Ltd (Delhi High Court)

The capital raised, whether in India or outside, can be utilized both for the purpose of acquiring fixed assets and to meet other expenses of the organization i.e. as working capital. For determining the nature of receipts, due consideration should be given to the source of funds and not to the ultimate use of the funds. The High Court, therefore, held that the entire gain has to be treated as capital receipt as the source of fund in this case is capital in nature.

5. Can subsidy received by the assessee from the Government of West Bengal under the scheme of industrial promotion for expansion of its capacities, modernization and improving its marketing capabilities be treated as a capital receipt?

Solution:

Rasoi Ltd (Calcutta High Court)

The object of the subsidy is to enable the assessee to run the business more profitably, the receipt is a revenue receipt. On the other hand, if the object of the assistance is to enable the assessee to set up a new unit or to expand an existing unit, the receipt would be a capital receipt. Therefore, the object for which subsidy is given determines the nature of the subsidy and not the form of the mechanism through which the subsidy is given.

6. What is the nature of incentive received under the scheme formulated by the Central Government for recoupment of capital employed and repayment of loans taken for setting up/expansion of a sugar factory – Capital or Revenue?

Solution:

Kisan Sahkari Chini Mills Ltd. (High Court)

In that case, the apex court held that the main eligibility condition for the scheme was that the incentive had to be utilized for the repayment of loans taken by the assessee to set up a new unit or substantial expansion of an existing unit. The subsidy receipt by the assessee was, therefore, not in the course of a trade and hence, was of capital nature.

2. INCOME WHICH DO NOT FORM PART OF TOTAL INCOME

7. Whether section 14A is applicable in respect of deductions, which are permissible and allowed under Chapter VI-A?

Solution:

Kribhco (Delhi High Court)

No disallowance can be made under section 14A in respect of income included in total income in respect of which deduction is allowable under section 80C to 80U.

8. Can *Explanation* to section 11(2) be applied in respect of the accumulation up to 15% referred to in section 11(1)(a), to treat the donation made to another charitable trust from the permissible accumulation upto 15%, as income of the trust?

Solution:

Bagri Foundation (Delhi High Court)

The Explanation to section 11(2), therefore, cannot be applied to the accumulations under section 11(1)(a) i.e. accumulations upto 15%, unless it is expressly mention in the Act for the same. Consequently, if the donations by the assessee to another charitable trust were out of past accumulations under section 11(1)(a) i.e. upto 15%, the same would not be liable to be included in the total income as assessed by the Assessing Officer.

9. In a case where the application for registration of a charitable trust is not disposed of within the period of 6 months as required under section 12AA(2), can the trust be deemed to have been registered as per provisions of section 12AA?

Solution:

CIT v. Karimangalam Onriya Pengal Semipu Amaipu Ltd. (2013) 354 ITR 483 (Mad)

The Madras High Court held that the time frame mentioned in section 12AA(2) is only directory in nature and non-disposal of the registration application within the said time frame of six months would not amount to "deemed registration".

There is no automatic or deemed registration if the application filed under section 12AA was not disposed of within the stipulated period of six months.

Note: Students should in examination, write that section 12AA says that it shall be deemed registration. However, certain judicial pronouncements say that there will be no deemed registration.

10. Where a charitable trust applied for issuance of registration under section 12AA within a short time span (nine months, in this case) after its formation, can registration be denied by the concerned authority on the ground that no charitable activity has been commenced by the trust?

Solution:

DIT (Exemptions) v. Meenakshi Amma Endowment Trust (2013) 354 ITR 219 (Kar.)

The High Court observed that, with the moneys available with the trust, it cannot be expected to carry out activity of charity immediately after its formation. Consequently, in such a case, it cannot be concluded that the trust has not intended to do any activity of charity.

In such a situation, the objects of the trust as mentioned in the trust deed have to be taken into consideration by the authorities for satisfying themselves about the genuineness of the trust and not the activities carried on by it.

Later on, if it is found from the subsequent returns filed by the trust, that it is not carrying on any charitable activity, it would be open to the concerned authorities to withdraw the registration granted or cancel the registration as per the provisions of section 12AA(3).

The registration cannot be denied on the ground that the trust has not carried out any charitable activity so far in the short span of time after its formation.

3. INCOME FORM SALARY

11. Can notional interest on security deposit given to the landlord in respect of residential premises taken on rent by the employer and provided to the employee, be included in the perquisite value of rent-free accommodation given to the employee?

Solution:

Shankar Krishnan (Bombay High Court)

That the Assessing Officer is not right in adding the notional interest on the security deposit given by the employer to the landlord in valuing the perquisite of rent-free accommodation, since the perquisite value has to be computed as per Rule 3 and Rule 3 does not require addition of such notional interest. Thus, the perquisite value of the residential accommodation provided by the employer would be the actual amount of lease rental paid or payable by the employer, since the same was lower than 10% (now 15%) of salary.

12. Can the limit of Rs. 1,000 per month per child be allowed as standard deduction, while computing the perquisite value of free or concessional education facility provided to the employee by the employer?

Solution:

Delhi Public School (Punjab and Haryana High Court)

The value of perquisite for free/concessional educational facility arising to an employee exceeds Rs. 1,000 per month per child, the whole perquisite shall be taxable in the hands of the employee and no standard deduction of Rs. 1,000 per month per child can be provided from the same. It is only in case the perquisite value is less than Rs. 1,000 per month per child, the perquisite value shall be nil. Therefore, Rs. 1,000 per month per child is not a standard deduction to be provided while calculating such a perquisite.

4. INCOME FROM HOUSE PROPERTY

13. Whether the rental income derived from the unsold flats which are shown as stock-in-trade in the books of the assessee would be taxable under the head 'Profits and gains from business or profession' or under the head 'Income from house property', in a case where the actual rent receipts formed the basis of computation of income?

Solution:

New Delhi Hotels Ltd. (Delhi High Court)

Rental income derived from unsold flats which were shown as stock-in-trade in the books of the assessee should be assessed under the head "Income from house property" and not under the head "Profits and gains from business or profession.

14. Can the rental income from the unsold flats of a builder be treated as its business income merely because the assessee has, in its wealth tax return, claimed that the unsold flats were stock-in-trade of its business?

Solution:

Azimganj Estate (P.) Ltd (Calcutta High Court)

The rental income from the unsold flats of a builder shall be taxable as "Income from house property" as provided under section 22 and since it specifically falls under this head, it cannot be taxed under the head "Profit and gains from business or profession Therefore, the assessee would be entitled to claim statutory deduction of 30% from such rental income as per section 24. The fact that the said flats have been claimed as not chargeable to wealth-tax, treating the same as stock-in-trade, will not affect the computation of income under the Income-tax Act, 1961.

15. Can benefit of self-occupation of house property under section 23(2) be denied to a HUF on the ground that it, being a fictional entity, cannot occupy a house property?

Solution:

Hariprasad Bhojnagarwala (Gujarat High Court)

On the above mentioned issue, the Gujarat High Court observed that a firm, which is a fictional entity, cannot physically reside in a house property and therefore a firm cannot claim the benefit of this provision, which is available to an individual owner who can actually occupy the house. However, the HUF is a group of individuals related to each other i.e., a family comprising of a group of natural persons. The said family can reside in the house, which belongs to the HUF. Since a HUF cannot consist of artificial persons, it cannot be said to be a fictional entity. Also, it was observed that since singular includes plural, the word "owner" would include "owners" and the words "his own" used in section 23(2) would include "their own". Therefore, the Court held that the HUF is entitled to claim benefit of self-occupation of house property under section 23(2).

16. Can an assessee engaged in letting out of rooms in a lodging house also treat the income from renting of a building to bank on long term lease as business income?

Solution:

Joseph George and Co. (High Court)

While lodging is a business, however, letting out of building to the bank on long-term lease could not be treated as business. Therefore, the rental income from bank has to be assessed as income from house property.

17. Can notional interest on interest-free deposit received by an assessee in respect of a shop let out on rent be brought to tax as business income or income from house property?

Solution:

Asian Hotels Ltd. (High Court)

The High Court observed that section 28(iv) is concerned with business income and brings to tax the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession. Section 28(iv) can be invoked only where the benefit or amenity or perquisite is otherwise than by way of cash. In the instant case, the Assessing Officer has determined the monetary value of the benefit stated to have accrued to the assessee by adding a sum that constituted 18 per cent simple interest on the deposit. Hence, section 28(iv) is not applicable. Section 23(1) deals with the determination of the expected rent of a let out property for computing the income from house property. It provides that the expected rent is deemed to be the sum for which the property might reasonably be expected to be let out from year to year. This contemplates the possible rent that the property might fetch and certainly not the interest on fixed deposit that may be placed by the tenant with the landlord in connection with the letting out of such property. Thus, the notional interest is neither assessable as business income nor as income from house property.

18. Where a building, comprising of several floors, has been developed and reconstructed, would exemption under section 54/54F be available in respect of the cost of construction of -
(i) the new residential house (i.e., all independent floors handed over to the assessee); or
(ii) a single residential unit (i.e., only one independent floor)?

Solution:

CIT v. Gita Duggal (2013) 357 ITR 153 (Delhi)

In the present case, the assessee was the owner of property comprising the basement, ground floor, first floor and second floor. In the year 2006, she entered into a collaboration agreement with a builder for developing the property. According to the terms of the agreement, the builder was to demolish the existing structure on the plot of land and develop, construct, and/or put up a building consisting of basement, ground floor, first floor, second floor and third floor with terrace at its own costs and expenses. The assessee handed over to the builder, the physical possession of the entire property, along with 25% undivided interest over the land. The handing over of the entire property was, however, only for the limited purpose of development. The builder was to get the third floor plus the undivided interest in the land to the extent of 25% for his exclusive enjoyment. In addition to the cost of construction incurred by the builder on development of the property amounting to ` 3.44 crores, a further amount of `4 crores was payable by the builder to the assessee as consideration against the rights of the assessee.

The High Court held that sale consideration for the transfer should include not only the amount of ` 4 crores received by the assessee in cash, but also the cost of construction amounting to `3.44 crore incurred by the developer in respect of the other floors, which were handed over to the assessee. Therefore, the sale price of 3rd floor shall be taken as ` 7.44 crores.

The cost of construction incurred by the builder is to be added to the sale price, then, the same should also correspondingly be considered as re-investment in the residential house for exemption under section 54.

The High Court held that the fact that the residential house consists of several independent units cannot be permitted to act as an impediment to the allowance of the deduction under section 54 or section 54F. All the 3 floors will be considered as one residential house.

It is neither expressly nor by necessary implication prohibited. Therefore, the assessee is entitled to exemption of capital gains in respect of investment in the residential house, comprising of independent residential units handed over to the assessee.

Particulars	**` (in crores)**
Cost of land to the assessee (Assumed)	5
Cost of construction of four floors	3.44
Total cost of four floors	8.44
Cost of each floor	2.11
Sale price of 3rd floor	7.44
Less: Cost of 3rd Floor	2.11
LTCG	5.33

Investment in 3 floors eligible for deduction under section 54/ 54F	6.33
Capital Gains	NIL

5. PROFITS AND GAINS OF BUSINESS OR PROFESSION

19. Can depreciation on leased vehicles be denied to the lessor on the ground that the vehicles are registered in the name of the lessee and that the lessor is not the actual user of the vehicles?

Solution:

I.C.D.S. Ltd (Supreme Court)

Assessee was entitled to claim depreciation in respect of vehicles leased out since it has satisfied both the requirements of section 32, namely, ownership of the vehicles and its usage in the course of business.

20. Can waiver of loan given to the assessee by the Government of India from Steel Development Fund (SDF) to meet the capital cost of asset be reduced to arrive at the actual cost as per section 43(1) for computing depreciation under section 32?

Solution:

Steel Authority of India Ltd. (Delhi High Court)

The waiver of the loan, in this case, is not a mere quantification of a subsidy granted generally for industrial growth. It was granted specifically to the assessee, who had reduced the amount waived from the cost of the assets in its books of account. This accounting treatment reflects the analogous understanding by the assessee regarding the purpose of the grant of loan. The High Court, therefore, held that, by applying the main provision of section 43(1), the amount of loan waived by the Government is to be reduced from the cost of assets to arrive at the "actual cost" for computing depreciation.

21. Can the second proviso to section 32(1) be applied to restrict the additional depreciation under section 32(1)(iia) to 50%, if the new plant and machinery was put to use for less than 180 days during the previous year?

Solution:

M.M. Forgings Ltd. v. ACIT (Madras High Court)

If an asset is acquired on or after 1.04.2003, it was mandatory that the claim of the assessee made under section 32(1)(iia) had to be necessarily assessed by applying the second proviso to section 32(1). Since there is a statutory stipulation restricting the allowability of depreciation to 50% of the amount computed under section 32(1)(iia), where the asset is put to use for less than 180 days, the amount of depreciation allowable has to be restricted to 50% of the amount computed under section 32(1)(iia). The High Court, accordingly, affirmed the order of the Tribunal.

22. Can business contracts, business information, etc., acquired by the assessee as part of the slump sale and described as 'goodwill', be classified as an intangible asset to be entitled for depreciation under section 32(1)(ii)?

Solution:

Areva T and D India Ltd. (Delhi High Court)

The specified intangible assets acquired under the slump sale agreement by the assessee are in the nature of intangible asset under the category "other business or commercial rights of similar nature" specified in section 32(1)(i) and are accordingly eligible for depreciation under section 32(1)(ii).

23. Is the assessee entitled to depreciation on the value of goodwill considering it as an asset within the meaning of *Explanation 3(b)* to Section 32(1)?

Solution:

Smifs Securities Ltd. (Supreme Court)

A reading of the words 'any other business or commercial rights of similar nature' in *Explanation* 3(b) indicates that goodwill would fall under the said expression. In the process of amalgamation, the amalgamated company had acquired a capital right in the form of goodwill because of which the market worth of the amalgamated company stood increased. Therefore, it was held that 'Goodwill' is an asset under Explanation 3(b) to section 32(1) and depreciation thereon is allowable under the said section.

24. Is the assessee entitled to depreciation on value of goodwill considering it as "other business or commercial rights of similar nature" within the meaning of an intangible asset?

Solution:

B. Raveendran Pillai (Kerala)

When goodwill paid was for ensuring retention and continued business in the hospital, it was for acquiring a business and commercial right and it was comparable with trade mark, franchise, copyright etc., referred to in the first part of clause (ii) of section 32(1) and so, goodwill was covered by the above provision of the Act entitling the assessee for depreciation.

25. Would the phrase " used for purpose of business" in respect of discarded machine include use of such asset in the earlier years for claim of depreciation under section 32?

Solution:

Yamaha Motor India Pvt. Ltd. (Delhi High Court)

The discarded machinery may not be actually used in the relevant previous year but depreciation can be claimed as long as it was used for the purposes of business in the earlier years provided the block continues to exist in the relevant previous year. Therefore, the condition for claiming depreciation in respect of the discarded machine would be satisfied if it is used in the earlier previous years for the business.

26. Can EPABX and mobile phones be treated as computers to be entitled to higher depreciation at 60%?

Solution:

Federal Bank Ltd (Kerala High Court)

The rate of depreciation of 60% is available to computers and there is no ground to treat the communication equipment as computers. Hence, EPABX and mobile phones are not computers and therefore, are not entitled to higher depreciation at 60%.

27. Would beneficial ownership of assets suffice for claim of depreciation on such assets?

Solution:

Smt. A. Sivakami and Another (Mad. High Court)

The assessee has made available all the documents relating to the business and also established before the authorities that she is the beneficial owner, the High Court held that she was entitled to claim depreciation even though she was not the legal owner of the buses.

28. What is the nature of expenditure incurred on demolition and re-erection of a cell room and expenditure incurred on purchase of pumping set, mono block pump and two transformers, which were parts of a bigger plant – revenue or capital?

Solution:

Modi Industries Ltd. (Delhi High Court)

After completely demolishing the old cell room, an entire new cell room was erected. The money spent was not merely on repairs of the cell room, but for constructing a new cell room. Even the nomenclature of the entry, as given by the assessee, was "fabrication and erection charges of cell room Thus, it was nothing but a complete demolition of the old cell room and construction/erection of a new cell room in its place. The expenditure incurred on the cell room was capital expenditure. However, so far as purchase of pumping set, mono block pump with HP motors and two transformers were concerned, they were not stand alone equipment, but were part of the bigger plant. Therefore, it would be treated as replacement of those parts and the expenditure would be eligible for deduction under section 37(1).

29. Is the expenditure incurred on payment of retrenchment compensation and interest on money borrowed for payment of retrenchment compensation on closure of one of the textile manufacturing units of the assessee-company, revenue in nature?

Solution:

DCM Ltd. (Delhi High court)

Deduction was allowable in respect of expenditure on payment of retrenchment compensation and interest on money borrowed for payment of retrenchment compensation.

30. What would be the nature of the repair and reconditioning expenditure incurred on a machine which broke down years ago – Revenue or Capital?

Solution:

Bharat Gears Ltd (Delhi High court)

The machinery which was repaired had outlived its utility and huge expenditure was incurred in replacing many vital parts in order to make the same functional. The expenditure was of such nature that it brought into existence a new machinery altogether and consequently, there was a benefit of enduring nature to the assessee even though technically no new asset came into

existence. Therefore, the Delhi High Court observed that it is in the nature of capital expenditure on which depreciation can be claimed.

31. Would the expenditure incurred on issue and collection of convertible debentures be treated as revenue expenditure or capital expenditure?

Solution:

ITC Hotels Ltd (Karnataka High Court)

The expenditure incurred on the issue and collection of debentures shall be treated as revenue expenditure even in case of convertible debentures, i.e. the debentures which had to be converted into shares at a later date.

32. Would expenditure incurred on feasibility study conducted for examining proposals for technological advancement relating to the existing business be classified as a revenue expenditure, where the project was abandoned without creating a new asset?

Solution:

Priya Village Roadshows Ltd (Delhi High court)

Since the feasibility studies were conducted by the assessee for the existing business with a common administration and common fund and the studies were abandoned without creating a new asset, the expenses were of revenue nature.

33. Can the expenditure incurred for purchase of second hand medical equipment for use as spare parts for existing equipment be claimed as revenue expenditure?

Solution:

Dr. Aswath N. Rao (Karnataka High Court)

Since the second hand machinery purchased by the assessee is for use as spare parts for the existing old machinery, the same had to be allowed as revenue expenditure. Since the entire sale consideration was paid on 31st March of the relevant previous year and the machinery was also dispatched by the vendor from USA, the sale transaction was complete on that date. The title to the goods had passed on to him on that date and he became the owner of the machinery even though the goods reached India only in August next year. Therefore, the assessee was eligible to claim deduction of expenditure in the relevant previous year ended 31st March.

34. Can the amount incurred by the assessee for replacing the old mono sound system in its cinema theatre with a new Dolby stereo system be treated as revenue expenditure?

Solution:

Sagar Talkies (Karnataka High Court)

The assessee had provided certain amenities to its customers by replacing the old system with a better sound system and by introducing such system, the assessee had not increased its income in any way. The assessee installed dolby stereo system instead of repairing the existing old stereo system. This had not benefited the assessee in any way with regard to the total income since there was no change in the seating capacity of the theatre or increase in the tariff rate of the ticket. In such a case, the expenditure on such change of sound system could not be considered capital in nature.

35. Can expenditure incurred on alteration of a dam to ensure adequate supply of water for the smelter plant owned by the assessee be allowed as revenue expenditure?

Solution:

Hindustan Zinc Ltd (Raj. High court)

The expenditure incurred by the assessee for commercial expediency relates to carrying on of business. The expenditure is of such nature which a prudent businessman may incur for the purpose of his business. The operational expenses incurred by the assessee solely intended for the furtherance of the enterprise can by no means be treated as expenditure of capital nature.

36. Can the commission paid to doctors by a diagnostic centre for referring patients for diagnosis be allowed as a business expenditure under section 37 or would it be treated as illegal and against public policy to attract disallowance?

Solution:

Kap Scan and Diagnostic Centre P. Ltd. (P&H)

Commission paid to doctors for referring patients for diagnosis is not allowable as business expenditure.

37. Can expenditure incurred by a company on higher studies of the director's son abroad be claimed as business expenditure under section 37 on the contention that he was appointed as a

trainee in the company under "apprentice training ", where there was no proof of existence of such scheme?

Solution:

Echjay Forgings Ltd (Bombay High Court)

There was no nexus between the education expenditure incurred abroad for the director's son and the business of the assessee company. Therefore, the aforesaid expenditure was not deductible.

38. Can the expenditure incurred on heart surgery of an assessee, being a lawyer by profession, be allowed as business expenditure under section 31, by treating it as current repairs considering heart as plant and machinery, or under section 37, by treating it as expenditure incurred wholly and exclusively for the purpose of business or profession?

Solution:

Shanti Bhushan (Delhi High Court)

No direct nexus between the expenses incurred by the assessee on the heart surgery and his efficiency in the professional field Therefore, the claim for allowing the said expenditure under section 37 is also not tenable. Hence, the heart surgery expenses shall not be allowed as a business expenditure of the assessee under the Income-tax Act, 1961.

39. Can payment to police personnel and gundas to keep away from the cinema theatres run by the assessee be allowed as deduction?

Solution:

Neelavathi & Others (Karnataka High Court)

If the assessee had incurred expenditure for the purpose of security, the same would have been allowed as deduction. However, in the instant case, since the payment has been made to the police and gundas to keep them away from the business premises, such a payment is illegal and hence, not allowable as deduction.

40. Is the amount paid by a construction company as regularization fee for violating building bye-laws allowable as deduction?

Solution:

Millennia Developers (P) Ltd (Karnataka High Court)

The amount paid to compound an offence is obviously a penalty and hence, does not qualify for deduction under section 37. Merely describing the payment as a compounding fee would not alter the character of the payment.

41. Can remuneration paid to working partners as per the partnership deed be considered as unreasonable and excessive for attracting disallowance under section 40A(2)(a) even though the same is within the statutory limit prescribed under section 40(b)(v)?

Solution:

Great City Manufacturing Co (All. High Court)

The question of disallowance of remuneration under section 40A(2)(a) does not arise in this case, since the Tribunal has found that all the three conditions mentioned above have been satisfied. Hence, the remuneration paid to working partners within the limits specified under section 40(b)(v) cannot be disallowed by invoking the provisions of section 40A(2)(a).

42. Can the waiver of principal amount of loan taken for purchase of capital asset by the bank be treated as "benefit arising out of business" or "a remission of trading liability" for taxability as business income of the company?

Solution:

Iskraemeco Regent Ltd (Mad.High Court)

The provisions of section 41(1) are attracted only in case of remission of a trading liability. Since the loan was taken for purchase of capital assets, waiver of a portion of principal would not amount to remission of a trading liability to attract the provisions of section 41(1). Further, such waiver cannot be treated as a benefit arising out of business and consequently, section 28(iv) will not apply in respect of such loan transaction.

43. Can the provisions of section 41(1) be invoked both in respect of waiver of working capital loan utilized for day-to-day business operations and in respect of waiver of term loan taken for purchasing a capital asset?

Solution:

Rollatainers Ltd. (Delhi High Court)

Term loan for purchase of capital assets, is not a trading liability. Therefore, the provisions of section 41(1) are not attracted in this case since the waiver was in respect of a term loan taken for a capital asset and hence, cannot be treated as remission or cessation of a trading liability. Thus, the waiver of such term loans cannot be treated as income of the assessee. However, in case loan is written off in the cash credit account, the benefit is in the revenue field as the money had been borrowed for day-to-day affairs and not for the purchase of capital asset. These loans were for circulating capital and not fixed capital. Therefore, the writing off of these loans on the cash credit account which was received for carrying out the day-to-day operations of the assessee amounted to remission of a trading liability and hence, has to be treated as income in the hands of the assessee by virtue of section 41(1).

44. Can unpaid electricity charges be treated as "fees" to attract disallowance under section 43B?

Solution:

Andhra Ferro Alloys P. Ltd. (A.P High Court)

The provisions of section 43B do not incorporate electricity charges. Therefore, non-payment of electricity charges would not attract disallowance under section 43B since such charges cannot be termed as "fees".

45. Can waiver of loan or advance taken for the purpose of relocation of office premises be treated as a revenue receipt liable to tax?

Solution:

CIT v. Softworks Computers P. Ltd. (2013) 354 ITR 16 (Bom.)

The Bombay High Court held that since the advance taken by the assessee-company was utilized by it for the purpose of relocating its office premises i.e., for acquisition of a capital asset, namely, a new office, the waiver of the same cannot be said to be waiver or remission of trading liability to attract taxability under the Act. Waiver of such advance, being capital in nature, is not taxable under the Act.

46. Is Circular No. 5/2012 dated 01.08.2012 disallowing the expenditure incurred on freebies provided by pharmaceutical companies to medical practitioners, in line with Explanation to section 37(1), which disallows expenditure which is prohibited by law?

Solution:

Confederation of Indian Pharmaceutical Industry (SSI) v. CBDT (2013) 353 ITR 388 (H.P.)

The High Court held that the contention of the assessee that the above mentioned Circular goes beyond section 37(1) was not acceptable. As per Explanation to section 37(1), it is clear that any expenditure incurred by an assessee for any purpose which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession. The sum and substance of the circular is also the same. Therefore, the circular is totally in line with the Explanation to section 37(1).

However, if the assessee satisfies the assessing authority that the expenditure incurred is not in violation of the regulations framed by the Medical Council then it may legitimately claim a deduction, but it is for the assessee to satisfy the Assessing Officer that the expense is not in violation of the Medical Council Regulations.

47. Where goods have been confiscated by custom authorities in a foreign country due to certain statutory violation, can the same be treated as a loss of stock-in-trade, and claimed as deduction?

Solution:

CIT v. T. C. Reddy (2013) 356 ITR 516 (Andhra)

Same as *Dr. T.A. Qureshi (SC)*

The High Court held that the **loss arising on confiscation of pharmaceutical drugs is a business loss,** based on the Supreme Court's decision in Dr. T. A. Qureshi's case.

48. Can the amount of employees' contribution towards provident fund, deducted and credited to the employee's PF account by the employer-assessee after the "due date" under the EPF & Miscellaneous Provisions Act, 1952, but before the due date of filing return of income under the Income-tax Act, 1961, be allowed as deduction while computing business income of the employer-assessee?

Solution:

CIT v. Kichha Sugar Co. Ltd. (2013) 356 ITR 351 (Uttarakhand)

Same as *AIMIL Ltd. (Del.)*

The High Court observed that the "due date" referred to in section 36(1)(va) must be read in conjunction with the "due date" referred to in the first proviso to section 43B. A combined reading of both the sections would make it clear that the due date referred to in section

36(1)(va) is the due date as mentioned in section 43B i.e., the due date of filing of return of income.

Therefore, any amount of employees' contribution paid by the employer-assessee to the provident fund authorities after the due date under the Employees Provident Fund & Miscellaneous Provisions Act, 1952 (EPF & MP Act) but before the due date of filing the return for the previous year, shall be allowable as deduction in the hands of the employer-assessee.

49. Whether conversion of sales tax liability into a loan pursuant to a Government order would entitle the assessee to deduction in the year of conversion, being the year in which the Government order is issued, inspite of the fact that the said order was communicated to the assessee only in the next year?

Solution:

CIT v. Minda Wirelinks Pvt. Ltd. (2013) 357 ITR 668 (Delhi)

The High Court held that sales tax liability shall be allowed in the year in which it was converted into a loan on the basis of the Government order issued, irrespective of the fact that the Government order was not communicated to assessee within the relevant assessment year. Sales tax liability converted into loan would be deemed as actual payment in the year of conversion.

However, interest on loan or borrowing or advance converted into a loan / borrowing / advance, would be deemed as actual payment not in the year of conversion but only in the year in which the converted interest, by whatever name called, is actually paid.

50. Can deduction for interest on borrowed funds be disallowed on the ground that such funds have been diverted as advances to directors, where there has been a consistent increase in the amount of advances given to directors, without corresponding return and without any increase in the performance of the company?

Solution:

A. Murali and Co. P. Ltd.v. ACIT (2013) 357 ITR 580 (Mad.)

The High Court further observed that except for stating that the assessee had made borrowals in the immediate preceding accounting year, no materials were placed before the court or before any other authority to show that the borrowed funds were not diverted for any purpose other than business. The mere contention that the borrowed funds were utilised for the purchase of trading goods per se could not be taken as a good ground to accept the plea of the

assessee, considering the fact that the advances given to the directors had consistently increased from ` 3.23 crores to ` 3.91 crores without corresponding return and with no better performance in the business of the assessee. Hence, the High Court held that the amount of interest on borrowed capital was not deductible.

51. What is the nature of expenditure incurred on glow-sign boards displayed at dealer outlets - capital or revenue?

Solution:

CIT v. Orient Ceramics and Industries Ltd. (2013) 358 ITR 49 (Delhi)

The Delhi High Court noted the following-

(i) The expenditure incurred by the assessee on glow sign boards does not bring into existence an asset or advantage for the enduring benefit of the business.

(ii) The glow sign board is not an asset of permanent nature. It has a short life.

(iii) The materials used in the glow sign boards decay with the effect of weather. Therefore, it requires frequent replacement. Consequently, the assessee has to incur expenditure on glow sign boards regularly in almost each year.

(iv) The assessee incurred expenditure on the glow sign boards with the object of facilitating the business operation and not with the object of acquiring asset of enduring nature.

The Delhi High Court held that such expenditure on glow sign boards displayed at dealer outlets was revenue in nature.

52. What is the eligible rate of depreciation in respect of computer accessories and peripherals under the Income-tax Act, 1961?

Solution:

CIT v. BSES Yamuna Powers Ltd (2013) 358 ITR 47 (Delhi)

The High Court observed that computer accessories and peripherals such as printers, scanners, UPS and server etc. form an integral part of the computer system and they cannot be used without the computer. Consequently, the High Court held that since they are part of the computer system, they would be eligible for depreciation at the higher rate of 60% applicable to computers.

53. Where the stamp duty value under section 50C has been adopted as the full value of consideration, can the reinvestment made in acquiring a residential property, which is in excess

of the actual net sale consideration, be considered for the purpose of computation of exemption under section 54F, irrespective of the source of funds for such reinvestment?

Solution:

Gouli Mahadevappa v. ITO (2013) 356 ITR 90 (Kar.)

In this case, actual sale price was ` 20 Lakhs and stamp duty value of ` 36 lakhs was deemed as sales price as per section 50C. Assessee invested ` 36 lakhs in new residential house property by taking a loan of ` 16 lakhs.

On the issue of exemption under section 54F, the High Court held that when capital gain is assessed on notional basis as per the provisions of section 50C, and the higher value i.e., the stamp duty value of `36 lakhs under section 50C has been adopted as the full value of consideration, the entire amount of `36 lakhs reinvested in the residential house within the prescribed period should be considered for the purpose of exemption under section 54F, irrespective of the source of funds for such reinvestment.

54. Can the conversion of land held as stock-in-trade into investment just before the sale of property, for the purpose of availing the benefit of concessional rate of tax as well as indexation benefit on long-term capital gains, be treated as furnishing of inaccurate particulars of income to attract levy of penalty?

Solution:

CIT v. Splender Construction (2013) 352 ITR 588 (Delhi)

The High Court, held that the issue was not a debatable one, considering that –

- the order of the Assessing Officer rejecting assesse's view was sustained by all appellate authorities; and
- it had also dismissed the appeal at the admission stage itself, there and then, after hearing the arguments.

Accordingly, the penalty order of the Assessing Officer was correct.

55. Can loan, exceeding the specified limit, advanced by a partnership firm to the sole-proprietorship concern of its partner be viewed as a violation of section 269SS to attract levy of penalty?

Solution:

CIT v. V. Sivakumar (2013) 354 ITR 9 (Mad.)

The High Court, relying upon the various court decisions, upheld the decision of the Tribunal holding that there is no separate identity for the partnership firm and that the partner is entitled to use the funds of the firm. In the present case, the assessee has acted bonafide and that there was a reasonable cause within the meaning of section 273B. Therefore, the transaction cannot be said to be in violation of section 269SS and no penalty is attracted in this case.

56. Can share issue expenses incurred by a company be treated as capital in nature, if the public issue could not ultimately materialize on account of non-clearance by SEBI?

Solution:

Mascon Technical Services Ltd. v. CIT (2013) 358 ITR 545 (Mad.)

Facts of the case:

The assessee-company incurred share issue expenses of `35.39 lakh for its proposed public issue, which could not ultimately materialize due to non-clearance by the SEBI. It claimed such expenses as revenue in nature, on the ground that the same was incurred for augmenting its working capital. The claim of the assessee was, however, rejected by the Assessing Officer.

High Court's Decision:

The High Court noted that the assessee-company had taken steps to go in for a public issue and incurred share issue expenses for the same. However, it could not go in for the public issue by reason of the orders issued by the SEBI just before the proposed issue. Though the efforts were aborted, the fact remains that the expenditure incurred was only for the purpose of expansion of the capital base.

The capital nature of the expenditure would not be lost on account of the abortive efforts. The expenditure, therefore, constitutes a capital expenditure.

57. Can depreciation under section 32 be allowed on the plant and machinery which is ready for use but could not be put to use at any time during the previous year due to some extraneous reason, for example, paucity of raw material?

Solution:

CIT v. Chennai Petroleum Corporation Ltd. (2013) 358 ITR 314 (Mad.)

The assessee claimed depreciation on the gas sweetening plant, which was built during the relevant previous year and was not used in that year on account of non-availability of raw material i.e., sour gas.

High Court's observations:

The High Court held that so long as the business was a going one and the machinery got ready for use but could not be put to use due to certain extraneous circumstances, depreciation under section 32 would be allowable.

High Court's decision:

The High Court confirmed the majority decision of the Tribunal holding that, in this case, the machinery was entitled to depreciation since the business was a going concern and the machinery, being ready for use, could not be actually put to use due to an extraneous reason, namely, raw material paucity.

58. In the case of an assessee, being a dealer in shares and securities, whose portfolio comprises of shares held as stock-intrade as well as shares held as investment, is it permissible under law to convert a portion of his stock-in-trade into investment and if so, what would be the tax treatment on subsequent sale of such investment?

Solution:

CIT v. Yatish Trading Co. Pvt. Ltd. (2013) 359 ITR 320 (Bom.)

Facts of the case:

The assessee, being a dealer in shares and securities, has a trading as well as an investment portfolio of shares and securities. On 1st April 2010 and 1st October 2012, the assessee converted certain shares and securities held as stock-in-trade into investments and thereafter, in the A.Y.2014-15, it transferred such converted shares and securities and declared income arising on such transfer under the head "Profits and gains of business or profession" and "Capital gains".

The profits and gains up to the date of conversion was offered as business income (i.e., fair market value on the date of conversion minus the cost of acquisition).

The profits and gains arising after conversion up to the date of sale was offered as capital gains (i.e., sale price minus the fair market value on the date of conversion).

The Assessing Officer, however, assessed the entire income arising on transfer of such converted shares and securities as business income.

Appellate Authorities' findings & views:

The Tribunal noted that the Department had accepted the conversion of stock-in-trade into investment while assessing the income of A.Y.2012-13 and A.Y.2013-14. Further, the books of account of the assessee showed such shares (on which the assessee offered income as capital gains) as investment. Also, the mere fact that the assessee company was trading in shares and securities cannot estop it from holding certain shares as investment and offering the gains on

sale of such shares to tax under the head "Capital gains". It is open for a trader in shares to have a trading as well as an investment portfolio of shares and securities.

High Court's decision:

The High Court concurred with the Tribunal's ruling that the gains arising on sale of those shares held as investments by the dealer-assessee (i.e., the difference between the sale price and the fair market value on the date of conversion) were to be assessed under the head "Capital gains" and not under the head "Profits and gains of business or profession".

6. CAPITAL GAINS

59. What are the factors determining the nature of income arising on sale of shares i.e. whether the income is taxable as capital gains or business income?

Solution:

PVS Raju (AP. High Court)

The question whether the shares were held as an investment to give rise to capital gain on its sale or as a trading asset to give rise to business income is not a pure question of law but essentially one of fact.

60. Where a leasehold property is purchased and subsequently converted into freehold property and then sold, should the period of holding be reckoned from the date of purchase or from the date of conversion for determining whether the resultant capital gains is short-term or long-term?

Solution:

Smt. Rama Rani Kalia (All. High Court)

Conversion of the rights of the lessee from leasehold to freehold is only by way of improvement of her rights over the property, which she enjoyed. It would not have any effect on the taxability of gain from such property, which is related to the period over which the property is held. Since, in this case, the period of holding is more than 36 months, the resultant capital gains would be long-term.

61. In determining the period of holding of a capital asset received by a partner on dissolution of firm, can the period of holding of the capital asset by the firm be taken into account?

Solution:

P. P. Menon (Ker. High Court)

The benefit of including the period of holding of the previous owner under section 2(42A) read with section 49(1)(iii)(b) can be availed only if the dissolution of the firm had taken place at any time before April 1, 1987.In this case, the firm was dissolved on April 15, 2001 and therefore the benefit of these sections would not be available to the assessee. Therefore, in this case, the period of holding of the asset received by the assessee-partner on dissolution of the firm has to be reckoned only from the date of dissolution of the firm. Since the assessee-partner has sold the property within three days of acquiring the same, the gains have to be treated as short-term capital gain.

62. What would be the period of holding to determine whether the capital gains on renunciation of right to subscribe for additional shares is short-term or long-term?

Solution:

Navin Jindal (SC)

The capital gains on renunciation of right to subscribe for additional shares is short-term or long-term, the period of holding would be from the date on which such right to subscribe for additional shares comes into existence upto the date of renunciation of such right.

63. Whether indexation benefit in respect of the gifted asset shall apply from the year in which the asset was first held by the assessee or from the year in which the same was first acquired by the previous owner?

Solution:

Manjula J. Shah (Bombay High Court)

The indexed cost of acquisition in case of gifted asset has to be computed with reference to the year in which the previous owner first held the asset and not the year in which the assessee became the owner of the asset.

64. Would an assessee be entitled to exemption under section 54 in respect of purchase of two flats, adjacent to each other and having a common meeting point?

Solution:

Syed Ali Adil (A.P. High Court)

The assessee was entitled to investment in both the flats purchased by him, since they were adjacent to each other and had a common meeting point, thus, making it a single residential unit.

65. Can exemption under section 54B be denied solely on the ground that the new agricultural land purchased is not wholly owned by the assessee, as the assessee's son is a co-owner as per the sale deed?

Solution:

Gurnam Singh (P&H High Court)

Merely because the assessee's son was shown in the sale deed as co-owner, it did not make any difference. It was not the case of the Revenue that the land in question was exclusively used by the son. Therefore, the assessee was entitled to deduction under section 54B.

66. Can exemption under section 54F be denied solely on the ground that the new residential house is purchased by the assessee exclusively in the name of his wife?

Solution:

Kamal Wahal (Delhi High Court)

That the assessee is entitled to claim exemption under section 54F in respect of utilization of sale proceeds of capital asset for investment in residential house property in the name of his wife.

67. In case of a house property registered in joint names, whether the exemption under section 54F can be allowed fully to the co-owner who has paid whole of the purchase consideration of the house property or will it be restricted to his share in the house property?

Solution:

Ravinder Kumar Arora (Delhi High Court)

The assessee was the real owner of the residential house in question and mere inclusion of his wife's name in the sale deed would not make any difference. The High Court also observed that section 54F mandates that the house should be purchased by the assessee but it does not stipulate that the house should be purchased only in the name of the assessee. In this case, the house was purchased by the assessee in his name and his wife's name was also included additionally. Therefore, the conditions stipulated in section 54F stand fulfilled and the entire

exemption claimed in respect of the purchase price of the house property shall be allowed to the assessee.

68. Can exemption under section 54F be denied to an assessee in respect of investment made in construction of a residential house, on the ground that the construction was not completed within three years after the date on which transfer took place, on account of pendency of certain finishing work like flooring, electrical fittings, fittings of door shutter, etc?

Solution:

Sambandam Udaykumar (Karnataka High Court)

The assessee would be entitled to exemption under section 54F in respect of the amount invested in construction within the prescribed period.

69. Can the assessee claim exemption under section 54F, on account of capital gain arising on transfer of depreciable assets held for more than 36 months i.e. a long-term capital asset, though the same is deemed as capital gain arising on transfer of short-term capital asset by virtue of section 50?

Solution:

Rajiv Shukla (Delhi High Court)

The deeming fiction created by section 50 that the capital gain arising on transfer of a depreciable asset shall be treated as capital gain arising on transfer of short-term capital asset is only for the purpose of sections 48 and 49 and not for the purpose of any other section Section 54F being an independent section will not be bound by the provisions of section 50. The depreciable asset if held for more than 36 months shall be a long-term capital asset as per the provisions of section 2(29A).Therefore, the exemption under section 54F on transfer of depreciable asset held for more than 36 months cannot be denied on account of fiction created by section 50.

70. Can exemption under section 54EC be denied on account of the bonds being issued after six months of the date of transfer even though the payment for the bonds was made by the assessee within the six month period?

Solution:

Hindustan Unilever Ltd (Bombay High Court)

The purpose of the provisions of section 54EC, the date of investment by the assessee must be regarded as the date on which payment is made. The High Court, therefore, held that if such payment is within a period of six months from the date of transfer, the assessee would be eligible to claim exemption under section 54EC.

71. Where transfer of shares in a company has been effected, fulfilling all the requirements for claim of exemption under section 10(38), can such exemption be denied on the ground that the transaction is a colorable device, since the underlying asset transferred is, in effect, land, which is a short-term capital asset, on sale of which capital gains tax liability would have been attracted?

Solution:

Bhoruka Engineering Inds. Ltd. (Karnataka High Court)

The assessee-company was holding shares in BFSL from 1st October, 1984. Therefore, the shares represent a long-term capital asset. The transaction had taken place subsequent to 28th September, 2004. Hence, the second condition for claim of exemption is fulfilled. The transaction had taken place through the Magadh Stock Exchange and securities transaction tax has been paid on such sale. Where all the three conditions have been fulfilled, the assessee is entitled to exemption under section 10(38) in respect of long-term capital gains arising from such transfer. Merely because capital gains tax liability would have been attracted had a registered sale deed been executed by BFSL for selling land to DLFCDL, it cannot be concluded that the shareholders of BFSL transferring their shares after complying with the legal requirements would not be entitled to the benefit of exemption. The High Court further noted that the companies involved in the transaction were existing companies. Thus, neither of the companies came into existence as a part of the scheme for purchase of immovable property or transfer of shares for the purpose of evading payment of tax. The event of transfer of shares happened in ordinary course of business and is legal. The transaction is, therefore, real, valuable consideration is paid, all legal formalities are complied with, and what is transferred is shares and not immovable property. Hence, it is a valid legal transaction and cannot be termed as a colorable device or sham transaction or an unreal transaction.

7. INCOME FROM OTHER SOURCES

72. What are the tests for determining "substantial part of business" of lending company for the purpose of application of exclusion provision under section 2(22)?

Solution:

Parle Plastics Ltd. (Bombay High Court)

Since lending of money was a substantial part of the business of the lending company, the money given by it by way of advance or loan to the assessee could not be regarded as a dividend, as it had to be excluded from the definition of "dividend" by virtue of the specific exclusion in section 2(22).

73. Can the loan or advance given to a shareholder by the company, in return of an advantage conferred on the company by the shareholder, be deemed as dividend under section 2(22)(e) in the hands of the shareholder?

Solution:

Pradip Kumar Malhotra (Cal. High Court)

The advance given to the assessee by the company was not in the nature of a gratuitous advance; instead it was given to protect the interest of the company. Therefore, the said advance cannot be treated as deemed dividend in the hands of the shareholder under section 2(22)(e).

74. Would the provisions of deemed dividend under section 2(22)(e) be attracted in respect of financial transactions entered into in the normal course of business?

Solution:

Ambassador Travels (P) Ltd. (Delhi High Court)

The assessee was involved in booking of resorts for the customers of these companies and entered into normal business transactions as a part of its day-to-day business activities. The High Court, therefore, held that such financial transactions cannot under any circumstances be treated as loans or advances received by the assessee from these concerns for the purpose of application of section 2(22)(e).

75. Can winnings of prize money on unsold lottery tickets held by the distributor of lottery tickets be assessed as business income and be subject to normal rates of tax instead of the rates prescribed under section 115BB?

Solution:

Manjoo and Co (Kerala High Court)

The rate of 30% prescribed under section 115BB is applicable in respect of winnings from lottery received by the distributor.

8. SET OFF AND CARRY FORWORD OF LOSSES

76. Can the loss suffered by an erstwhile partnership firm, which was dissolved, be carried forward for set-off by the individual partner who took over the business of the firm as a sole proprietor, considering the succession as a succession by inheritance?

Solution:

Pramod Mittal v. CIT (2013) 356 ITR 456 (Delhi)

If a partnership firm was dissolved and the takeover of the running business of the firm by the erstwhile partner as a sole proprietor was not a case of succession by inheritance. Hence, the carry forward of losses of the firm by the sole proprietor was not allowed in this case.

Note: In *Madhukant M. Mehta's* case, the sole proprietor had expired and after his death the heirs succeeded the business as a partnership concern. Therefore, the losses suffered by the deceased proprietor was allowed to be set-off by the partnership firm since the case falls within the exception mentioned under section 78(2), i.e., a case of succession by inheritance.

9. DEDUCTIONS FROM GROSS TOTAL INCOME

77. Can unabsorbed depreciation of a business of an industrial undertaking eligible for deduction under section 80-IA be set off against income of another non-eligible business of the assessee?

Solution:

Swarnagiri Wire Insulations Pvt. Ltd. (Karnataka High Court)

It is a generally accepted principle that deeming provision of a particular section cannot be breathed into another section. Therefore, the deeming provision contained in section 80-IA(5) cannot override the provisions of section 70(1). The assessee had incurred loss in eligible business after claiming depreciation. Hence, section 80-IA becomes insignificant, since there is no profit from which this deduction can be claimed. It is thereafter that section 70(1) comes into play, whereby the assessee is entitled to set off the losses from one source against income from another source under the same head of income. The Court, therefore, held that the assessee was entitled to the benefit of set of 57 of loss of eligible business against the profits of non-eligible business. However, once set-off is allowed under section 70(1) against income from another source under the same head, a deduction to such extent is not possible in any subsequent assessment year i.e., the loss (arising on account of balance depreciation of eligible business) so set-off under section 70(1) has to be first deducted while computing profits eligible for deduction under section 80-IA in the subsequent year.

78. Can freight subsidy arising out of the scheme of Central Government be treated as a "profit derived from the business" for the purposes of section 80-IA?

Solution:

Kiran Enterprises (HP High Court)

On appeal, the High Court held that the transport subsidy received by the assessee was not a profit derived from business since it was not an operational profit. The source was not the business of the assessee but the scheme of Central Government. The words "derived from" are narrower in connotation as compared to the words "attributable to". Therefore, the freight subsidy cannot be treated as profits derived from the business for the purposes of section 80-IA.

79. Would grant of transport subsidy, interest subsidy and refund of excise duty qualify for deduction under section 80-IB?

Solution:

Meghalaya Steels Ltd. (Gauhati High Court)

The payment of Central excise duty had a direct nexus with the manufacturing activity and similarly, the refund of the Central excise duty also had a direct nexus with the manufacturing activity, being a profit-linked incentive, since payment of the Central excise duty would not arise

in the absence of any industrial activity. Therefore, the refund of excise duty had to be taken into account for purposes of section 80-IB.

80. Does income derived from sale of export incentive qualify for deduction under section 80-IB?

Solution:

Jaswand Sons (P&H High Court)

Income derived from sale of export incentive cannot be said to be income "derived from" the industrial undertaking and therefore, such income is not eligible for deduction under section 80-IB.

81. Whether the process of bottling of gas into gas cylinders amounts to production of gas cylinders for the purpose of deduction under section 80-IB?

Solution:

Puttur Petro Products P. Ltd. (Karnataka High Court)

The process of bottling of gas into gas cylinders, which requires a very specialised process and independent plant and machinery, amounts to production of "gas cylinders" containing gas for the purpose of claiming deduction under section 80-IB.

82. Would the procurements of parts and assembling them to make windmill fall within the meaning of "manufacture" and "production" to be entitled to deduction under section 80-IB?

Solution:

Chiranjjeevi Wind Energy Ltd. (Madras High Court)

The different parts procured by the assessee could not be treated as a windmill individually. Those different parts had distinctive names and only when assembled together, they got transformed into an ultimate product which was commercially known as a "windmill". Thus, such an activity carried on by the assessee would amount to "manufacture" as well as "production" of a thing or article to qualify for deduction under section 80-IB.

83. Can an industrial undertaking engaged in manufacturing or producing articles or things treat the persons employed by it through agency (including contractors) as "workers" to qualify for claim of deduction under section 80-IB?

Solution:

Jyoti Plastic Works Private Limited (Bombay High Court)

The Tribunal was justified in holding that the condition of section 80-IB(2)(iv) had been fulfilled and therefore, the deduction under section 80-IB is allowable.

84. Does the period of exemption under section 80-IB commence from the year of trial production or year of commercial production? Would it make a difference if sale was effected from out of the trial production?

Solution:

Nestor Pharmaceuticals Ltd. / Sidwal Refrigerations Ind Ltd. (Delhi High Court)

The manufacture for the purpose of marketing the goods had not started which starts only with commercial production, namely, when the final product to the satisfaction of the manufacturer has been brought into existence and is fit for marketing. However, in this case, since the assessee had effected sale in March 1998, it had crossed the stage of trial production and the final saleable product had been manufactured and sold. The quantum of commercial sale and the purpose of sale (namely, to obtain registration of excise / sales-tax) is not material. With the sale of those articles, marketable quality was established. Therefore, the conditions stipulated in section 80-IB were fulfilled with the commercial sale of the two items in that assessment year, and hence the five year period has to be reckoned from A.Y.1998-99.

85. Can an assessee who has not claimed deduction under section 80-IB in the initial years, start claiming deduction thereunder for the remaining years during the period of eligibility, if the conditions are satisfied?

Solution:

Praveen Soni (Delhi High Court)

The provisions of section 80-IB nowhere stipulated a condition that the claim for deduction under this section had to be made from the first year of qualification of deduction failing which the claim will not be allowed in the remaining years of eligibility. Therefore, the deduction under section 80-IB should be allowed to the assessee for the remaining years up to the period for which his entitlement would accrue, provided the conditions mentioned under section 80-IB are fulfilled.

86. Can Duty Drawback be treated as profit derived from the business of the industrial undertaking to be eligible for deduction under section 80-IB?

Solution:

CIT v. Orchev Pharma P. Ltd. (2013) 354 ITR 227 (SC)

Same as *Liberty India v. Commissioner of Income-tax (SC) (2009)*

On this issue, the Supreme Court, following the decision in case of Liberty India v. CIT (2009) 317 ITR 218 (SC) held that Duty Drawback receipts cannot be said to be profits derived from the business of industrial undertaking for the purpose of computation of deduction under section 80-IB.

10. ASSESSMENT OF VARIOUS ENTITIES

87. Would the ancestral property received by the assessee after the death of his father, be considered as HUF property or as his individual property, where the assessee's father had received such property as his share when he went out of the joint family under a release deed?

Solution:

D. L. Nandagopala Reddy (Individual) (Karnataka High Court)

The High Court held that that when the property came to the hands of the assessee, it was not his self-acquired property; it was property belonging to his HUF. The assessee had given a portion of the property to his wife without a registered document, which is possible only if the property is a HUF property. If such property is treated as a self-acquired property, then assessee would have been able to give the portion of the property to his wife only by registered document.

88. Under which head of income is rental income from plinths inherited by individual co-owners from their ancestors taxable - "Income from house property" or "Income from other sources"? Further, would such income be assessable in the hands of the individual co-owners or in the hands of the Association of Persons?

Solution:

Shudir Nagpal (P & H High Court)

That the income from letting out the plinths is assessable under section 56 as "Income from other sources" and not under the head "Income from house property".

89. Would the interest earned on surplus funds of a club deposited with institutional members satisfy the principle of mutuality to escape taxability?

Solution:

Madras Gymkhana Club (Madras High Court)

Interest earned from investment of surplus funds in the form of fixed deposits with institutional members does not satisfy the principle of mutuality and hence cannot be claimed as exempt on this ground. The interest earned is, therefore, taxable.

90. Can transfer fees received by a co-operative housing society from its incoming and outgoing members be exempt on the ground of principle of mutuality?

Solution:

Sind Co-operative Housing Society (Bombay High Court)

Transfer fees received by a co-operative housing society, whether from outgoing or from incoming members, is not liable to tax on the ground of principle of mutuality since the predominant activity of such co-operative society is maintenance of property of the society and there is no taint of commerciality, trade or business. Further, section 28(iii), which provides that income derived by a trade, professional or similar association from specific services performed for its members shall be treated as business income, can have no application since the co-operative housing society is not a trade or professional association.

91. Would non-resident match referees and umpires in the games played in India fall within the meaning of "sportsmen" to attract taxability under the provisions of section 115BBA, and consequently attract the TDS provisions under section 194E in the hands of the payer?

Solution:

Indcom (Cal High Court)

The payments made to non-resident umpires and the match referees are "income" which has accrued and arisen in India, the same are not taxable under the provisions of section 115BBA and thus, the assessee is not liable to deduct tax under section 194E.

92. In a case where the partnership deed does not specify the remuneration payable to each individual working partner but lays down the manner of fixing the remuneration, would the assessee-firm be entitled to deduction in respect of remuneration paid to partners?

Solution:

Anil Hardware Store (HP High court)

The manner of fixing the remuneration of the partners has been specified in the partnership deed. In a given year, the partners may decide to invest certain amounts of the profits into other ventures and receive less remuneration than that which is permissible under the partnership deed, but there is nothing which debars them from claiming the maximum amount of remuneration payable in terms of the partnership deed. The method of remuneration having been laid down, the assessee-firm is entitled to deduct the remuneration paid to the partners under section 40(b)(v).

93. Can interest under sections 234B and 234C be levied where a company is assessed on the basis of book profits under section 115JB?

Solution:

Rolta India Ltd. (SC)

Interest under sections 234B and 234C shall be payable on failure of the company to pay advance tax in respect of tax payable under section 115JB.

94. Can long-term capital gain exempted by virtue of section 54EC be included in the book profit computed under section 115JB?

Solution:

N. J. Jose and Co. (P.) Ltd (Kerela High Court)

Once the Assessing Officer found that total income as computed under the provisions of the Act was less than 30 per cent of the book profit, he had to make the assessment under section 115J which does not provide for any deduction in terms of section 54E. As long as long-term capital gains are part of the profits included in the profit and loss account prepared in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956 (now, Statement of Profit and Loss prepared in accordance with Part II of Schedule III to the Companies Act, 2013), capital gains cannot be excluded unless provided under the Explanation to section 115J(1A).

11. INCOME-TAX AUTHORITIES

95. Where no proceeding is pending against a person, can the Assessing Officer call for information under section 133(6), which is useful or relevant to any enquiry, with the permission of Director or Commissioner?

Solution:

Kathiroor Service Co-operative Bank Ltd (SC)

Information of general nature could be called for from banks. In this case, since notices have been issued after obtaining approval of the Commissioner, the assessing authority had not erred in issuing the notices to assessees requiring them to furnish information regarding account holders with cash transactions or deposits of more than Rs. 1 lakh. The Supreme Court, therefore, held that for such enquiry under section 133(6), the notices could be validly issued by the assessing authority.

96. Is the requirement to grant a reasonable opportunity of being heard, stipulated under section 127(1), mandatory in nature?

Solution:

Sahara Hospitality Ltd. (Bombay High Court)

The word "may" used in this section should be read as "shall" and such income-tax authority has to mandatorily give a reasonable opportunity of being heard to the assessee, wherever possible to do so, and thereafter, record the reasons for taking any action under the said section "Reasonable opportunity" can only be dispensed with in a case where it is not possible to provide such opportunity. In such a case also, the authority should record its reasons for making the transfer, even though no opportunity was given to the assessee. The discretion of the authority is only to consider as to what is a reasonable opportunity in a given case and whether it is possible to give such an opportunity to the assessee or not. The authority cannot deny a reasonable opportunity of being heard to the assessee, wherever it is possible to do so.

97. Does the Central Board of Direct Taxes (CBDT) have the power under section 119(2)(b) to condone the delay in filing return of income?

Solution:

Lodhi Property Company Ltd (Delhi High Court)

The Board has the power to condone the delay in case of a return which was filed late and where a claim for carry forward of losses was made. The delay was only one day and the assessee had shown sufficient reason for the delay of one day in filing the return of income. If the delay is not condoned, it would cause genuine hardship to the petitioner. Therefore, the Court held that the delay of one day in filing of the return has to be condoned.

12. ASSESSMENT PROCEDURE

98. Can unabsorbed depreciation be allowed to be carried forward in case the return of income is not filed within the due date?

Solution:

Govind Nagar Sugar Ltd (Delhi High Court)

That the unabsorbed depreciation will be allowed to be carried forward to subsequent year even though the return of income of the current assessment year was not filed within the due date.

99. Can an assessee revise the particulars filed in the original return of income by filing a revised statement of income?

Solution:

Orissa Rural Housing Development Corpn. Ltd. (Orissa High Court)

The assessee can make a fresh claim before the Assessing Officer or make a change in the originally filed return of income only by filing revised return of income under section 139(5). There is no provision under the Income-tax Act, 1961 to enable an assessee to revise his income by filling a revised statement of income. Therefore, filling of revised statement of income is of no value and will not be considered by the Assessing Officer for assessment purposes.

100. Is a person having income below taxable limit, required to furnish his PAN to the deductor as per the provisions of section 206AA, even though he is not required to hold a PAN as per the provisions of section 139A?

Solution:

Smt. A. Kowsalya Bai (Karnataka High Court)

That it may not be necessary for such persons whose income is below the maximum amount not chargeable to income-tax to obtain PAN and in view of the specific provision of section 139A, section 206AA is not applicable to such persons. Therefore, the banking and financial institutions shall not insist upon such persons to furnish PAN while filing declaration under section 197A., section 206AA would continue to be applicable to persons whose income is the maximum amount not chargeable to income-tax.

101. Can the Assessing Officer reopen an assessment on the basis of merely a change of opinion?

Solution:

Aventis Pharma Ltd (Bombay High Court)

There was no tangible material before the Assessing Officer to hold that income had escaped assessment within the meaning of section 147 and the reasons recorded for reopening the assessment constituted a mere change of opinion. Therefore, the reassessment was not valid.

102. Is it permissible under section 147 to reopen the assessment of the assessee on the ground that income has escaped assessment, after a change of opinion as to a loss being a speculative loss and not a normal business loss, consequent to a mere re-look of accounts which were earlier furnished by the assessee during assessment under section 143(3)?

Solution:

ICICI Securities Primary Dealership Ltd. (SC)

The assessee had disclosed full details in the return of income in the matter of its dealing in stocks and shares. There was no failure on the part of assessee to disclose material facts as mentioned in proviso to section 147. Further, there is nothing new which has come to the notice of the Assessing Officer. The accounts hadbeen furnished by the assessee when called upon. Therefore, re-opening of the assessment by the Assessing Officer is clearly a change of opinion and therefore, the order of re-opening the assessment is not valid.

103. Can the Assessing Officer reassess issues other than the issues in respect of which proceedings were initiated under section 147 when the original "reason to believe" on basis of which the notice was issued ceased to exist?

Solution:

Ranbaxy Laboratories Ltd (Delhi High Court)

If the income, the escapement of which was the basis of the formation of the "reason to believe" is not assessed or reassessed, it would not be open to the Assessing Officer to independently assess only that income which comes to his notice subsequently in the course of the proceedings under the section as having escaped assessment. If he intends to do so, a fresh notice under section 148 would be necessary.

104. In case of change of incumbent of an office, can the successor Assessing Officer initiate reassessment proceedings on the ground of change of opinion in relation to an issue, which the predecessor Assessing Officer who framed the original assessment had already applied his mind and come to a conclusion?

Solution:

H. K. Buildcon Ltd (Gujarat High Court)

The Gujarat High Court, applying the rationale of the Apex Court ruling, observed that in the entire reasons recorded in this case, there was nothing on record to show that income had escaped assessment in respect of which the successor Assessing Officer received information subsequently, from an external source. The reasons recorded themselves indicated that the successor Assessing Officer had merely recorded a different opinion in relation to an issue to which the Assessing Officer, who had framed the original assessment, had already applied his mind and come to a conclusion. The notice of reassessment was, therefore, not valid.

105. Can the Assessing Officer issue notice under section 154 to rectify a mistake apparent from record in the intimation under section 143(1), after issue of a valid notice under section 143(2)?

Solution:

State Handloom and Handicrafts Corporation Ltd. (P&H High Court)

The Punjab and Haryana High Court relying, inter alia, on the said decision held that the scope of proceedings under section 143(2) is wider than the power of rectification of mistake apparent from record under section 154.The notice under section 143(2) is issued to ensure that the assessee has not understated the income or has not computed excessive loss or underpaid the tax. It is only on consideration of the matter and on being satisfied that it is necessary or expedient to do so that the Assessing Officer issues the notice under section 143(2). Therefore, the Assessing Officer has to proceed under section 143(3) and issue an assessment order. If issue

of notice under section 154 is permitted to rectify the intimation issued under section 143(1), then it would lead to duplication of work and wastage of time. Therefore, it was concluded that proceedings under section 154 for rectification of intimation under section 143(1) cannot be initiated after issuance of notice under section 143(2) by the Assessing Officer to the assessee.

106. Would the doctrine of merger apply for calculating the period of limitation under section 154(7)?

Solution:

Tony Electronics Limited (Delhi High Court)

The High Court held that once an appeal against the order passed by an authority is preferred and is decided by the appellate authority, the order of the Assessing Officer merges with the order of the appellate authority. After merger, the order of the original authority ceases to exist and the order of the appellate authority prevails. Thus, the period of limitation of 4 years for the purpose of section 154(7) has to be counted from the date of the order of the Appellate Authority.

13. APPEALS AND REVISION

107. Can an assessee, objecting to the reassessment notice issued under section 148, directly approach the High Court in the normal course contending that such reassessment proceedings are apparently unjustified and illegal?

Solution:

Samsung India Electronics P. Ltd. (Delhi High Court)

The High Court, thus, held that it will not be appropriate and proper in the facts of the present case to permit and allow the petitioner to bypass and forgo the procedure laid down by the Supreme Court in GKN Driveshafts (India) Ltd. by directly approaching to the High Court, since the procedure of assessment under section 147 has been almost universally followed and has helped cut down litigation and crystallise the issues thus assessee should first respond to the Assessing Officer by filing return of income and thereafter if the AO does not provide reason to believe he may approach to the court.

108. Would the period of limitation for an order passed under section 263 be reckoned from the original order passed by the Assessing Officer under section 143(3) or from the order of reassessment passed under section 147, where the subject matter of revision is different from the subject matter of reassessment under section 147?

Solution:

ICICI Bank Ltd. (Bombay High Court)

The order of assessment under section 143(3) allowed deduction under section 36(1)(vii), 36(1)(viia) and in respect of foreign exchange rate difference. The order of reassessment, however, had not dealt with these issues. Therefore, the doctrine of merger cannot be applied in this case. The order under section 143(3) cannot stand merged with the order of reassessment in respect of those issues which did not form the subject matter of the reassessment. Therefore, the period of limitation in respect of the order of the Commissioner under section 263 with regard to a matter which does not form the subject matter of reassessment shall be reckoned from the date of the original order under section 143(3) and not from the date of the reassessment order under section 147.

109. Can an assessee file a revision petition under section 264, if the revised return to correct an inadvertent error apparent from record in the original return, is filed after the time limit specified under section 139(5) on account of the error coming to the notice of the assessee after the specified time limit?

Solution:

Sanchit Software and Solutions Pvt. Ltd (Bombay High Court)

The High Court, accordingly, set aside the order of Commissioner and remanded the matter for fresh consideration. The High Court further directed the Assessing Officer to consider the rectification application filed by the assessee under section 154 as a fresh application received on the date of service of this order and dispose of the rectification application on its own merits, without awaiting the result of the revision proceedings before the Commissioner of Income-tax on remand, at the earliest.

110. Can an assessee make an additional/new claim before an appellate authority, which was not claimed by the assessee in the return of income (though he was legally entitled to), otherwise than by way of filing a revised return of income?

Solution:

Pruthvi Brokers & Shareholders (Bombay High Court)

The Bombay High Court, considering the above mentioned decisions, held that additional grounds can be raised before the Appellate Authority even otherwise than by way of filing return of income. However, in case the claim has to be made before the Assessing Officer, the same can only be made by way of filing a revised return of income.

111. Does the Appellate Tribunal have the power to review or re-appreciate the correctness of its earlier decision under section 254(2)?

Solution:

Earnest Exports Ltd. (Bombay High Court)

In this case, the Tribunal, while dealing with the application under section 245(2), virtually reconsidered the entire matter and came to a different conclusion. This amounted to a re-appreciation of the correctness of the earlier decision on merits, which is beyond the scope of the power conferred under section 254(2).

112. Can the Tribunal exercise its power of rectification under section 254(2) to recall its order in entirety, where there is a mistake apparent from record?

Solution:

Lachman Dass Bhatia Hingwala (P) Ltd. (Delhi High Court)

The Delhi High Court observed that the Tribunal, while exercising the power of rectification under section 254(2), can recall its order in entirety if it is satisfied that prejudice has resulted to the party which is attributable to the Tribunal's mistake, error or omission and the error committed is apparent.

113. Does the High Court have an inherent power under the Income-tax Act, 1961 to review an earlier order passed on merits?

Solution:

Deepak Kumar Garg (MP High Court)

In that case it was observed that, keeping in view the provisions of section 260A(7), the power of re-admission/restoration of the appeal is always enjoyed by the High Court. However, such

power to restore the appeal cannot be treated to be a power to review the earlier order passed on merits.

114. Where the Commissioner sets aside the assessment order under section 263 on issues relating to a particular business (cattle feed and green vegetable business) of an assessee and the matter was restored to the Assessing Officer, can the Assessing Officer make enquiries relating to another business (mentha business) of the assessee, in respect of which the original order passed by the Assessing Officer had attained finality?

Solution:

Smt. Shobha Govil v. Additional Commissioner, Income-tax (2013) 354 ITR 668 (Allahabad)

The High Court, held that since the objections raised by the Commissioner in his show-cause pertained only to the cattle feed and green vegetable business, the Assessing Officer's queries should also be confined to the said business and cannot extend to mentha business. The High Court, however, clarified that it is open to the Assessing Officer to raise all relevant queries to determine the income of the assessee with regard to the cattle feed and green vegetable business.

14. PENALTIES

115. Where an assessee repays a loan merely by passing adjustment entries in its books of account, can such repayment of loan by the assessee be taken as a contravention of the provisions of section 269T to attract penalty under section 271E?

Solution:

Triumph International Finance (I.) Ltd. (Bombay High Court)

In effect, the assessee has violated the provisions of section 269T by repaying the loan amount by way of passing book entries and therefore, penalty under section 271E is applicable. However, since the transaction is bona fide in nature being a normal business transaction and has not been made with a view to avoid tax, it was held that the assessee has shown reasonable cause for the failure under section 269T, and therefore, as per the provisions of section 273B, no penalty under section 271E could be imposed on the assessee for contravening the provisions of section 269T.

116. Would making an incorrect claim in the return of income *per se* amount to concealment of particulars or furnishing inaccurate particulars for attracting the penal provisions under section 271(1)(c), when no information given in the return is found to be incorrect?

Solution:

Reliance Petro Products Pvt. Ltd (SC)

The Apex Court, therefore, held that where there is no finding that any details supplied by the assessee in its return are incorrect or erroneous or false, there is no question of imposing penalty under section 271(1)(c). A mere making of a claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee.

117. Can reporting of income under a different head tantamount to furnishing of inaccurate particulars or suppression of facts to attract penalty under section 271(1)(c)?

Solution:

Amit Jain (Delhi High Court)

The High Court, after considering the above observations of the Tribunal and the decision of the Supreme Court in *CIT v. Reliance Petro Products Pvt.Ltd. (2010) 322 ITR 158*, held that mere reporting of income under a different head would not characterize the particulars reported as "inaccurate" to attract levy of penalty under section 271(1)(c).

118. Can penalty under section 271(1)(c) be imposed on the ground of disallowance of a certain deduction under Chapter VI-A owing to the subsequent decision of the Supreme Court?

Solution:

Celetronix Power India P. Ltd. (Bombay High Court)

The Bombay High Court affirmed the decision of Appellate Tribunal deleting the penalty under section 271(1)(c) on the ground that the additions made on account of disallowance were neither due to the failure on the part of the assessee to furnish accurate particulars nor on account of furnishing inaccurate particulars.

119. Can penalty under section 271(1)(c) for concealment of income be imposed in a case where the assessee has raised a debatable issue?

Solution:

Indersons Leather P. Ltd. (P&H High Court)

The High Court observed that, mere raising of a debatable issue would not amount to concealment of income or furnishing inaccurate particulars and therefore, penalty under section 271(1)(c) cannot be imposed.

120. Can the penalty under section 271(1)(c) be imposed where the assessment is made by estimating the net profit at a higher percentage applying the provisions of section 145?

Solution:

Vijay Kumar Jain (Chhattisgarh High Court)

The High Court held that the particulars furnished by the assessee regarding receipts in the relevant financial year had not been found inaccurate and it was also not the case of revenue that the assessee concealed any income in his return.Thus, penalty could not be imposed. The High Court placed reliance on the ruling of the Supreme Court in CIT v. Reliance Petroproducts P. Ltd. (2010) 322 ITR 158, while considering the applicability of section 271(1)(c). In that case, the Apex Court had held that in order to impose a penalty under the section, there has to be concealment of particulars of income of the assessee or the assessee must have furnished inaccurate particulars of his income. Where no information given in the return is found to be incorrect or inaccurate, the assessee cannot be held guilty of furnishing inaccurate particulars.

121. Can an assessee who has surrendered his income in response to the specific information sought by the Assessing Officer in the course of survey, be absolved from the penal provisions under section 271(1)(c) for concealment of income?

Solution:

MAK Data P. Ltd. v. CIT (2013) 358 ITR 593 (SC)

Facts:

The assessee-company filed its return of income for the A.Y. 2012-13 declaring an income of `16.17 lakh along with tax audit report. The assessee's case was selected for scrutiny and notices were issued under section 143(2) and section 142(1). During the course of assessment proceedings, it was noticed by the Assessing Officer that certain documents, namely, share application forms, bank statements, memorandum of association of companies, affidavits, copies of income-tax returns and assessment orders and blank share transfer deeds duly signed, had been found in the course of survey proceedings under section 133A conducted on

December 16, 2011, in the case of a sister concern of the assessee, and the same were impounded.

The Assessing Officer issued a show cause notice dated October 26, 2014 to the assessee seeking specific information regarding the documents pertaining to share applications found in the course of survey, particularly, blank transfer deeds signed by persons who had applied for the shares.

In its reply to the show cause notice, the assessee made an offer to surrender a sum of ` 40.74 lakhs by way of voluntary disclosure without admitting any concealment or any intention to conceal and subject to non-initiation of penalty proceedings and prosecution. The Assessing Officer, however, completed the assessment bringing the sum of ` 40.74 lakhs to tax and levied penalty under section 271(1)(c) for concealment of income and not furnishing true particulars.

Supreme Court's Observations:

The Apex Court observed that the assessee had stated that the surrender of the additional sum was with a view to avoid litigation, to buy peace and to channelize the energy and resources towards productive work and to make amicable settlement with the Income tax Department. The Court observed that these types of defenses are, however, not recognized under the statute. It further observed that the survey was conducted and documents were impounded ten months before the assessee filed its return of income. The Court opined that had it been the intention of the assessee to make full and true disclosure of its income, it would have filed the return declaring an income inclusive of the amount which was surrendered later during the course of the assessment proceedings. It is the statutory duty of the assessee to record all its transactions in the books of account, to explain the source of payments made by it and to declare its true income in the return of income filed by it from year to year.

Apex Court's Decision:

The Apex Court was, therefore, of the view that surrender of income in this case is not voluntary, in the sense, that the offer of surrender was made in view of detection made by the Assessing Officer in the survey conducted in the sister concern of the assessee.

The Apex Court, therefore, held that levy of penalty is correct in law.

15. OFFENCES AND PROSECUTION

122. Would prosecution proceedings under section 276CC be attracted where the failure to furnish return in time was not willful?

Solution:

Union of India v. Bhavecha Machinery and Others (MP High Court)

The High Court observed that for the provisions of section 276CC to get attracted, there should be a willful delay in filing return and not merely a failure to file return in time. There should be clear, cogent and reliable evidence that the failure to file return in time was 'willful' and there should be no possible doubt of its being 'wilful'. The failure must be intentional, deliberate, calculated and conscious with complete knowledge of legal consequences flowing from them. In this case, it was observed that there were sufficient grounds for delay in filing the return of income and such delay was not willful. Therefore, prosecution proceedings under section 276CC are not attracted in such a case.

16. DEDUCTION, COLLECTION AND RECOVERY OF TAX

123. Do the tips collected by hotel and disbursed to employees constitute salary to attract the provisions for tax deduction at source under section 192?

Solution:

ITC Ltd. (Delhi High Court)

The High Court, therefore, held that the tips would constitute income within the meaning of section 2(24) and thus, taxable under section 15. It was obligatory upon the company to deduct tax at source from such payments under section 192. In this case, the assessee-company had not deducted tax at source on tips under a *bona fide* belief that tax was not deductible. This practice had been accepted by the Revenue by accepting the assessments in the form of annual returns of the assessees in the past. The High Court held that since no dishonest intention could be attributed to the assessees, they could not be made liable for levy of penalty as envisaged under section 201.

124. Where the assessee fails to deduct tax at source under section 194B in respect of the winnings, which are wholly in kind, can he be deemed as an assessee-in-default under section 201?

Solution:

Hindustan Lever Ltd. (Karnataka High Court)

The High Court observed that if the assessee fails to ensure that tax is paid before the winnings are released in favour of the winner, then, section 271C empowers the Joint Commissioner to levy penalty equivalent to the amount of tax not paid, and under section 276B, such non-payment of tax is an offence attracting rigorous imprisonment for a term which shall not be less than three months but which may extend to seven years and with fine. However, the High Court held that proceedings under section 201 cannot be initiated against the assessee.

125. Can discount given to stamp vendors on purchase of stamp papers be treated as 'commission or brokerage' to attract the provisions for tax deduction under section 194H?

Solution:

Ahmedabad Stamp Vendors Association (SC)

The Supreme Court affirmed the above decision of the High Court holding that the given transaction is a sale and the discount given to stamp vendors for purchasing stamps in bulk quantity is in the nature of cash discount and consequently, section 194H has no application in this case.

126. Are TDS provisions under section 194H attracted in a case where an assessee, a dairy, makes an outright sale of milk to its concessionaires at a certain price (which is lower than the MRP fixed by the assessee-dairy) and the concessionaires make full payment for the purchases on delivery and bear all the risks of loss, damage, pilferage and wastage?

Solution:

Mother Dairy India Ltd. (Delhi High Court)

The High Court opined that the issue had to be decided on the basis of the fact as to when and what point of time the property in the goods passed to the concessionaire. In this case, the concessionaire became the owner of the milk and products on taking delivery of the same from the assessee-dairy. Therefore the relationship between the assessee and the concessionaire is a Principal to Principal relationship. The High Court, therefore, held that the difference between

the purchase price (price paid to the Dairy) and the MRP is the concessionaire's income from business and cannot be categorized as commission to attract the provisions of section 194H.

127. Can the difference between the published price and the minimum fixed commercial price be treated as additional special commission in the hands of the agents of an airline company to attract TDS provisions under section 194H, where the airline company has no information about the exact rate at which tickets are ultimately sold by the agents?

Solution:

Qatar Airways (Bombay High Court)

Tax at source was not deductible on the difference between the actual sale price and the minimum fixed commercial price, even though the amount earned by the agent over and above minimum fixed commercial price would be taxable as income in his hands.

128. In respect of a co-owned property, would the threshold limit mentioned in section 194-I for non-deduction of tax at source apply for each co-owner separately or is it to be considered for the complete amount of rent paid to attract liability to deduct tax at source?

Solution:

Senior Manager, SBI (All. High Court)

The Allahabad High Court held that, since the share of each co-owner is definite and ascertainable, they cannot be assessed as an association of persons as per section 26. The income from such property is to be assessed in the individual hands of the co-owners. Therefore, it is not necessary that there should be a physical division of the property by metes and bounds to attract the provisions of section 26. Therefore, in the present case, since the payment of rent is made to each co-owner by way of separate cheque and their share is definite, the threshold limit mentioned in section 194-I has to be seen separately for each co-owner. Hence, the assessee would not be liable to deduct tax on the same and no interest under section 201 is leviable.

129. What is the nature of landing and parking charges paid by an airline company to the Airports Authority of India and is tax required to be deducted at source in respect thereof?

Solution:

Japan Airlines Co. Ltd. (Delhi High Court)

The landing and parking fee were definitely "rent" within the meaning of the provisions of section 194-I as they were payments for the use of the land of the airport.

130. Can the payment made by an assessee engaged in transportation of building material and transportation of goods to contractors for hiring dumpers, be treated as rent for machinery or equipment to attract provisions of tax deduction at source under section 194-I?

Solution:

Shree Mahalaxmi Transport Co. (Gujrat High Court)

Since the assessee had given sub-contracts for transportation of goods and not for the renting out of machinery or equipment, such payments could not be termed as rent paid for the use of machinery and the provisions of section 194-I would, therefore, not be applicable.

131. Can the transmission, wheeling and SLDC charges paid by a company engaged in distribution and supply of electricity, under a service contract, to the transmission company be treated as fees for technical services so as to attract TDS provisions under section 194J or in the alternative, under 194C?

Solution:

Ajmer Vidyut Vitran Nigam Ltd., In re (2013) 353 ITR 640 (AAR)

The AAR, considering the definition of fees for technical services under section 9(1)(vii) and the process involved in proper transmission of electrical energy, held that transmission and wheeling charges paid by the applicant to the transmission company are in the nature of fees for technical services, in respect of which the applicant has to withhold tax thereon under section 194J.

As regards SLDC charges, the AAR opined that the main duty of the SLDC is to ensure integrated operation of the power system in the State for optimum scheduling and dispatch of electricity within the State. The SLDC charges paid appeared to be more of a supervisory charge with a duty to ensure just and proper generation and distribution in the State as a whole. Therefore, such services were not in the nature of technical service to the applicant. Resultantly, it does not attract TDS provisions under section 194J or under section 194C.

132. Can discount given on supply of SIM cards and pre-paid cards by a telecom company to its franchisee be treated as commission to attract the TDS provisions under section 194H?

Solution:

Bharti Cellular Ltd. v. ACIT (2013) 354 ITR 507 (Cal.)

Same as *Vodafone Essar Cellular Ltd. v. ACIT (Ker.) (2011)*

The High Court held that there is an indirect payment of commission, in the form of discount, by the assessee-telecom company to the franchisee. Therefore, the assessee is liable to deduct tax at source on such commission as per the provisions of section 194H.

Note - Similar ruling was pronounced by the Kerala High Court in Vodafone Essar Cellular Ltd. v. ACIT (TDS) (2011) 332 ITR 255, wherein it was held that there was no sale of goods involved as claimed by the assessee-telecom company and the entire charges collected by the assessee from the distributors at the time of delivery of SIM cards or recharge coupons were only for rendering services to ultimate subscribers. The assessee was accountable to the subscribers for failure to render prompt services pursuant to connections given by the distributor. Therefore, the distributor only acted as a middleman on behalf of the assessee for procuring and retaining customers and consequently, the discount given to him was within the meaning of commission on which tax was deductible under section 194H.

133. Would commission payment remitted outside India to a non-resident (who is not liable to pay tax in India) for procuring export orders outside India attract disallowance under section 40(a)(i) for non-deduction of tax at source under section 195?

Solution:

CIT v. Model Exims (2013) 358 ITR 72 (Allahabad)

The High Court observed that there was no obligation to deduct tax at source under section 195 on commission paid to a non-resident, who was not liable to pay tax in India. The payment of commission to foreign agents also did not entitle such foreign agents to pay tax in India. Thus, there was no obligation to deduct tax at source under section 195 on the commission paid to a non-resident recipient, who was not liable to pay tax in India. Further, there was also nothing on record to demonstrate that the non-resident agents had been appointed as selling agents, designers or technical advisers.

17. Interest

134. Are the provisions of section 234D levying interest on excess refund attracted in a case where the refund granted to the assessee in pursuance of the order of Commissioner (Appeals) was reversed on account of setting aside of such order by the Tribunal?

Solution:

DIT (International Taxation) v. Delta Air Lines Inc. (2013) 358 ITR 0367 (Bom.)

Facts of the case:

In the present case, the Assessing Officer disallowed the benefit of article 8 of the Double Taxation Avoidance Agreement between India and the U.S.A. (DTAA) to the assessee. The Commissioner (Appeals), on the other hand, held that the assessee was entitled to the benefit of article 8 of the DTAA. The Tribunal, however, set aside the order of the Commissioner (Appeals) and restored the order passed by the Assessing Officer. While giving effect to the order of the Tribunal, the Assessing Officer apart from levying interest under sections 234A and 234B, also levied interest under section 234D on the refund granted to the assessee pursuant to the order of Commissioner (Appeals).

High Court's decision:

The High Court observed that interest under section 234D is chargeable only where the refund has been granted to the assessee while processing the return of income under section 143(1) and thereafter, such refund is found to be excessive under the regular assessment.

In the present case, the refund was not granted under section 143(1). The refund was not granted even by way of an assessment order passed under section 143(3) read with section 147. The same was granted pursuant to the order passed by the Commissioner (Appeals). Consequently, the High Court concurred with the Tribunal's view that the provisions of section 234D were not attracted in this case.

Note: Section 234D(1) provides that where any refund is granted to the assessee under section 143(1) and –

(a) no refund is due on regular assessment; or

(b) the amount refunded under section 143(1) exceeds the amount refundable on regular assessment,

the assessee shall be liable to pay simple interest @½% on the whole or the excess amount refunded, for every month or part of a month comprised in the period from the date of grant of refund to the date of such regular assessment.

18. Refunds

135. Can refund of tax due to the assessee for a particular assessment year be adjusted, against sums due from the assessee in respect of another assessment year, under section 245, without giving prior intimation to the assessee of the proposed adjustment?

Solution:

Jeans Knit P. Ltd. v. DCIT (2013) 358 ITR 0505 (Kar.)

Facts of the case:

In the present case, the company is an export oriented unit. A certain deduction was disallowed for A.Y.2011-12 by the Assessing Officer, but subsequently, on appeal by the assessee, the same was allowed by the Commissioner (Appeals). Consequent to the order of Commissioner (Appeals), the assessee became entitled to a refund of ` 14.25 crores. While giving effect to the order of Commissioner (Appeals), the Assessing Officer adjusted the refund towards the tax demand for the A.Y. 2012-13`.

High Court's Observations:

On the issue of whether refund can be adjusted against demand for the subsequent year without prior intimation, the Karnataka High Court observed that for the purpose of any adjustment of the amount due to the assessee by way of refund against an outstanding demand due from the assessee to the Revenue, an intimation in writing is required to be given to the concerned person of the action proposed. Proposed action would mean a notice before making the adjustments and not an intimation of making the adjustment. An order passed purporting to adjust the refund due to the assessee without prior intimation would be against the express provisions of law and is hence, bad in law. The provisions of section 245 are mandatory in nature.

High Court's Decision:

In view of the above rulings, the Karnataka High Court, in this case, held that the communication informing the adjustment of refund, without prior intimation to the assessee, is illegal and contrary to law. Therefore, the High Court set aside the order in so far as it relates to adjustment of refund against tax due.