

## Important judgements and Updates

Update No 99/ 2021

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**Nayan Jayantilal Balu** Criminal Writ Petition No.2698 of 2021 Bombay High Court Against Assessee

### Issues discussed and addressed:

Issue No 1 Prosecution The power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases. The order of sanction need not contain detailed reasons in support thereof. But the basic facts that constitute the offence must be apparent on the sanction order and the record must bear out the reasons in that regard.

### Facts of the case with respect to issue No 1:

Assessee-Individual, engaged in trading of ferrous and non-ferrous metals, was subjected to addition of Rs.34.25 Lacs in reassessment on account of bogus purchases of Rs.2.74 Cr. pursuant to which penalty u/s 271(1)(c) was also initiated. The reassessment order was confirmed by both CIT(A) and ITAT whereafter PCIT issued a show cause notice to the Assessee for prosecution u/s 276C(1) and 277 which was objected to by the Assessee on the basis that reassessment was made on estimates and no penalty u/s 271(1)(c) was imposed on him whereas the penalty order of Rs.10.85 Lacs was passed after a Criminal Complaint was filed against the Assessee.

### Held by the Authorities with respect to Issue No 1:

HC, on perusal of Section 276C, notes that the prosecution can be initiated against the person even if one of the three ingredients, i.e. (a) evasion of tax, (b) evasion of penalty and (c) evasion of interest chargeable, is fulfilled and finds that the prosecution was launched after recording satisfaction u/s 279(1) that the Assessee attempted to evade tax.

The order of sanction shows that prosecution under Section 279(1) of the said Act has been accorded after recording satisfaction that Petitioner has attempted to evade tax. It is stated in the sanction order that Petitioner has failed to substantiate the claim of purchases amounting to Rs. 2,74,03,016/- and the assessing office held the purchases to be bogus and made an addition of Rs. 34,25,377/- (12.5% of the bogus purchases.) It is well settled that before granting sanction the authority must have before it the necessary report and the material facts which prima facie establish the commission of offence alleged for and that the sanctioning authority would apply its mind to those facts. The order of sanction is only an administrative act and not a quasi-judicial one nor is a lis involved. Therefore, the order of sanction need not contain detailed reasons in support thereof. But the basic facts that constitute the offence must be apparent on the sanction order and the record must bear out the reasons in that regard. A perusal of the sanction order clearly

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indicates that the sanctioning authority appears to have applied its mind to the facts placed before it and considered them and then granted sanction.

### Judgments Relied upon by the Authorities with respect to Issue No 1:

- a. State of Haryana v. Bhajan Lal 1992 Supp (1) SCC 335 Supreme Court

### Jetha Properties Private Limited ITA No.96 of 2002 Bombay High Court In favour of Assessee

#### Issues discussed and addressed:

Issue No 1      Repair and Maintenance Expense      Where an expenditure is incurred while the business is going on and is not incurred either for extension of the business or for the substantial replacement of its equipment, the aim & object of the expenditure would determine its character and nature. The source or the manner of the payment would then be of no consequence. Whether the expenditure is so related to the carrying on or conducting of the business that it might be regarded as an integral part of the profit making process, it should be held to be revenue expenditure. However, if the purpose and aim of the expenditure is to acquire an asset or a right of a permanent character, the possession whereof is a condition precedent to the commencement or continuance of the business, the expenditure would be of a capital nature.

#### Facts of the case with respect to issue No 1:

Assessee-Company engaged in the business of warehousing incurred Rs. 10.70 lakhs to raise the floor height by about 18 inches so that whenever water logging happened in monsoon, the water would remain outside the ware-house and will not enter the ware-house and consequently, goods stored will not be affected. This helped the Assessee in tying up with Bombay Dyeing for a period of four years on enhanced rates of 25%, and thus claimed the expenditure as revenue in nature for AY 1991-92; Revenue held that expenditure was incurred to bring into existence an advantage of enduring nature and thus was capital in nature, which was confirmed by the CIT(A) and the ITAT.

#### Held by the Authorities with respect to Issue No 1:

The test to be borne in mind is that as a result of the expenditure, which is claimed as an expenditure for repairs what is really being done is to preserve and maintain an already existing asset. The object of the expenditure is not to bring a new asset into existence, nor is its object the obtaining of a new or fresh advantage. If the amount was spent only to preserve and maintain the already existing assets that would be a revenue expenditure.

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If the expenditure is made for the purpose of running the business or working it with a view to produce the profit, it would be a revenue expenditure.

Appellant by spending the amount of Rs.10,70,000/- did not bring into existing any new asset. The expenditure was incurred wholly and solely to ensure that the existing business with the Customer, which was offering attractive returns to Appellant, was continued uninterrupted. The expenditure incurred by Appellant had direct relation to the business with the customer because Appellant also received corresponding increased compensation from the customer. The expenditure so incurred is related to the carrying on or conducting of ware-house business of Appellant and hence, it should be regarded as an integral part of the profit earning process. The expenditure, therefore, cannot be treated as capital expenditure but should be treated as revenue expenditure

### Judgments Relied upon by the Authorities with respect to Issue No 1:

- a. Ballimal Naval Kishore and Another v/s. Commissioner of Income Tax (1997) 224 ITR 414 (SC)
- b. Assam Bengal Cement Co. Ltd., v/s. Commissioner of Income Tax (1955) 27 ITR – 34 SC
- c. CIT v/s. Ciba of India Ltd (1968) 69 ITR 692 SC

### Kanoria Chemicals & Industries Ltd ITA No. 2184/Kol/2018 Kolkata ITAT Against Assessee

#### Issues discussed and addressed:

Issue No 1      Education Cess      Education cess being additional surcharge not deductible

#### Facts of the case with respect to issue No 1:

Assessee-Company raised an additional ground before ITAT for AY 2012-13 for claiming Rs. 3.19 Cr. in terms of Rajasthan HC ruling in Chambal Fertilizers and coordinate bench ruling in ITC Ltd.

#### Held by the Authorities with respect to Issue No 1:

As per the provisions of Finance Act of 2004 and 2011 the education cess is an additional surcharge levied on the income-tax. ITAT following SC ruling in K. Srinivasan where surcharge and additional surcharge were held to be a part of the income-tax decided the issue against assessee and observed that the SC ruling and the provisions of Finance Act, 2004 and the relevant provisions of Section 2(11) and (12) of the subsequent Finance Acts were not brought to the knowledge of the two HCs.