DIRECT-TAX INSIGHTS

12th January, 2022

Important judgements and Updates

Update No 06/2022 (Previous Colander Year 100/ 2021)

Shankar Vittal Motor Co. Ltd. & Another I.T.A.No.653/2016 c/w I.T.A.No.11/2017 Karnataka High Court

In favour of Assessee Dated 01.12.2021

Issues discussed and addressed:

Issue No 1	Capital Gain	ITAT has not erred in determining guidance value as mode of determination of full value of consideration for taxability of capital gains under joint development agreement (JDA). HC h did not agree to the decision of ITAT in case of N.S.Nagaraj [(2014) 52 Taxman 211], wherein it was has held that full consideration would be the cost of construction incurred by the builder on the assessee's share of constructed area, because the assessee would receive the constructed area in view of the land share.

Facts of the case with respect to issue No 1:

Assessee-Company entered into a JDA for AY 2006-07, under which it was entitled to receive 25% of the built up area with proportionate undivided share in common areas and facilities, which was transferred for a consideration of Rs.3 Cr. but not reflected in the books of account since it was not realized. Revenue, in the reassessment proceedings treated the cost of construction as the full of value of consideration. CIT(A) directed the Revenue to adopt the FMV as consideration against which the appeal was dismissed by the ITAT

Held by the Authorities with respect to Issue No 1:

The guidance value of the land or the guidance value of the building would be appropriate mode to determine the full value of consideration in the case of a transfer where consideration for the transfer of a capital asset is not attributable or determinable. Hence, guidance value adopted by the Tribunal cannot be faulted with.

Ganeshsagar Infrastructure Pvt. Ltd I.T.A. Nos. 1535/Ahd/2018 Ahmedabad ITAT In favour of Assessee

Dated 22.11.21

Issues discussed and addressed:

Issue No 1	Capital Gain	The compensation received for release of right to sue on account of breach of contract for sale of land is neither chargeable under the normal provision of the Act nor includible for the purposes of determination of book profit u/s 115JB.

Facts of the case with respect to issue No 1:

Assessee-Company entered into an agreement for purchase of land during 1992 which was under a dispute and paid part consideration, but later learnt that the original owners had sold the land to another purchaser in 1986 which was mutated only in 1993. Assessee filed objection before competent authority, which

eventually led to passing of an arbitral award in 2007 directing the original purchasers to sell the disputed land to a third party and distribute the amount so realized between original purchaser and the Assessee along with the direction for withdrawal of civil suits. Thus, Assessee received Rs.70 Cr on release of its right to sue for AY 2012-13 which was not offered to tax.

Held by the Authorities with respect to Issue No 1:

Taxability under the head Capital Gain

In the instant case, the rights of the assessee arising under the sale agreement with the original land owners were frustrated in view of another sale agreement of the same land parcels in favour of other party. The assessee received certain consideration by way of damages as a culmination of on going vexatious dispute towards rightful ownership of land parcels in question. The amount arose to the assessee by virtue of arbitral award adhered to by the parties to the dispute. The assessee has received consideration for its release of right to sue. Despite the definition of expression 'capital asset' in the widest possible term of Section 2(14) of the Act, a right to a capital asset must fall within the expression 'property of any kind' and must not fall within the exceptions. Section 6 of Transfer of property Act which uses the same expression 'property of any kind' in the context of transferability makes an exception in the case of a mere right to sue.

Thus mere 'right to sue', while a capital receipt, is not a capital asset under s.2(14) of the Act and thus compensation received on release of right to sue is not a taxable receipt.

There are long line of judicial precedents which echoes the view that the right to receive the compensation for release of right to sue on account of breach of contract for sale of land is not a capital asset and thus not chargeable to tax as capital gains.

Taxability under Section 115JB

It is trite that a capital receipt can be taxed only when the same has been expressly included and deemed as 'income' under s.2(24) of the Act. As a general rule for Income Tax, all revenue receipts unless specifically exempted are taxable under the provisions of Income Tax Act and all capital receipts unless made specifically taxable by the Act do not constitute income chargeable to tax. The compensation received for release of right to sue being a capital receipt is not deemed to be 'income' and hence not chargeable to tax. Significantly, the Constitution itself uses the term 'tax on income' and the term 'income' must be construed in the same manner as the one defined under Income Tax Act. As a corollary, it is impermissible to cover such capital receipts under S. 115JB in an unregulated manner. The receipt being of capital nature does not

enter into the computation provision at all and hence, there is no question of including the same in book profits for the purposes of Section 115JB of the Act.

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

a. CIT vs. J. Dalmiya (1984) 149 ITR 215 (Del);
b. Baroda Cements & Chemicals Ltd. vs. CIT (1986) 158 ITR 636 (Guj);
c. CIT vs. A. A. Dehgamwalla & Ors. 195 ITR 28 (Bom.).
d. Bhojison Infrastructure Pvt. Ltd. vs. ITO (2018) 99 Taxmann.com 26 (Ahd.)
e. ACIT vs. Shree Cement Ltd. [ITA No. 614,615 & 635/JP/2010 order dated 9.9.2011]

Connaught Plaza Restaurants P. Ltd I.T.A. No.993 & 1984/DEL/2020 Delhi ITAT In favour of Assessee Dated 31.12.2021

Issues discussed and addressed:

Issue No 1 TDS Common area maintenance (CAM) charges being in the nature of contractual payment liable for TDS u/s 194C and not u/s 194-I.

Facts of the case with respect to issue No 1:

Assessee-Company is engaged in the business of running fast food restaurants in North and East India under the brand name of McDonald's; Revenue, in the course of survey on Ambience Group, observed that the Assessee had hired space on lease in the malls owned by the Group and had deducted tax at source on CAM charges at 2% u/s 194C instead of 10% u/s 194-I. Revenue thus, subjected the Assessee to the proceedings as assessee-in-default for short deduction of tax at source on CAM charges of Rs.4.26 Cr., which was upheld by CIT(A).

Held by the Authorities with respect to Issue No 1:

The CAM charges are completely independent and separate from rental payments, and are fundamentally for availing common area maintenance services which may be provided by the landlord or any other agency, therefore, the same cannot be brought within the scope and gamut of the definition of terminology “rent”.

As the CAM charges are not paid for use of land/building but are paid for carrying out the work for maintenance of the common area/facilities that are available along with the lease premises, therefore, the same could not be characterized and/or brought within the meaning of “rent” as defined in Section 194-I of the Act.

As the CAM charges are in the nature of a contractual payment made to a person for carrying out the work in lieu of a contract, therefore, the same would clearly fall within the meaning of "work" as defined in Section 194C of the Act.

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

a. Kapoor Watch Company P. Ltd. vs. ACIT in ITA No.889/Del/2020 Delhi ITAT

Kotak Mahindra Bank Limited ITA 748/Bang/2011 Bangalore ITAT In favour of Assessee Dated 03.01.2022

Issues discussed and addressed:

Issue No 1 Section 37 Expenditure incurred on core banking software is revenue in nature.

Facts of the case with respect to issue No 1:

The Assessee purchased an application software being core banking solution (CBS) for networking 125 branches of the bank with centralized processing solution namely 'Profile' & 'M data base. This software was purchased from Sanchez Computer Associates Inc. As per the agreement entered into Sanchez, the Assessee bank was granted license to use the 'Profile' and other software solely for processing the bank's data. The Bank was granted a 'nonexclusive, non-transferable license' to use the integrated 'PROFILE' Software system for processing a specified number of loan accounts, deposit accounts of the bank's customers. A single processing location was to be located at Bangalore to support 8 lakh accounts. The assessee has s[ent a Sum Rs 23,05,49,466 on the same whichw as claimed as revenue expenditure.

The assessee also incurred a sum of Rs. 3,35,16,164/-towards purchase of computer systems from IBM in connection with the above project. This amount was capitalized by the assessee and there is no dispute in this regard.

Held by the Authorities with respect to Issue No 1:

The cardinal rule is that the question whether a certain expenditure is on capital or revenue account should be decided from the practical and business view point and in accordance with sound accountancy principles and this rule is of special significance in dealing with expenditure on expansion and development of business.

In order to treat any expenditure as capital expenditure, the same should result in accrual of advantage of enduring benefit and such benefit should accrue to the assesses in the capital field. What exactly is meant by accrual of benefit in the capital field is that the said benefit should form part of the profit-making apparatus of the assessee's business. The question whether expenditure incurred on computer software is capital or

revenue has to be seen from the point of view of its utility to a businessman and how important an economic or functional role it plays in his business. In other words, the functional test becomes more important and relevant because of the peculiar nature of the computer software and its possible use in different areas of business touching either capital, or revenue field or its utility to a businessman which may touch either capital or revenue field.

The objective of CBS project is that the assessee wants to gain and exploit technology advantage to be able to provide anytime anywhere, any channel banking services to its clients and compete with international banks and new private sector banks operating in India. The technology solutions were to support retail banking, corporate banking, commercial banking, retailing of financial products and services, loan origination and collection processes, inter branch transactions and reconciliation till all branches operate from the core solution, capital assets accounting, consolidation of GL of all branches, offices, treasuries etc., clearing activities for the present and future, IBD operations, CRM, generation of all MIS reports, costing, budgeting and profitability analysis at client, product, branch levels, lagging foundation for a robust CIF and interfaces to external systems and other current applications. The overall program objective is to position assessee competitive as a leading domestic retail bank, to ensure that the program confirms and is in line with the business strategy and objectives of the assessee, to advise and guide CBS project as per specifications, budget, time and quality, to advise and guide the assessee as to how to operate effectively in a new IT enabled business environment etc.

The expenditure in question only facilitates carrying on the business of the assessee more profitably without touching the profit making apparatus of the bank which is receiving deposits and lending/investing them for profit. Therefore the expenditure in question has to be regarded as revenue expenditure.

Held by the Authorities with respect to Issue No 1:

Payment of application software though there is an enduring benefit, it does not result into acquisition of any capital asset and merely enhances the productivity or efficiency and hence has to be treated as revenue expenditure.

a. CIT VS. IBM India Ltd. (2013) 357 ITR 88 (KAR)

Expenditure, even if incurred for obtaining an advantage of enduring benefit, may nonetheless be on revenue account and the test of enduring benefit may break down. It is not every advantage of enduring nature acquired by an assessee that brings the case within the principles laid down in this test. What is

material to consider is the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test.

b. Empire Jute Co. Ltd. v. CIT 124 ITR 1 Supreme Court

The license was for a period of five years liable to be terminated in certain events and since the object of the agreement was to obtain the benefit of the technical assistance for running the business of the assessee the expenditure in question was of revenue nature.

c. CIT v. Ciba of India. Ltd. 69 ITR 692 Supreme Court

Jitendrakumar Sheth R/SCA No. 19285 of 2021 Gujarat High Court In favour of Assessee Dated 11.01.22

Issues discussed and addressed:

Issue No 1 Section 148 Reopening based on incorrect facts is not justified.

Facts of the case with respect to issue No 1:

The Assessing Officer received information during the course of the assessment proceedings of one another assessee namely Tapas Elegance (a partnership firm in which the writ applicant himself is one of the partners) that the writ applicant herein had deposited cash of Rs.26,50,000/- during the demonetization in the current account No.1070006437127 of the partnership firm maintained with the Ahmedabad District Cooperative Limited. It is the case of the writ applicant that the ground on which the assessment is sought to be reopened is incorrect since no such amount referred to above was deposited by the writ applicant at any point of time in the current account maintained by the partnership firm.

Held by the Authorities with respect to Issue No 1:

The writ applicant herein has a savings account in his individual name maintained with the Adarsh Co-operative Bank Limited. The bank statement of the Adarsh Co-operative Bank Limited would indicate that the cash to the tune of Rs.26,50,000/- during the F.Y. 2016-17 relevant to the A.Y. 2017-18 was deposited by the writ applicant herein in his savings account maintained with the Adarsh Cooperative Bank Limited. In view of the aforesaid, prima facie, the reasons assigned by the AO being incorrect does not seem to be correct the impugned notice issued u/s 148, is quashed and set aside.

Darshan Enterprise R/SCA. No. 13556 of 2021 Gujarat High Court In favour of Assessee Dated 03.01.22

Issues discussed and addressed:

Issue No 1 Section 144B Order passed in violation section 144B(9) deserves to be set aside for de novo consideration.

Section 68 Assessee is not supposed provide source of source.

Facts of the case with respect to issue No 1:

The Assessing Officer rejected the argument canvassed on behalf of the assessee as regards Section 68 of the Act on the ground that the assessee had not been able to prove the creditworthiness of the partners of the firm who introduced huge capital in the firm and also the identity, genuineness and creditworthiness of the other parties from whom funds had been received by the partners for being introduced in the firm as capital. The order passed by the AO was challenged by writ on the ground that assessment order is nothing but an exact reproduction of the draft assessment order and thus being in violation of Section 144B deserves

to be quashed. The case of revenue is that the writ should not be entertained as the assessee has alternate remedy of filing the appeal.

Held by the Authorities with respect to Issue No 1:

When the impugned assessment order is bereft of reasons, then the same could be said to be passed in gross violation of the principles of natural justice and the alternative remedy of filing an appeal under Section 246 of the Act before the Commissioner would not be a bar in entertaining the writ application.

According to section 144B (9) if the procedure laid down under Section 144B is not followed or complied with, the assessment would be rendered non-est. When the legislature has thought fit to use the word non-est, it would mean a nullity and hence the argument of alternative remedy of an appeal should fail.

The impugned assessment order is nothing but an exact reproduction of the draft assessment order. Nothing as pointed out by the assessee has been taken into consideration. All that has been done by the Assessing Officer is to express doubts as regards the genuineness of the entries.

Once it is established that the amount has been invested by a particular person, be he a partner or an individual, then the responsibility of the assessee-firm is over. The assessee-firm cannot ask that person who makes investment where the money invested is properly taxed or not. The assessee is only to explain that this investment has been made by the particular individual and it is the responsibility of that individual to account for the investment made by him. If that person owns that entry, then the burden of the assessee-firm is discharged.

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

Order Passed in violation of Section 144B deserves to be set aside for de novo consideration

a. Mantra Industries Ltd. (2021) 131 taxmann.com 165 (Bombay)
b. Milestone Brandcom Private Limited Writ Petition (L) No.28212 of 2021, decided on 14.12.2021

Alternative remedy of filing an appeal under Section 246 of the Act before the Commissioner would not be a bar in entertaining the writ applicationwhen the assessment order is in vilation of Section 144B.

c. Malini Construction Company SCA No.13971 of 2019 (Guj.)

While Section 68 gives the liberty to the Assessing Officer to enquire into the source/sources from where the creditor has received the money, Section 106 makes the assessee liable to disclose only the source(s) from where he has himself received the credit.

d. Nemi Chand Kothari (2004) 136 Taxman 213 (Gau)

Arunaben Kanaiyalal Patel L/R Of Late Kanaiyalal Dalsukh Patel

R/SCA. No 18981 of 2021 Gujarat High Court In favour of Assessee Dated 04.01.2022

Issues discussed and addressed:

Issue No 1 Section 148 Notice issued in the name of dead person deserves to be quashed.

Facts of the case with respect to issue No 1:

Notice of reopening issued under Section 148 of the Act for the A.Y. 2013-14 was challenged mainly on the ground that the same is without jurisdiction as the impugned notice has been issued to a dead assessee.

Held by the Authorities with respect to Issue No 1:

Notice issued in the name of dead person deserves to be quashed.

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

a. Bhupendra Bhikhalal Desai (2021) 320 CTR(Guj.) 289

Vimal Tyagi SLP Appeals (C) No. 12939 of 2020 Supreme Court of India In favour of Assessee

Issues discussed and addressed:

Issue No 1 Since entire demand has been recovered during the pendency of appeal, the CIT Appeals was directed to dispose the appeals on merits at the earliest.

Facts of the case with respect to issue No 1:

During pendency of assessee's stay application under section 220(6) of the Income-tax Act, 1961, the demand has been recovered from the petitioner and, therefore, the petitioner prayed before the High Court that demand recovered may be directed to be returned to her.

Held by the Authorities with respect to Issue No 1:

It is an admitted case of the parties that demand has already been recovered, therefore, no order is required to be passed at this stage for return of the amount recovered unless the petitioner succeeds in appeal. Under the circumstances and to meet the ends of justice and as agreed by the learned counsel for the Department, directions were issued that the appeal of the petitioner pending before the CIT (Appeals), Ghaziabad may be decided on merits in accordance with law, expeditiously

Naveen Partap Tyagi ITA. No. 1639/Del/2018 Delhi ITAT In favour of Assessee

Issues discussed and addressed:

Issue No 1 Section 263 In case of a limited scrutiny case only revisionary powers could have been exercised u/s 263 of the income tax act with respect to such limited scrutiny reasons for which the return of income of the assessee is picked up.

Facts of the case with respect to issue No 1:

Assessee-Individual, an agriculturalist, furnished his return for AY 2013-14 declaring income of Rs.1.34 Cr. was subjected to limited scrutiny for verification of a large cash deposit of Rs.49.25 Lakhs in saving bank accounts whereby Revenue accepted details of cash deposits along with its documentary evidence and the returned income.

PCIT held the assessment was completed without carrying out the necessary and proper enquiry, and held the assessment order to be erroneous and prejudicial to the interest of Revenue on issues related to year of sale of land, cash deposited, claim of deduction u/s 54B, mismatch between TDS and bank interest income to the extent of Rs.22 Lakhs and directed the Revenue to make fresh assessment after making proper enquiry/ investigation, against which Assessee preferred the instant appeal.

Held by the Authorities with respect to Issue No 1:

In the present case, the case of the assessee was selected for scrutiny on the limited scrutiny basis. The reasons recorded for the selection of the case is "verification of large cash deposits in the savings bank accounts". Thus during the course of assessment proceedings the learned assessing officer was not required to enquire on any other issue except the reason for which the case of the assessee was selected/picked up for limited scrutiny. The original assessment order did not have any infirmity or error to the extent of cash deposited in the bank account.

Therefore necessarily the revisionary authority cannot say that the learned assessing officer has failed to look into the issue, which he is not authorised to look into, and thus the order of the learned assessing officer is erroneous and prejudicial to the interest of revenue.

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

a. CBDT instruction number 7/2014 dated 26/9/2014, and circular number 225/26/2006- ITA- II(pt) dated 8/9/2010

Lokhandwala Foundation I.T.A. No.1702 /Mum/2020 Mumbai ITAT In favour of Assessee

Issues discussed and addressed:

Issue No 1 Section 250 CIT(A) does not have authority to give directions in matters not before him.

Facts of the case with respect to issue No 1:

Vide intimation u/s 143(1), the exemption u/s 11 was denied on account of not filing of Form 10 in prescribed time. However subsequently since the assessee has submitted the Form 10, during the scrutiny proceedings the claim of exemption was allowed u/s 143(3). Hence the appeal filed by the assessee against the order passed u/s 143(1) became infructuous. However the CIT Appeals despite noting this fact directed revenue to look whether the Form 10 /10B was filed in time or not and dismissed the appeal on technical ground.

Held by the Authorities with respect to Issue No 1:

The moment it is held that the appeal of the assessee has become infructuous, CIT Appeals is not capable of passing any direction to the assessing officer. Further, section 250(2) provides Assessee right to be heard when the CIT(A) decides the issue on merits and therefore if any direction was passed by the CIT(A), Assessee should be given an opportunity to meet out such observation, accordingly holds that the order passed by CIT(A) is in violation of principles of natural justice and thus not sustainable.

In the instant case, benefit of Sections 11 and 12, including accumulation of income was granted by Revenue through assessment order passed u/s 143(3), and thus the directions now issued by CIT(A), will tantamount to giving direction to Revenue in the order passed u/s 143(3) whereas the appeal is against intimation issued against 143(1). Thus CIT(A) has issued directions in matters not before him which is not permissible.