
Latest Landmark Judicial Developments

Presentation by :

CA. Kapil Goel, ACA, LLB
Chartered Accountant
New Delhi
cakapilgoel @gmail.com

OBJECT/SCOPE

To discuss some latest landmark Judicial Developments on Income Tax Front

- ☐ *Reopening Section 147 to section 152*
- ☐ *Search Assessment Section 153A to section 153D*
- ☐ *Service of Notice Section 292BB; section 282 etc*
- ☐ *Section 56 ; Finance No 2 Act 2009*
- ☐ *Section 142A DVO Issues*

OBJECT/SCOPE

- ❑ *Section 36(1)(iii) and Section 14A; and*
- ❑ *Section 68; 69 etc Unexplained Income*
- ❑ *Section 43B Latest Supreme Court Alom Extrusions (PF contribution etc) 319 ITR 306*
- ❑ *Concealment Penalty Section 271(1)(c) Income Tax Act*
- ❑ *Section 40(a)ia) –Latest Developments*
- ❑ *Supreme Court SLP Dismissal in Important Stay Ruling Of DHC in Valvoline 4/8/2009 Order- CIT-A & AO stay powers etc*

OBJECT/SCOPE

- ☐ *Section 263 – CIT's revision*
- ☐ *Section 2(15)- Finance Act 2008 amendment*
- ☐ *Section 244A: Interest on refund to assessee*
- ☐ *Section 32: Depreciation Intangible assets etc*
- ☐ *Receipts during construction period etc*

SC in Kelvinator case 18/01/2010

- ON REOPENING U/S 148 HELD: LARGER BENCH
 - Affirmed DHC in 256 ITR Page 1 Full bench ruling
 - Although reopening wide after 1987 amendments but;
 - No power of review and change of opinion;
 - Inbuilt protection in section 148 apparent from schematic interpretation etc
 - Tangible Material with Live Nexus must for Reasons to believe

SC in Kelvinator case 18/01/2010

- ON REOPENING U/S 148 HELD: LARGER BENCH :
Issues for debate
 - How far DHC ruling as to presumption of mind stands adopted in SC ruling when there is no specific reference for the same;
 - Whether SC ruling applies in reopening after 143(1) and 143(3) (within 4 and after 4 years)?
 - Whether SC ruling in Rajesh Jahaveri 291 ITR 500 Division bench stands explained to assessee's favor?

SC in Kelvinator case 18/01/2010

- ON REOPENING U/S 148 HELD: LARGER BENCH :
Issues for debate
- Whether material as stated in SC instant ruling
can be existing material or is fresh material?

Kar High Court on reopening at DICTATES (Jan 2010)

- Aslam Ulla Khan: ITA 451/2004
- Held reopening on dictates of CIT as apparent from reasons recorded without application of mind is bad in law.
- Also refer DHC latest ruling in Jagjit Pal Singh (if AO examined the matter on its own and there is no action spelt out by higher authority- reopening ok)
- SC ruling in Green World Corpn.
- Raj HC in 178 Taxman 33 (dictates reopening)
- Latest Mumbai Bench ITAT in Double Dot 33 DTR 442

Section 153A- Basic Points

- *Applicable to search/requisition initiated/made on/after 1 June 2003*
- *Non Obstante clause to Section 139;147;148;149;151 and section 153*
- *Notice for six assessment years immediately preceding the asst. year corresponding to previous year in which search is made- with six different assessments*
- *As Per explanation, all other provisions to apply ACCORDINGLY*
- *Assessment/reassessment pending on date of initiation of search shall ABATE*

Section 153A- Abatement Matrix: As on Search Date

Status of Six Years	Scope of 153A Assessment
Year 1: Return filing time available – return not filed	Whether limited to search material?
Year 2: No return filed due date passed	Whether limited to search material?
Year 3: 143(2) pending	Whether limited to search material?
Year 4 &5 : 148 Pending	Whether limited to reasons and search material?
Year 6 : 153A Pending	Whether limited to prior search and current search material?

Section 153A- Abatement Matrix: As on Search Date

- *Delhi Bench of ITAT in Sanjay and Anil Bhatia*

Held even after earlier 143(1) if nothing found being incriminating during search for addition concerned- same cannot be sustained

Orders Dated 1/01/2010

Eg: mere filing of share application forms during search may not empower AO to proceed to investigate during 153A assessment, the said issue.....

Section 153C- Search Assessment of Other Person

Notwithstanding anything contained in [section 139](#), [section 147](#), [section 148](#), [section 149](#), [section 151](#) and [section 153](#), where the Assessing Officer is satisfied that any money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned belongs or belong to a person other than the person referred to in [section 153A](#), then the books of account or documents or assets seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against each such other person and issue such other person notice and assess or reassess income of such other person in accordance with the provisions of [section 153A](#) :]

Implication (if any of missing word in non obstante clause "to the contrary")

Service of Notice u/s 143(2) ETC

- Whether amendment of section 292BB is prospective or retrospective?
 - Del ITAT in Cebon India held same to be prospective (contrary Ahd ITAT in Varia Pratik)
 - Special Bench of Del ITAT Kuber Group cases 117 ITD 273
 - P&H High Court in Cebon
 - DHC Mani Kkkar 178 Taxman 315
 - Held Prospective from AY 2008-2009

Service of Notice u/s 143(2) – Case Studies

- **DHC Ruling in Silver Streak** (Where assessment is completed u/s 144 after alleged service of notice u/s 142(1)/143(2) by Speed Post) – Held mere service by Speed Post cannot be deemed as service specially when a) assessee has timely objected before AO regarding non service of notice b) revenue failed to prove service by producing relevant material (viz **postal receipt etc**) c) revenue did not take steps to find out whether jurisdictional notice properly served or not 216 CTR 261
- In cases *where Assessee did not have any chance to participate in asst proceedings which concluded u/s 144 finally – it seems section 292BB will not trigger-* advisable to take objection before CIT(A)

Service of Notice u/s 143(2) – Case Studies

- **DHC in Vins Overseas 212 CTR 554** (In case of asst. u/s 143(3) – where assessee for first time took plea before ITAT regarding belated/non service of jurisdictional notice and assessee never whispered doubt before AO (when it appeared before AO)– HC reversing ITAT order – held service by registered post – presumed to be correct
- **Emphasizes Timely objection** to service of notice is must - more because of 292BB -**Also held by Delhi ITAT in r.k.gupta 122 TTJ 256 that when no notice u/s 143(2) issued – no question of application of 292BB/148 proviso**

Service of Notice u/s 143(2) – Case Studies

- **DHC in Rajesh Sharma 214 CTR 547** – Service on employee of co. – not authorized to receive notice – bad in law & where ever service is doubted – **revenue is bound to produce postal receipt and in case wrong address is reflected thereon – service will be bad in law (SLP Dismissed by SC on 9 May 2008)**
- **Further refer:**
 - **Latest P&HHC in Avtar Singh 219 CTR 588**
 - **DHC in Shanker Lal Ved Prakash 300 ITR 243**
 - **DHC in Yamu Industries 214 CTR 445**
 - **Latest Luck ITAT in Bedi Entp 114 TTJ 706 & 116 TTJ 239**

Service of Notice u/s 143(2) – Case Studies

- Extract from All HC in Choubsons ITA 90/2005 – 6 MAY 2008:

"A notice on a company incorporated within the meaning of the Companies Act can not be served on anybody associated with the company in any manner and any such undue service can not be considered as sufficient service"

Service of Notice u/s 143(2) – Case Studies

■ Snap shot of Various Other rulings

Precedent	Ratio
DHC Hotline 211 CTR 207	Service on Security Guard Improper, timely objected
DHC in Regency Express 291 ITR 55- <u>also refer Mad HC in Sumitra Menon</u>	Service on Employee – Proper – as No objection before AO
Del ITAT in 98 TTJ 97, 92 ITD 415	Service must be on authorized person as per sec 282
DHC in 216 CTR 142 Nulon – (SC SLP Dismissal) & 171 Taxman 359	Borderline notices issued at limitation end – no presumption for valid service (u/s 143(2))

Service of Notice u/s 143(2) – Case Studies

■ Snap shot of Various Other rulings

Precedent	Ratio
<p>DHC in Vishnu & Co ITA 470/2008- <i>Also see latest SC SLP dismissal in <u>AVI OIL 317 ITR PART 1- ITAT Ruling at 18 SOT 219</u> - AFFIXTURE-AGRA 3RD MEMBER ARUN LAL</i></p>	<p>Notice issued on last day of limitation – taken to assessee's premises after working hours – Inspector affixed the same held not proper service (Asr ITAT K.G.Sinhannia)</p>
<p>DHC in Eshaan Holdings <u>(Jind Cooperative – P&H High Court)</u></p> <p>Also refer latest Mad HC in P.L.Gandhi Non issuance of 143(2) in specified time- renders asst void</p>	<p>Proof for service of notice must be on record (onus revenue) and Revenue bound to take cognizance of new address in subsequent returns for correct service of notice</p>

Service of Notice u/s 143(2) – Case Studies

■ Snap shot of Various Other rulings

Precedent	Ratio
Del ITAT 17 DTR 127 AMARJEET KAUR	Service within time specified u/s 143(2) must-affidavit filed before AO
P&HHC in Sat Narain 183 Taxman 401 Luck ITAT 121 TTJ 701	Identity of Person recd the notice & Service on assessee personally not legal mandate
For ex-parte assessment u/s 144 for failure to response to 142 notice	Mandatory to Prove 142 service refer: Gau ITAT TM 93 ITD 100 DHC 266 ITR 476/ 84 ITD 33

Service of Notice u/s 143(2) – Case Studies

Precedent	Ratio
DHC Mani Kakkar 1203/2008 DHC Cross Investments ITA 111/2009	Incorrect Service of jurisdictional notice will be fatal to assessment
Madras High Court Subbu Shahashank TA 1341/2009- Dec 2009	In case revenue not able to prove that assessee's contention as to non service is incorrect- treated- non service
DHC Mayawati 222 CTR 117	Notice Service at address occupied by assessee in official capacity - valid

Notice and Assessment on non existent entity

■ Snap shot of Various Other rulings

Precedent	Ratio
DHC Suresh Kumar Mittal applied SC 65 ITR 207	NOTICE ON NON EXISTENT FIRM BAD IN LAW
DHC ITA 1343/2009 18/12/2009	Notice Issued after time period- assessment bad in law
DHC Vived Marketing (similar ratio in Impsat 91 ITD 354; Century Enka 303 ITR 1 AT/Pampasar 15 SOT 331)	Assessment order on hitherto dissolved & struck off company (Section 560)- bad assessment to be quashed

Section 143(2)/148 service - issues

Other issues:



- a) Appearance on telephonic call – whether stops assessee from pleading non service etc
- b) Assessee having purchased the Stamp Paper on 9/4/2005 for giving POA to CA – ITAT drew presumption that notice of section 148 dated 4/4/2005 was served on assessee (when same did not come back) 127 TTJ 250 (Agra – TM)

Jurisdictional Objection

- ROI filed with ITO New Delhi , Notice u/s 143(2) by ITO Mumbai
- Unless Jurisdiction transferred as per section 127, objection as to issuance of notice by ITO Mumbai as per section 124(2) in one month from service of notice
- Refer Useful guidance in : P&HHC in 220 ITR 446, Chd ITAT in Gurdev Singh 86 TTJ 861 , DHC in Anil Kohsla and Anjali Dua 219 CTR 183
- In between transfer to Correct AO ? Whether valid?
- Latest Bang ITAT (AO's finding hitting at Jurisdiction) and Mumbai ITAT 32 SOT 473 rulings²⁴

Section 56 : Finance No 2 Act 2009

- No rules for quantification of concession enjoyed whether stand can be taken that Charge will fail for transactions done in previous year (SC B.C.Shrinivassa Shetty 128 ITR 294)- No advance tax interest possible? (Infosys 297 ITR 167)
- Status of Business transactions and Distress Sales etc? Section 145 versus Section 56
- Onus on assessee to prove genuineness of Gifts from relatives on lines of section 68, even when exempted?
- Whether interpolation of co. can avoid legitimately the tax exposure of section 56?
- Interpolated cost at the time of sale? Section 49(4)

Sec 142A – Issues and Concerns

Section 69; 69B etc

- Inserted by Finance No 2 Act of 2004 w.e.f 15 April 1972 to overrule SC ruling in Ayya Bala Paul case, giving power to refer the valuation of investment to DVO
 - *For the purposes of making an asst.*
 - *Where estimate is required to be made*
 - AO may refer the valuation of invest referred in sec 69/69A/69B to DVO
 - Before using DVO report, AO bound to confront it to assessee (del ITAT 23 SOT 297 SMC)
 - *Final Discretion lies with AO to use or not to use DVO report (AO not bound to accept DVO report)*

Sec 142A – Issues and Concerns

- Whether provision can be applied first time by ITAT in pending appeals where reference to DVO made by AO before Oct 2004 when Finance Act 2004 came in operation Held Yes :
 - Del ITAT in 93 TTJ 425
 - Asr ITAT in 109 TTJ 568
 - Luck TM ITAT in 104 ITD 126

Sec 142A – Reopening on Valuation Report

- Whether reopening allowed on basis on DVO report where previously 143(1)/intimation is issued? Held:
 - Yes in 107 TTJ 779 Pune ITAT, Luck ITAT Dinesh Dua &
 - No in 22 SOT 156 Del ITAT, Jp ITAT in 9 DTR 459
 - Ref BHC in 216 CTR 217 & TM Ahd ITAT in 113 ITD 255 For Principles laid
 - HELD NO By Guj HC in Manjusha Estates Pvt Ltd March 2009' Luck ITAT in Vijetha
 - Held No by Jaipur ITAT in Shree Goverdhan Builders 29 SOT 72 (URO)

Sec 69 and Valuation Report

- Whether addition u/s 69/69B for understatement of purchase consideration of property, can be made only on basis of DVO report collected u/s 142A? Answer seems to be NO:
 - Refer Del ITAT in 102 TTJ 964 Fav, 89 ITD 586;Ahd ITAT (Third Member) in Amit Estate 113 ITD 255
 - Ref Jaipur ITAT in 111 TTJ 531 Fav
 - **Deeming Fiction of section 69/69B requiring factum of investment may not be discharged by solitary reference to DVO report u/s 142A (Refer Pithisaria Commentary Page 3211/Vol 2) Also see Ralkt ITAT in 98 TTJ 518**
 - Adv Del ITAT in Haneamp 101 ITD 19

Section 69 and VALUATION REPORT

Further, when as held by Guj HC and, DVO report is not material sufficient for reopening the case u/s 148, same cannot be used for justifying the addition (as DVO report is mere guidance value and is not gospel truth)
Addition u/s 69 on basis of DVO report/Stamp valuation rates is not justifiable unless positive evidence for understatement is there:

- a) Del ITAT in Chandni Bhuchar ITA 1580/2008***
- b) Del ITAT in Rajeshwar Nath HUF ITA 4295/200; Luck ITAT in Vijetha (infra)***
- c) DHC in Shakuntla Devi ITA 345/2007; Del ITAT in 180 Taxman 131 Magazine & Dinesh Jain – 34 SOT 444***

Section 69- Valuation Report

- Whether addition for excessive construction cost as estimated by DVO u/s 142A, can be made even when assessee has maintained audited books recording cost of construction with reference to vouchers etc.? Answer seems to be no:
 - Refer Luck ITAT TM in Rohtas Projects 104 TTJ 1, Jd ITAT in 97 TTJ 426' Mad HC in 20 DTR 113 etc; *Luck ITAT in Vijeta Educational Society 115 ITD 337 (142A to be read with 145)*
 - In case assessee also furnished own valuer's report which remained unchallenged – Addition on basis of DVO's report u/s 142A invalid Jaipur ITAT in 29 SOT 72 (URO)- Held section 142A not for estimating expense u/s 69C as same is not covered u/s 142A- 32 DTR 92 DHC– Aar Pee Appt

Unexplained income – Section 68

- Post SC ruling in Lovely exports holding identity proof sufficient discharge of onus- ITAT benches – New trends (ADVERSE)
- In case of High Premium/portion: Kushara Real Estate ITA 4247/Del/2009
- In case of entry operator statement: Janki Jewellers ITA 3787/Del/2009
- In case of denial by share holder: Beautux
- In case of non service of summons/non production of shareholders: Infomediary and Tirputai Venkateshwar...Delhi Bench

Unexplained purchases/expenses etc

In case where assessee builder purchased properties and sold the same at profit offered for taxation, and taxed as such, whether AO can still proceed to disallow purchase/construction expenses for want of Evidence (for which Primary details provided and no further investigation by revenue)?

Delhi Bench of ITAT ruling in 124 TTJ 554 Eland case

Unexplained loans etc

Whether even after providing all the identity Details of lenders including confirmations; lender's bank statements; final accounts etc and Even after having on record the presence of Lender who confirmed the factum of loan, can Still be addition u/s 68 made in hands of borrower for vague explanation by lender as to its source of income vis a vis amount lent?

Allahabad High Court in Raj Kr Aggarwal case ITA 179/2008 (SOURCE OF SOURCE CANNOT BE ASKED)

Section 69C- Unexplained Household expense

- Size of family and so called living standard cannot be made basis for additions on account of unexplained house hold expenses 106 TTJ 712 Jodhpur ITAT
- Where AO had totally relied upon Inspector report which was based on estimation and no other evidence was collected, much less statement of persons who alleged to have performed various functions for marriage celebration by assessee of his daughter, whereas assessee gave detailed accounts disclosing expense incurred and source of the same, rejection of assessee's explanation was unsustainable 118 TTJ 272

Section 69C- Unexplained Household expense

- An addition cannot be made merely in the basis of suspicion especially when there was no material on record to suggest that household expenses claimed to have been incurred and declared by assessee were not correct 114 TTJ 973 (Delhi ITAT Deepa Bhatia etc)

Previous Withdrawals and Cash Deposit

- Latest Mumbai Bench of ITAT RULING IN 34 SOT 281 – Raj Dadarkar
- Latest Delhi Bench of ITAT ruling in Sanjiv Chadha etc

Section 36(1)(iii)

- SC SA Builders 288 ITR 1
- DHC Dalmia Cement 183 Taxman 422 (onus on revenue to prove loan advanced for personal benefit of director/ non business purpose); Mad High Court 298 ITR 306 (funds given to hospital trust where employees of assessee were given concessional treatment- commercial expediency)
- Case Study: Ancillary Unit finance (intt free)
- Case Study: Controlling interest maintain
- Case Study: Partnership firm
- Case Study: Interest capitalisation? 120 TTJ 397; 34 SOT 57 etc

Section 36(1)(iii)

- DHC H.B.Stock Holdings 27 DTR 45 (enough funds – own available); 319 ITR 299 – Sushma Kapoor
- Latest P&H HC in 319 ITR 75 MARUDHAR
- DHC & Delhi Bench of ITAT ruling in Knorr Bremse (borrowed funds given to subsidiary for purchasing stake)
- Jab Bench ITAT (enough own funds available – no justification for interest bearing funds- disallowance upheld) Yash Vehicles 34 SOT 502 (40A(2)(b)); 318 ITR 210
- New Proviso – Scope ?

Section 14A: Rule 8D

- Latest P&H High Court in Hero Cycles
Finding by AO that assessee incurred some expense to earn tax exempt income must

P&H HC in 318 ITR 100: Held Relief u/ch VIA –
no role of Section 14A

Rule 8D Issues? whether applicable to situation
where assessee do not intends to earn tax
exempt income (stock in trade etc)

Derivative: Speculative F&O

- Delhi Bench of ITAT ruling in G.K.Anand Bros Buildwell (notification relates back to date of amendment in Finance Act 2005- in between loss cannot be treated as speculative –ratio applied to commodity transactions also)
- Section 43(5)(d) versus Explanation to section 73?
- Section 43(5)(d): whether can be waived?

Jaipur ITAT ruling on section 40(a)(ia) 26 DTR...

ITAT accepted assessee's contention that said provision cannot be applied in a scenario where there were genuine doubts on interpretation/application of TDS provisions and payment made is genuine in nature. For this ITAT pressed into service CBDT Circular No 5/2005.

Further, ITAT also held that section 40(a)(ia) is only applicable where amount is PAYABLE (DUE AND OUTSTANDING) and not where expenditure stands PAID, reasoning that section 40(a)(ia) being deeming fiction needs strict interpretation and since, word payable is different from PAID.

Section 40(a)(ia)

Other issues:

- a) correlation with section 201 default – double jeopardy argument
- b) Gujarat High Court – 40(a)(ia) reimbursements – no tds – no disallowance
- c) Case Study on Lab Test Collection centre
- d) Case Study on freight collected by seller
- e) Case Study on rate difference TDS?

TDS developments Section 194C etc

- Asr Bench ITAT in Satish Agarwal ITA 228/2008 held entering into contract for hiring of trucks is not equivalent to entering into contract for carrying out any work as contemplated in section 194C (here the assessee hired trucks belonging to truck owners for a fixed period, on payment of hire charges. The hired trucks were utilised by the assessee in its business of civil construction. There was no agreement for carrying out any work or to transport any goods or passengers from one place to another. The assessee simply hired trucks on pymt of hire charges) – similar ratio in Viskhapatnam Bench ruling in 28 DTR 129 Mythri Transport & Cuttack Bench in 126 TTJ 240

TDS developments Difference in receipts

- In case of difference in receipts disclosed in TDS certificates and receipts shown in books of accounts, addition for undisclosed income (if any) can be of profit embedded in the same Cuttack Bench in 126 TTJ 240

Section 43B

- SUPREME COURT RULING IN ALOM EXTRUSIONS (FINANCE ACT 2003 AMENDMENT DELETING SECOND PROVISIO RETROSPECTIVE) 319 ITR 306
- KAR HIGH COURT SABARI (EMPLOYEE'S PF COVERED BY SECTION 43B 298 ITR 141
- ADVANCE PAYMENT COVERED? SPECIAL BENCH GLAXO 107 ITD 343

Books of Accounts, GP Rate etc

- *Books / Method of accounting cannot be rejected light heartedly/casually Refer SC in 216 CTR 345, 299 ITR 1, Del ITAT in 15 SOT 353*
- *Audited books free from qualification needs to be ordinarily taken as correct unless strong reasons for doubt are there (eg trading outside the books detected etc) – CBDT Circular No 3/16-1-1942 & 18/28-4-1955 (revenue cannot lecture how accounts should be kept)*
- *Fall in GP rate – Explain with reference to specific sale/purchase instance, market /economy conditions, increase in purchase price, increase in gross sales etc (Jodh Bench Haridas Parikh; Delhi ITAT Chetan Dass Laxman Dass/Motia Rani etc)*

Books of Accounts, GP Rate etc

- Whether Stock register must u/s 2(12A) read with sec 44AA or mere non maintenance of stock register and/or fall in GP rate without any thing more is sufficient to reject books?
- Held No 25 SOT 19 URO Jd , 25 SOT 59 Jd URO (other defects required), Bang ITAT in 104 TTJ 1030, 3 SOT 803, Del TAT in 15 SOT 353, Jd ITAT in 113 TTJ 274, Asr ITAT in 307 ITR 172 AT, Jd ITAT in 107 TTJ 114
- Cal HC in 279 ITR 457, Raj HC in 207 CTR 19
- Adv in Mum ITAT in 24 SOT 556
- Further depends upon *line of business whether manufacturing involving numerous raw materials or simple trading etc*

DHC Ruling in Madhushree- Background of the case

- Section 271(1)(c) Relevant Text "

"271. Failure to furnish returns, comply with notices, concealment of income, etc. (1) If the Assessing Officer or the Commissioner (Appeals) or the Commissioner in the course of any proceedings under this Act, is satisfied that any person -

...

*(c) has concealed the particulars of his income or furnished inaccurate particulars of such income, **he may direct** that such person **shall** pay by way of penalty, -*

.....

*iii) (ii) in the cases referred to in clause (c), in addition to tax, if any, payable by him, a sum which **shall not be less than** , but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income. ..."*

DHC Ruling in Madhushree- Background of the case

- *DHC rulings which held that satisfaction as to income concealment must be REFLECTED/APPARENT FROM ASSESSMENT ORDER ITSELF, while initiating penalty proceedings:*

Before subject amendment:

- *DHC in Ram Commerical 246 ITR 568 (Noted with approval by SC in Dilip Shroff)*
- *DHC in Diwan Enterprises 246 ITR 571*
- *DHC Full Bench in Rampur Engg 309 ITR 141*
- *DHC in Vikas Promoters 277 ITR 337*
- *DHC in Auto Lamps 278 ITR 32*
- *DHC in Shree Bhagwant 280 ITR 412.....*

DHC Ruling in Madhushree- Background of the case

- *Memorandum Explaining Provisions in the Finance Bill, 2008* Satisfaction for initiation of penalty under section 271(1) Sub-section (1) of Section 271 of the Income-tax Act empowers the Assessing Officer to levy penalty for certain offences listed in that sub-section. It is a requirement that the Assessing Officer is required to be satisfied before such a penalty is levied. There is a considerable variance in the judicial opinion on the issue as to whether the Assessing Officer is required to record his satisfaction before issue of penalty notice under this sub-section. **Some judicial authorities have held that such a satisfaction need not be recorded. However, Hon'ble Delhi High Court in the case of CIT v. Ram Commercial Enterprises Ltd (246 ITR 568) has held that such a satisfaction must be recorded by the Assessing Officer.**

DHC Ruling in Madhushree- Background of the case

-Given the conflicting judgments on the issue and the legislative intent, it is imperative to amend the Income Tax Act to unambiguously provide that where any amount is added or disallowed in computing the total income or loss of an assessee in any order of assessment or reassessment; and such order contains a direction for initiation of penalty proceedings under sub-section (1), such an order of assessment or reassessment shall be deemed to constitute satisfaction of the Assessing Officer for initiation of penalty proceedings under sub-section(1). Similar amendment has also been proposed in the Wealth-tax Act. **These amendments will take effect retrospectively from 1st April, 1989.**

DHC Ruling in Madhushree- Background of the case

Amendment by Finance Act, 2008 With Retrospective Effect from 1/4/1989 in section 271

[(1B) Where any amount is added or disallowed in computing the total income or loss of an assessee in any order of assessment or reassessment and *the said order contains a direction for initiation of penalty proceedings under clause (c) of sub-section (1), such an order of assessment or reassessment shall be deemed to constitute satisfaction of the Assessing Officer for initiation of the penalty proceedings under the said clause (c).*]

DHC Ruling in Madhushree-

Assessee's Submissions before High Court (Interalia):

- (iv) In view of the position of law professed by the learned counsel, it was submitted by him that such satisfaction which is required to be arrived at by the Assessing Officer before initiation of penalty proceedings and issuance of notice under Section 274 of the Act, is a question of fact which cannot be legislatively presumed by creating a fiction, as is sought to be done, by the impugned provision. Furthermore, he contends that the decision to levy penalty is discretionary which has to be exercised by the Assessing Officer, acting in his quasi judicial capacity, based on facts and circumstances of each case and hence cannot be substituted by legislative presumption

DHC Ruling in Madhushree-

Assessee's Submissions before High Court (Interalia):

....(v) The impugned provision is violative of Article 14 of the Constitution as there is no nexus between the object sought to be achieved by the legislature and the impugned provision. He impugned the provisions of Section 271(1B) of the Act on the ground that it confers on the Assessing Officer wholly arbitrary power, there being no in-built guidelines laid down for exercising such power

DHC Ruling in Madhushree-

Assessee's Submissions before High Court (Interalia):

...submitted that a bare reading of the Memorandum explaining the Finance Bill, 2008 (hereinafter referred to as the ‘Memorandum’) and the Notes on Clauses, i.e., Clause 48 would show that the object and reasons stated therein do not get reflected in the impugned provision. He contends that the very fact that sub-section (1B) of Section 271 of the Act deems satisfaction in the order of assessment, re-assessment or rectification, the Revenue would accept that satisfaction is required to be arrived at by the Assessing Officer during the course of any such proceedings. Being a quasi-judicial function the satisfaction should be reasoned.

DHC Ruling in Madhushree-

Assessee's Submissions before High Court (Interalia):

".....The learned counsel further submitted that while he does not question the power of legislature to enact law retrospectively; the retrospective amendment is not only oppressive but also fails to supply any rationale for its applicability from 1.4.1989.The learned counsel further contended that penalty proceedings being penal in nature, the principle of greater latitude in economic matters cannot apply to such like provisions. He also contends that while constitutionality of a provision is presumed and the onus is on the party which challenges its constitutionality; the onus in the instant case would shift, as no plausible reason has been given with regard to the provision coming into force w.e.f. 01.04.1989....

DHC Ruling in Madhushree-

Revenue's Contention before High Court:

(i) There is always a presumption with regard to constitutionality of a provision. The constitutionality of legislation should be judged from the generality of its provision and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. He submitted that hardship, financial or otherwise cannot be a ground for challenging constitutionality of a legislation, particularly while dealing with complex economic issues....

DHC Ruling in Madhushree-

Revenue's Contention before High Court:

[ii) He refuted the submissions of the petitioner that there was no nexus between the impugned provision and the objects sought to be attained by the impugned legislation. The learned ASG submitted that the purpose and object of the amendment was to clarify the interpretation of the provisions of Section 271(1)(c) of the Act. It was his contention that the legislative intent in bringing about the amendment was; that the satisfaction is required to be recorded in writing only at the time of levy of penalty and not at the time of initiation of penalty proceedings. He submitted that taxing statute has to be construed strictly.

DHC Ruling in Madhushree-

Revenue's Contention before High Court:

(ii)He submitted that amendment was clarificatory in as much as it sought to make clear that the Assessing Officer is not required to record his satisfaction in writing before initiating penalty proceedings and such satisfaction can be specifically arrived at and hence recorded, only at the stage of levy of penalty as against prima facie satisfaction which is arrived, at the stage of initiation. He contended that instead of satisfaction at two stages, by virtue of the amendment, satisfaction be arrived at and recorded only at the stage of imposition. Therefore, according to the learned ASG a simple endorsement in the assessment order that penalty proceedings are initiated would suffice

DHC Ruling in Madhushree-

High Court Analysis/Reasoning:

15.5 In our opinion the impugned provision only provides that an order initiating penalty cannot be declared bad in law only because it states that penalty proceedings are initiated, if otherwise it is discernible from the record, that the Assessing Officer has arrived at prima facie satisfaction for initiation penalty proceedings. The issue is of discernibility of the 'satisfaction' arrived at by the Assessing Officer during the course of proceeding before him...

DHC Ruling in Madhushree-

High Court Analysis/Reasoning:

15.6 As indicated hereinabove, the position is no different post-amendment. The contra-submission of the learned ASG that prima facie satisfaction of the Assessing Officer need not be reflected at the stage of initiation but only at the stage of imposition of penalty is in the teeth of Section 271(1)(c) of the Act. Section 271(1)(c) has to be read in consonance of Section 271(1B).

DHC Ruling in Madhushree-

High Court Analysis/Reasoning:

.....

The presence of prima facie satisfaction for initiation of penalty proceedings was and remains a jurisdictional fact which cannot be wished away as the provision stands even today, i.e., post amendment. If an interpretation such as the one proposed by the Revenue is accepted then, in our view, the impugned provision will fall foul of Article 14 of the Constitution as it will then be impregnated with the vice of arbitrariness....

DHC Ruling in Madhushree-

High Court Analysis/Reasoning:

.....The Assessing Officer would in such a situation be in a position to pick a case for initiation of penalty merely because there is an addition or disallowance without arriving at a prima facie satisfaction with respect to infraction by the assessee of clause (c) of sub-section (1) of Section 271 of the Act. A requirement which is mandated by the provision itself... ..

DHC Ruling in Madhushree-

High Court Analysis/Reasoning:

..... Even though both the Memorandum as well as Notes On Clauses refers to the conflict in judicial opinion and gives that, as the section (1B) of Section 271 does not do away with the principle that the prima facie satisfaction of the Assessing officer must be discernible from the order passed by the Assessing Officer during the course of assessment proceedings pending before him.....

DHC Ruling in Madhushree-

High Court Analysis/Reasoning:

...15.8 If there is no material to initiate penalty proceedings; an assessee will be entitled to take recourse to a court of law. ... **16. In our view the submission of the Revenue that the impugned provision deals with procedural aspect of the matter and hence cannot be challenged on the ground of retrospectivity is a surplusage. Suffice it to say that the legislature had plenary powers to enact a law both prospectively and retrospectively subject to certain constitutional limitations, as long its competency to do so is not under challenge and it is not unfair or unreasonable, i.e., falls foul Article 14 of the Constitution. ...**

DHC Ruling in Madhushree-

High Court Analysis/Reasoning:

In the instant case the legislature has expressly made a retrospective amendment by inserting Section 271(1B) w.e.f. 01.04.1989. The competency of the legislature to enact the impugned provision is not under challenge before us. In so far as the challenge to the impugned provision is laid on the ground of violation of Article 14; the same is not sustained when read in the manner, in which, we have read and interpreted the impugned provision...

..The fact that retrospectivity is limited to 01.04.1989, as indicated hereinabove even though perhaps carried out for obscure reasons, cannot enure to benefit of those to whom the amended law is to apply

DHC Ruling in Madhushree-

Final Conclusion:

held: "quote

Section 271(1B) of the Act is not violative of Article 14 of the Constitution. (ii) The position of law both pre and post amendment is similar, in as much, the Assessing Officer will have to arrive at a prima facie satisfaction during the course of proceedings with regard to the assessee having concealed particulars of income or furnished inaccurate particulars, before he initiates penalty proceedings. (iii) Prima facie` satisfaction of the Assessing Officer that the case may deserve the imposition of penalty should be discernible from the order passed during the course of the proceedings. Obviously, the Assessing Officer would arrive at a decision, i.e., a final conclusion only after hearing the assessee

DHC Ruling in Madhushree-

Final Conclusion: (iv) At the stage of initiation of penalty proceeding the order passed by the Assessing Officer need not reflect satisfaction vis-a-vis each and every item of addition or disallowance if overall sense gathered from the order is that a further prognosis is called for. (v) However, this would not debar an assessee from furnishing evidence to rebut the 'prima facie' satisfaction of the Assessing Officer; since penalty proceeding are not a continuation of assessment proceedings. [See *Jain Brothers v. Union of India* (1970) 77 ITR 107(SC)] (vi) Due compliance would be required to be made in respect of the provisions of Section 274 and 275 of the Act.

DHC Ruling in Madhushree-

Final Conclusion:

(vii) the proceedings for initiation of penalty proceeding cannot be set aside only on the ground that the assessmer order states ‘penalty proceedings are initiated separately’ if otherwise, it conforms to the parameters set out hereinabove are met.”

P&H High Court in 314 ITR 215

Haryana Warehousing Corporation case:
Revenue's Contention regarding Supreme Court
ruling in Dharmendra Textiles 306 ITR 277

The second contention advanced by the learned counsel for the appellant-revenue was, that the impugned order passed by the Income Tax Appellate Tribunal deleting the penalty imposed on the respondent-assessee under section 271(1)(c) of the Act, was not sustainable in law because of the clear judgment rendered by the Supreme Court in Union of India v. Dharamendra Textile Processors and others, 306 ITR 277. According to the learned counsel for the appellant-revenue the entire income which remained undisclosed, "with or without" any conscious act of the assessee. was liable to penal action.

P&H High Court in 314 ITR 215

Haryana Warehousing Corporation case:
Revenue's Contention regarding Supreme Court
ruling in Dharmendra Textiles 306 ITR 277

It is submitted by the learned counsel for the appellant revenue, that the concept of law, with regard to levy of penalty has drastically changed in view of the said judgment, inasmuch as, now penalty can be levied even when an assessee claims deduction or exemption by disclosing the correct particulars of its income. According to the learned counsel, if an addition is made in quantum proceedings by the revenue authorities, which addition attains finality, an assessee per se becomes liable for penalty action under section 271(1)(c) of the Act. ..

P&H High Court in 314 ITR 215

Haryana Warehousing Corporation case:
Revenue's Contention regarding Supreme Court
ruling in Dharmendra Textiles 306 ITR 277

. It is the vehement contention of the learned counsel for the appellant-revenue, that a penalty automatically became leviable against the respondent-assessee under section 271(1)(c) of the Act, after the finalisation of quantum proceedings. In this behalf, it is also pointed out, that in view of the judgment of the Supreme Court referred to above, the dichotomy between penalty proceedings and assessment proceedings stands completely obliterated.....

P&H High Court in 314 ITR 215

Haryana Warehousing Corporation case:
High Court rejecting revenue's plea:

It is also essential for us to notice, while dealing with the second submission advanced by the learned counsel for the appellant revenue, that the issue which arose for determination before the Supreme Court in *Union of India v. Dharamendra Textiles Processors and others*, 306 ITR 277 was, whether under section 11AC inserted in the Central Excise Act, 1944, by the Finance Act 1996, penalty for evasion of payment of tax had to be mandatorily levied in case of short of levy or non-levy of duty under the Central Excise Act, 1944, irrespective of the fact whether it was an intentional or innocent omission.

P&H High Court in 314 ITR 215

Haryana Warehousing Corporation case:

High Court rejecting revenue's plea:

In other words, the Apex Court was examining a proposition, whether mens-rea was an essential ingredient before penalty under section 11AC of the Central Excise Act, 1944 could be levied. In view of the factual position noticed here in above, the issue of mens-rea does not arise in the present controversy because the ingredients before any penalty can be imposed on an assessee under section 271 (1)(c) of the Act, were not made out in the instant case, as has been concluded in the foregoing paragraph.

P&H High Court in 314 ITR 215

Haryana Warehousing Corporation case:
High Court rejecting revenue's plea:

. Thus viewed, the judgment relied upon by the learned counsel for the appellant-revenue is, besides being a judgment under a different legislative enactment, is totally inapplicable to the facts and circumstances of this case. Accordingly, we find no merit even in the second contention advanced by the learned counsel for the appellant revenue.....

P&H High Court in Siidharth Entp.

- *Siddharth Enterprises: Concealment Penalty : SC Dharmendra Textiles Analysed :*

"Learned counsel for the revenue submits that even if claim of set-off of capital loss against profits of business was by negligence or mistake, the fact remains that the particulars of income furnished were not correct and willful concealment not being an essential requirement for levy of penalty under section 271(1)(c) of the Act, as held by the Hon'ble Supreme Court in Union of India v. Dharmendra Textile Processors, (2008) 306 ITR 277, the penalty could not be deleted.

...

P&H High Court in Siidharth Entp.

- *Siddharth Enterprises: Concealment Penalty : SC Dharmendra Textiles Analysed : We are unable to accept the submission. The judgment of the Hon'ble Supreme Court in Dharmendra Textile (supra) cannot be read as laying down that in every case where particulars of income are inaccurate, penalty must follow. What has been laid down is that qualitative difference between criminal liability under section 276C and penalty under section 271(1) (c) had to be kept in mind and approach adopted to the trial of a criminal case need not be adopted while considering the levy of penalty. Even so, concept of penalty has not undergone change by virtue of the said judgment.*

P&H High Court in Siidharth Entp.

- *Siddharth Enterprises: Concealment Penalty : SC Dharmendra Textiles Analysed :*

.....Penalty is imposed only when there is some element of deliberate default and not a mere mistake. This being the position, the finding having been recorded on facts that the furnishing of inaccurate particulars was simply a mistake and not a deliberate attempt to evade tax, the view taken by the Tribunal cannot be held to be perverse."

LATEST DHC in Escorts Finance Ex Facie Bogus – 183
Taxman 453 & 29 DTR 77

Latest ITAT rulings on Concealment Penalty

- ***Delhi ITAT in Sandhya Verma 114 TTJ 933: (also refer latest 123 TTJ 566)***

Facts: During assessment proceedings, it was noticed by AO that assessee has received certain gift of Rs 5 lacs. The assessee was asked to produce donor on various occasions. By assessee failed to produce the donor and finally surrendered the amount as income (to buy peace and avoid litigation)

Whether penalty u/s 271(1)(c) leviable?

Held No relying upon *DHC in 240 ITR 880* as revenue made no attempts to prove that version of assessee is false

Similar conclusion by Del ITAT in 171 Taxman 136 (Mag) in context of penalty on surrendered NR Gifts

Latest ITAT rulings on Concealment Penalty

- ***Delhi ITAT in Giri Raj Gupta 162 Taxman 81 (Mag)***

Facts: During assessment proceedings, it was noticed by AO that assessee has received sold certain shares on certain shares on which capital gains was offered to taxation. Assessee submitted available evidence in form of broker's notes etc. AO made enquiries through Investigation wing etc. and concluded that assessee brought undisclosed income in the guise of capital gains. Finally assessee surrendered the amount as income (to buy peace and avoid litigation)

Whether penalty u/s 271(1)(c) leviable?

Held No relying upon Guj HC in 249 ITR 125 as albeit assessee couldn't succeed in proving the amount represented cap gains proceeds but it could not be proved positively that assessee's claim stood disproved

Latest ITAT rulings on Concealment Penalty

- ***Pune ITAT in Emilio 118 TTJ 971***

Facts: In original return, certain tax position was taken on certain income treating them as non taxable (on basis of some technical advise), however later on, voluntarily, the said tax position was revised and due taxes were paid (to buy peace and avoid litigation). Revenue made the consequential assessment u/s 148 of the Act where revised income was accepted.

Whether penalty u/s 271(1)(c) leviable?

Held No as assessee acted bonafidely and his total conduct points reasonable cause

Latest ITAT rulings on Concealment Penalty

- *Asr ITAT in 172 Taxman 87 Mag*

Whether in penalty order u/s 271(1)(c) it is must that AO clearly specifies on what count penalty is levied viz for inaccurate particulars or for concealment of particulars of income?

Held Yes

relying upon Guj HC in 282 ITR 642; 122 ITR 306

Show cause notice: Section 274 : specific versus General Delhi ITAT in Cargill 110 ITD 616

Surrender Cases Concealment Penalty

- Concept of plea bargain US jurisprudence
- Penalty not to be initiated
- Evidence to prove income in concealment (fulcrum)
- Latest Nagpur Bench of ITAT in Malu Electrodes 33 DTR 487 & Delhi ITAT in Sanjay Chugh Dr. ITA 330/2008
- Conditional surrender to be honoured in TOTO Delhi Bench of ITAT in Raj Rani Mittal ITA 2275/2009

Asst & Stay

- DHC in Valvoline 217 CTR 292 and Soul 173 Taxman 468 recently held stay must be granted in routine manner where asst is made more than twice of returned income (In Valvoline case, DHC imposed Rs 15000 costs on revenue for unnecessarily forcing litigation on assessee)
- further refer CBDT Instruction No. 96- 21/8/1969 and 1914 dated 2/12/1993,
- **On 4/8/2009 SC has Dismissed revenue's SLP in above matter**
- **Latest Allahabad High Court 184 Taxman 59: Smita Aggarwal (CIT-A powers) & DHC Nokia 292 ITR 22**

Section 263 Revision by CIT

- **DHC Sun Beam (2009- TIOL- 552-HC- DEL) & Ashish Rajpal (ITA 485/2008- 14-05-2009)**
- **Lack of enquiry versus inadequate enquiry**
- **Brief AO's order**
- **Total remand versus Specific Remand**

Section 2(15) Charitable trust

Chd ITAT ruling in HP Environment case 125 TTJ 98 (services incidental rendered without profit motive not hit by new amendment); DHC ICAI Foundation 226 CTR 27 ; (merely because some remuneration is taken for incidental accounting projects at instance of govt – amended proviso not applies)

Section 2(15) Charitable trust

Latest Delhi ITAT ruling in Cane Development 33 DTR 170 Held if partly charitable objects are there, exemption u/s 11;12 is there and whatever action can be taken is possible at final assessment stage and not 12A registration stage

Bang ITAT (contra) 317 ITR 65 AT

Section 2(15) Charitable trust

Mum ITAT in 31 SOT 346 – Prospective operation from AY 2009-10 ONLY

Form No 10: revision is possible –P&H HC in 318 ITR 96 & P&H HC 318 ITR 93/96 – not required that society must be trust under Indian Trust Act

Mutuality

DHC in 319 ITR 179: SCOPE

HELD RENTAL INCOME DERIVED FROM NON MEMBERS- MERELY INCIDENTAL TO SERVICE TO NON MEMBERS – NOT TAINTED WITH COMMERCIALITY – CONTRA – 318 ITR 427 KER HC -

SC in 226 ITR 97 & 243 ITR 89 applied

Deemed Dividend

Not apply to trading transactions

*DHC 318 ITR 376 Ambassador ; 318 ITR 476
Creative Dyeing & 181 Taxman 155
(comprehensive- held trade advance do not
fall in it)*

*Finding for accumulated profits must:
Guj HC in 319 ITR 437*

*Mum SB ITAT in Bhaumik 120 TTJ 865 & Raj
HC in Hilltop 313 ITR 116*

Derivative: Speculative F&O

- Delhi Bench of ITAT ruling in G.K.Anand Bros Buildwell (notification relates back to date of amendment in Finance Act 2005- in between loss cannot be treated as speculative –ratio applied to commodity transactions also)
- Section 43(5)(d) versus Explanation to section 73?
- Section 43(5)(d): whether can be waived?

Depreciation: Section 32

- Intangible Assets:
 - GOODWILL DELHI ITAT HINDUSTAN COCA COLA DELHI ITAT SB PENDING IN TECHUMECH?;
 - NON COMPETE FEES ITAT IN 120 TTJ 983/ 318 ITR AT 283
 - BSE CARD : BHC TECHNO SHARES AND SECURITIES
 - MARKETING RIGHTS: DELHI ITAT GURUJI ENTERTAINMENT; SKYLINE CATERERS ETC
 - Latest Hyd Bench of ITAT in A.P.Paper Mills 33 DTR 148 Favorable
 - Delhi Bench ONGC Videsh ITA472/2008-30/10/2009 (commercial rights of mineral exploration – eligible as intangible asset for dep)

Depreciation: Section 32

- Active Use and Passive Use Latest DHC ruling in Panacea and Insilco (SLP SC dismissed); B.J.Duplex
- Stand By Equipment/emergency spares Allowable? Yes
- Discarded Machinery Depreciation DHC Yamaha (earlier years use suffice)
- Actual Cost – Credit basis purchase: Dep? Yes
- Section 40(a)(ia)- Depreciation to be disallowed if on part of actual cost TDS not deducted (already capitalized)
- Actual Cost of Plant : P&H to be determined on VALUATION OFFICER CERTIFICATE if no actual details available

Depreciation: Section 32

- Depreciation : Finance Lease Mumbai ITAT Special Bench in Asean Bank (SC in Asea Brown Boveri case etc)
- Block Concept
 - Latest DHC Balco Ruling: Use of block important and not individual assets
 - BHC G.R.Shipping (itatonline.org)
 - Mum ITAT Swati Synthetics (itatonline.org)

Contingent Expenses

- Warranty: SC Rotork Control
- Forex Fluctuation : SC Woodward Governors
- Long Service Award: DHC Insilco

Indexation benefit Section 48

- Mumbai ITAT SB in Manjula Shah 318 ITR 417 AT
In case of previous owner as per section 49,
indexation from date when predecessor hold the
asset

Delhi High Court Section 41(1) etc

- Sanden Vikas 15/01/2010: ITA 14/2010:
 - HELD: (if an amount written off has neither been allowed as deduction nor does it represent trading liability which had gone in income computation in earlier years, same do not attract section 41(1))- customs duty embedded in actual cost – remitted – 41(1) attracts? Mum ITAT 31 DTR 82 (also refer SC in Nectar case)
 - Also refer P&H latest rulings in Sita Juneja and G.P International (merely because liability is outstanding for the last six years when same are shown as payable in assessee's books, section 41(1) is not attracted as it requires write-off etc)

Section 41(1) etc

- P&H High Court in Aggarwal Steel Case:
 - Refund of excise duty recd during relevant year is taxable u/s 41(1) on receipt basis and mere show cause notice to dispute said refund could not defer taxability u/s 41(1), however, held if subsequently found payable would be allowable as expense in the year in which liability is discharged?
 - Whether covers bank guarantee furnished cases? Western India Polywood SC SLP Notice issued
 - Kar High Court in Karnataka Breweries (when debtor know creditors has waived the liability-41(1) attracts) ITA 12/2005

Section 41(1) etc

- Bombay High Court in SarlaDisha ITA 2319/2009: Held

Section 41(1) deals with a situation when there is a Remission/cessation inter alia in respect of trading Liability. There is a finding of fact that liability continues to be acknowledged by both the parties to the transaction. Therefore ITAT was not wrong in coming to the conclusion that there is no remission/cessation of a trading liability.

Business suspension and Expense allowability

33 DTR 210: KNP Securities:

Mum ITAT Held: SEBI has barred the assessee from doing business till further orders and thus not doing business activity was on account of forced Circumstances and not voluntarily and therefore Assessee was entitled to deduction for business Expense, interest etc

SC on Manufacture for 80IA/80IB in Jan 2010

- Oracle case

Held when a blank CD is transformed into software loaded disc it amounts to manufacture u/s 80IA

- Emptte Poly Yarn case

Held after considering Finance No 2 Act 2009

Definition of manufacture- twisting and texturising
Of partially oriented yarn amounts to manufacture

SC on Diversion of Income at source and Real Income Theory

- In context of allowability of state advised price (SAD) as an expense in the hands of societies paid to cane growers, held to be determined:
 - Real income theory basis;
 - Business Working manner of societies;
 - Manner in which SAD is fixed;
 - Overriding charge versus application of income

Satpuda Tapi case- Jan 2010

Section 244A: SC in HEG case

- Words “refund of any amount becomes due to the assessee” also includes interest which was accrued on refund but not paid with refund of tax and hence interest is eligible for “interest on refund” withheld
- Similar Ratio by DHC in MGF cases

NBFC's taxation: NPA as per RBI Directive

- SC in Sothorn Technologies Held
 - RBI directive is limited to presentation/disclosure of final accounts and has nothing to do with computation of taxable income under income tax act
 - Provision for NPA in terms of RBI directions 1998 neither constitute expense as per section 36(1)(vii) nor u/s 37. Further section 37 can also not be availed.
 - Accounting policies of NBFC cannot determine taxable income.

Characterization of rentals income: Sec 22 versus 28 versus 56

- BHC in Enakshi Mills ITA 2409/2009
 - Held Business centre rentals which have been taken on rent by assessee and further sub-rented after exploitation of property as commercial venture- is income from business (REFER DHC in D.S.Promoters ITA 654/2008 & Guj HC in 296 ITR 661)
 - Kar High Court affirmed in Mysore Hotels case ITAT finding that mixed rentals from property and facilities – facility portion rental to be assessed under business head as assessee is carrying hotel business

Characterization of rentals income: Sec 22 versus 28 versus 56

- BHC in Automann ITA 2342/2009
- Rental/royalty etc from business conducting by third party is business income where assessee had kept effective control of business to itself; licenses and permits stood in assessee's name; term of agreement was 3 yrs; conductor would remove himself after end of agreement's terms... (income assessable under business head and not other sources as sought to be contended by revenue)

Characterization of share transaction: section 45 versus 28

- DHC in Jindal Photo Investment: Held where share were held for long period of time and share were shown as non current investment asset in balance sheet/books right from their acquisition and sale proceeds utilised to discharge loan- capital account transaction – intention to earn dividend and capital appreciation (consistency of treatment highlighted)
- DHC in SMC Credit where ITAT gave finding that there is significant and systematic dealing in shares by assessee they really constituted stock and not investment irrespective of books treatment)

Characterization of share transaction: section 45 versus 28

- BHC in Gopal Purohit affirmed ITAT order 122 TTJ 87 Held (very important Delhi ITAT case 34 SOT 42- Rohit anand case)
- It is open to assessee to maintain two separate portfolios & Shares activity treated as investment in earlier years cannot be business in subsequent years if facts are the same
- Also refer Mum ITAT Janak Rangwalla 11 SOT 627 & Sarnath 120 TTJ 216
- DHC latest ruling in Shri S Chand/14/12/2009: publishing business – shares sold as market going repeatedly down- predominant income from publishing business- not business transaction

Characterization of share transaction: section 45 versus 28

- Very important Delhi ITAT case 34 SOT 42- Rohit anand case Held (consistency also highlighted)
- Where assessee was doing jewellery business- intention to hold shares as investor corroborated from:
 - No use of borrowed funds; own funds used
 - Not routed frequently
 - Total no of transactions are few
 - Shares purchases are held for quite no of days
 - Delivery taken

Sanctity to short term concept versus business asset

Latest Advance ruling of Jan 2010 in Star Cases

- On Tax Planning: Held
- It is within the legitimate freedom of the contracting parties to enter into a transaction, which has the effect of extending to the party the benefit of exemption under the statute. The contracting party is not bound to enter into a transaction in such a way that it results in tax liability while foregoing the benefit of exemption under the law.

Advance ruling in Dana Corpn case

Cap Gains Consideration Sec 48

- Held: The profit/gain envisaged in section 45 is not something which remains ambivalent or indefinite or indeterminate. The consideration for transfer of shares in money/money's worth is not something which can be implied or assumed. No profit or gain in the form of consideration for transfer by a process of deeming or on presumptive basis.
- (Long term lease and refundable security deposit case study)

Scope of Deduction u/s 80IA/80IB Derived from

- BHC in Rachna Udyog ITA 2394/2009: Held Forex fluctuation arising out of sales proceeds is directly related to sale transaction has to be considered while computing deduction u/s 80IA/80IB
- DHC in Advance Detergents 33 DTR 185: Held interest recd by assessee on overdue payments from customers is to be considered as profits and gains derived from industrial undertaking
- HPHC in 31 DTR 323 Allied Ind: Held income surrendered eligible for 80IA/80IB benefit & SC
- Liberty 317 ITR 218 considered

Section 40A(2)

Whether disallowance of interest paid to relatives
Can be made by AO u/s 40(A)(2)(b) comparing
the given rate of 18% interest p/a with assumed
General rate of 12% p/a?

CBDT Circular No 6-P 6/7/1968
SC Indian Printing 117 ITR 569

Not applicable on Discount to Related Parties
DHC United Exports case & Mad HC 123 ITR 592

Withdrawal of CBDT Circulars 786/2K & 23/1969

Since there is no change in legal position and it has never been the case of CBDT that their circulars which prevailed for a long lasting period were against the law and those circulars in turn were based on basic legal understanding emerging from statute and case-laws, their withdrawal should not directly impact NR's vis a Vis their tax liability. Further, when there has been court rulings given primarily on law Being reinforced from erstwhile circulars – those Rulings should not loose their precedential value.

P&H High Court on Restructuring Expenses

In JCT Electronics following Mad High Court in 275 ITR 491

Upheld ITAT order as to restructuring expenses are revenue in nature ITA 676/2009

Similar ratio in 242 ITR 317; Mad HC in Carbondum Universal 219 CTR 202 Management consultancy fees

P&H High Court in 310 ITR 90 Majestic Auto

Business Procurement Expenses

Payment for liaison services in case of govt
Supplies: ITAT held besides being open tenders
Agent's services are reqd for pre-information of
Tenders, collecting information about
Competitors, release of payments etc

DHC Contimeters Electricals Pvt Ltd ITA
1401/2008

Explanation to section 37- Illegal expenses

Demurrage charges are fumigation expenses and incidental to trade allowable in full

DHC Ikea Trading ITA 1264/2009 & Jet Air etc

Delhi ITAT in Jindal Saw Mills 118 TTJ 228 &
Mum ITAT BCAJ Aug 2003 Rubber Plase case

P&H:Hero Cycles; Industrial

Cables.....contractual breach...Jamna Auto;

ITAT in 124 TTJ 659; Delhi ITAT Sanjay Entp
Public Policy? SC Dr TA.Quereshi & SC in
Distillers

Section 32(1)(iii)

Section 50 not applicable to loss on sale of Depreciable/block assets to be dealt as per section 32(1)(iii) Mumbai Bench of ITAT Mukand Global

Section 50 versus Section 50C- Depreciable Building etc sold cannot be subject to section 50C – Mum ITAT 34 SOT 64

Interest Accrued: Real Income?

Real Income theory:

DHC in Eicher Interest taxability when principal
Written off

Query on Citi Financial Delhi ITAT ruling :
Dealer's/DSA Commission issue/Incentive
(deferred revenue expense versus TOTO)

Trade Loss Section 28/29

DHC in Rose Services Aprtment ITA 777/2008
held advance for purchase of land not refunded
is business loss/allowable for a trader assessee
(SC SLP dismissed) & Raj HC in 124 Taxman 429

DHC in Bala Kaul ITA 329/2009: Trade Loss:
SHARE Purchase Advance – not recovered –BHC
in Mehta Pvt Limited Guarantee Loss & Locksons

Kar High Court Bhatiya Reserve Bank Note
Mudran Ltd: machine transit loss – business loss

Belated New Claims in Assessment

- Finance No 2 Act 2009 amendment in 80A(5)
- SC ruling in Goetze further explained in Mum ITAT Chicago Penumatic 15 SOT 252; BHC In 221 CTR 440 & DHC in Nalwa Investments
- Mumbai Bench in 19 DTR 441 Emersons
- Ahd Bench of ITAT in Niko 22 DTR 225 (before CIT-A)

Subsidiary advance written off

Mad High Court V Ramakrishna Ltd

*Held in the normal course of business to
preserve its interest allowable as bad debt
36(2)(i)*

Cal High Court Turner Morrison 245 ITR 724

Hyd Bench of ITAT in ITW Singnode 110 TTJ 170

Stock Broker Taxation

Issues:

- a) Section 36(2)(i): Debt taken into account
- b) Section 194J : SEBI transaction fees
- c) Section 73 Explanation : forced transactions
- d) Section 14A: On account minimum trading
- e) Section 37 Explanation- SEBI Penalties etc

Section 54F

Kerala High Court in P.R.Seshadri 33 DTR 128

Held Investment in house of which land is owned by assessee's wife – assessee was entitled to exemption u/s 54F in respect of investment in Construction of house property on the land owned by his wife.

Thank You

CA.Kapil Goel

9910272806

cakapilgoel@gmail.com