Recent Judgments – July 2015

By

Ms. Bhavya Rangarajan, Advocate

Ms. B. Mala, Associate

Subbaraya Aiyar, Padmanabhan and Ramamani

(SAPR) Advocates

1. CIT Vs SMCC Construction India Ltd ITA No.439, 511 and 526/2014 dt 03.07.2015

When the payment of royalty is made by a licensee and the benefit is not of an enduring nature, it cannot be held to be a capital expenditure.

Note: Where it is only a licence to produce, it was held as revenue expenditure (CIT Vs Sharda Motor Industrial Ltd 189 Taxman 211). Similarly where payment is for licensed use of software and not for its acquisition, there are no proprietary rights passed to the assessee and the expenditure held to be revenue in nature (ITO Vs. M/s Fluor Daniel India Pvt Ltd 2008-TIOL-46-ITAT-DEL)

Overview of the case:

- The assessee entered into a Technical Collaboration Agreement with Sumitomo Mitsui Construction Co. Ltd. (SMCL) incorporated in Japan, wherein the Japanese company was described as a licensor and the assessee as the Licensee.
- The Licensor and the Licensee were engaged in three kinds of services as envisaged by the Agreement: provision of construction management services, turnkey contract service and the consultancy services including project management.
- The assessee incurred certain expenditure on account of royalty and fees for technical assistance in terms of the aforesaid Agreement, which the AO treated as capital expenditure.
- On appeal, the CIT(A) held that the expenditure was a periodical payment incurred for obtaining selling/servicing rights under the Agreement. The assessee did not obtain any benefit for the period beyond the relevant assessment years

by incurring the said expenditure and hence, they do not constitute capital expenditure.

- On further appeal, the Tribunal held that the assessee did not become the owner of the technical know-how by making the payment and that the benefit was not of enduring nature.
- On appeal by the department, the Hon'ble Delhi High Court held that:
    - The Agreement clearly provides that the payment is for technical know-how given to the assessee as a licensee. The very nature of the License Agreement is that it is not of a permanent nature and hence the assessee does not become an owner of the technical know-how.
    - Therefore, as there is no enduring benefit, the expenditure cannot be said to be capital in nature.
- Cases referred:
    - Premier Automobiles Ltd. vs. CIT, (1984) 150 ITR 28 (Bom)
    - Travancore Sugars and Chemicals Ltd. vs. CIT (1966) 62 ITR 566 (SC)

2. <u>CIT Vs T.G Leisure and Resorts Pvt Ltd ITA No.368/2015 dt 03.07.2015</u>

A ground not raised before the Tribunal cannot be urged before the High Court.

Note: No question can be referred to High Court u/s 256 unless it arises out of the order of the tribunal Ramanathan Vs. CIT 63 ITR 458 (SC)

<u>Overview of the case</u>:

- The assessee is engaged in the business of hospitality and hotel industry.
- During assessment, the AO made an addition u/s 14A r.w. R 8D.
- On appeal, the CIT(A) held that no such addition can be made when the investment is out of interest free funds and restricted the disallowance.
- On further appeal, the Tribunal held that it is incumbent on the AO to record his satisfaction regarding the correctness of the claim of the assessee and that there should be a live nexus between the expenditure incurred and the exempt income.

- The revenue did not raise the ground that even if the assessee has not earned exempt income, there could be a disallowance u/s 14A (Circular No. 5 of 2014 dated 11th February 2014).
- The Revenue went on appeal to the Delhi High Court. The Revenue has sought to rely on the Circular No. 5 of 2014 dated 11th February 2014 wherein the CBDT issued a clarification that for invoking disallowance under Section 14A of the Act it is not material that the Assessee should have earned such exempted income during the financial year under consideration. Revenue candidly admitted that the said circular was not placed before the ITAT in the appeal filed by the Revenue.
- The Hon'ble High Court held that a ground that was not raised before the ITAT cannot be urged before the High Court and dismissed the Revenue's appeal.

3. Shri Thomas George Muthoot Vs CIT 2015-TIOL-1654-HC-KERALA-IT dt 03.07.2015

A statutory provision, unless otherwise expressly stated to be retrospective or by intendment shown to be retrospective, is always prospective in operation.

If an assessee claims the exemption provided in section 194A(1), the burden is on the assessee to establish that he satisfied the conditions specified in the proviso to the section.

Note: Defect or anomaly has been removed by Finance Act, 2012 by inserting second proviso to section 40(a)(ia) to bring it at par with the amendment made by the Finance Act, 2012 to section 201(1) which is applicable from 1.7.2012. The said amendment made by Finance Act 2012 to section 40(a)(ia) cannot benefit the assessee, and the same cannot be considered retrospective (Ramesh Bhagwandas Makhija Vs ITO 2013-TIOL-1194-ITAT-MUM).

Overview of the case:

- The assessee, an individual, had paid interest on amounts drawn by him from his partnership firm. The interest was disallowed by the AO u/s 40(a)(ia).
- On appeal, the CIT(A) confirmed the order of the AO and further appeals to the Tribunal were also dismissed.
- Before the Hon'ble Kerala High Court, the assessee contended that:

- Section 194A(1) excludes individuals and HUFs from deducting tax at source and hence, the assessee need not deduct tax at source.
- The payee has included the entire interest paid by the assessee in its total income and filed return of income accordingly and hence, the disallowance u/s 40(a)(ia) does not arise.
- The payer is not liable to pay the amounts of short/non deduction of tax u/s 201(1) in cases where the payee has already included the relevant amount in its total income, as laid down in *M/s. Hindustan Coca Cola Beverages Pvt. Ltd. 293 ITR 226 (SC)*
- The second proviso to section 40(a)(ia) inserted with effect from 1.4.2013 was intended to remove the unintended consequences and was a beneficial provision for removal of hardship and therefore, retrospective in operation and applicable to the assessee's case.
- The assessee had already paid the amount and therefore, the provisions of Section 40(a)(ia), applicable only in respect of the amount which remains payable on the last day of the financial year, is not at all attracted.

- The Hon'ble High Court held that:
  - While section 194A(1) excludes individuals and HUFs from deducting tax at source, the benefit of exclusion is restricted only to those individuals and HUFs whose total sales, gross receipts or turnover from business or profession do not exceed the monetary limit specified under Section 44AB(a) or (b) of the Act, during the financial year immediately preceding the financial year in which such interest is credited or paid, in view of the proviso to section 194A(1).
  - In the instant case, the Tribunal had clearly specified that income of the assessee exceeded the limit prescribed u/s 44AB of the Act but the assessee has not brought on record any specific material to contradict this specific factual finding.
  - When it is found that the assessee has failed to deduct tax at source, section 40(a)(ia) is attracted and the fact that the recipient has

subsequently paid tax will not absolve the payee from the consequence of disallowance. The Hindustan Coca Cola judgment relied upon was rendered in the context of section 201(1), the object of which being compensatory in nature, cannot be of any assistance to the assessee to resist a proceeding under Section 40(a)(ia).

  - A statutory provision, unless otherwise expressly stated to be retrospective or by intendment shown to be retrospective, is always prospective in operation. Finance Act 2012 shows that the second proviso to Section 40(a)(ia) has been introduced with effect from 01.04.2013. Reading of the second proviso does not show that it was meant or intended to be curative or remedial in nature and therefore, the provision can only be said to be prospective in nature.
  - The language of section 40(a)(ia) does not warrant an interpretation that it is attracted only if the interest remains payable on the last day of the financial year. If this contention is to be accepted, this Court will have to alter the language of Section 40(a)(ia) and such an interpretation is not permissible.
- Cases referred:
  - Crescent Exports Syndicate and another 2013-TIOL-404-HC-KOL-IT
  - CIT V. Sikandadarkhan N Tunvar 2013-TIOL-389-HC-AHM-IT
  - Prudential Logistics And Transports Vs. ITO (2014) 364 ITR 689 (Ker)
  - Allied Motor (P) Ltd. V. CIT 2002-TIOL-588-SC-IT-LB
  - CIT V. Hindustan Coca Cola Beverages Pvt. Ltd. 2007-TIOL-144-SC-IT

4. CIT Vs M/s. Orient Express TC(A) Nos.298 and 299 of 2015 dt 07.07.2015

Exporters having a turnover below Rs.10.00 crores and above Rs.10.00 crores should be treated similarly and the amendment to Section 80HHC(3) has prospective effect.

Note: The retrospective amendment should not be detrimental to any of the assessees. The Supreme Court in the case of CIT Vs Avani Exports [2015] 58 taxmann.com 100 (SC), upheld the decision of the High Court.

Overview of the case:

- The assessee is engaged in the business of manufacture of leather and leather garments. For the relevant assessment years, the assessee claimed deduction under section 80HHC.
- The Assessing Officer denied the said claim on the ground that the turnover of the assessee during the year exceeded Rs.10.00 crores and hence the assessee had not satisfied the twin conditions in the amended provision of Section 80HHC(3) of the Income Tax Act.
- On appeal, the CIT(A) relied on *Avani Exports & Others Vs CIT 348 ITR 391 (Guj.)* and allowed the appeal of the assessee. On further appeal, the Tribunal upheld the order of the CIT(A) and directed the AO to recompute the deduction in accordance with the decision rendered in the case of Avani Exports.
- Subsequently, the department filed an appeal before the High Court. The Hon'ble Madras High Court held that:
    - Section 80HHC(3) of the Act was amended by the Taxation Laws (Second Amendment) Act, 2005 with retrospective effect from 1st April, 1998 whereby the 2nd, 3rd, 4th and 5th provisos were added to Section 80HHC(3) and clauses (iiid) and (iiie) were inserted in Section 28 with effect from 1st April, 1998 and 1st April 2001 respectively.
    - The 3rd and the 4th provisos mandate the satisfaction of the twin conditions by the assessees whose export turnover is more than Rs.10.00 crores:
        - the assessee has an option to choose either the duty drawback or the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme; and
        - the rate of drawback credit attributable to the customs duty was higher than the rate of credit allowable under the Duty Entitlement Pass Book Scheme, being Duty Remission Scheme.

- The Gujarat High Court, in the case of Avani Exports, had clearly held that the amendment was only prospective in nature and that a retrospective amendment should not be detrimental to the assessee.
- Moreover, the said judgment has also been upheld by the Supreme Court in *CIT Vs Avani Exports [2015] 58 taxmann.com 100 SC* whereby it held that the exporters having a turnover below Rs.10.00 crores and above Rs.10.00 crores should be treated similarly and the amendment to Section 80HHC(3) is effective prospectively.
- Therefore, the departmental appeal is dismissed.

- Cases referred:
  - Avani Exports & Others V. CIT 348 ITR 391 (Guj.)
  - CIT Vs Avani Exports [2015] 58 taxmann.com 100 SC
  - Topman Exports 342 ITR 49 (SC)
  - IPCA Laboratory Ltd Vs. DCIT 266 ITR 521 (SC)

5. M/s. Spritle Software Pvt. Ltd Vs ACIT I.T.A.No.65/Mds/2015 dt 10.07.2015

Approval from the Board appointed by Government of India under sec. 14 of the Industries Development and Regulation Act, 1951 necessary for claiming deduction u/s 10B; assessee entitled to deduction u/s 10A even if it is not claimed in the return filed.

Note: Similar issue decided in favour of assessee by the Delhi High Court in the case of CIT Vs Valiant Communications in ITA No. 2002 of 2010 in Civil Misc. Appln. No. 12/2013.

Overview of the case:

- The assessee had produced a copy of the ratification given by the Board of Approval granted by Development Commissioner u/s 10B of the Act and claimed deduction u/s 10B.
- The AO disallowed the claim on the basis that the assessee has not obtained approval from the competent authority.

- The assessee relied on Circular No. 2 of 2009 dt 09.03.2009 and contended that exemption u/s 10B is available in the case of a 100% EOU approved by the Board appointed by Government of India under sec. 14 of the Industries Development and Regulation Act, 1951. Even otherwise, it was contended that the assessee is eligible for exemption u/s 10A of the Act.
- The CIT(A) confirmed the disallowance. On further appeal, the Hon'ble Tribunal held that:
  - Though the assessee has been approved by Development Commissioner, SEZ, it has not got the approval from the Board appointed by Government of India under the Industries (Development and Regulation) Act, 1951 as required by Explanation 2(iv) of section 10B. Therefore, the disallowance is confirmed.
  - However, as such a requirement is not required for claiming deduction u/s 10A of the Act, the case is remanded to the AO for examination of the claim u/s 10A.
  - Moreover, it is not necessary that the assessee should have made a claim u/s 10A in the return filed. *M/s VSN Macro Technologies Pvt Ltd Vs ACIT dt 13.01.2011* and *ACIT Vs Severn Glocon (India) Pvt. Ltd in 2816/Mds/2014 dt 19.06.2015*.
- Cases referred:
  - M/s VSN Makro Techologies Pvt. Ltd Vs ACIT dated 13.1.2011
  - ACIT Vs Severn Glocon (India) Pvt. Ltd in 2816/Mds/2014, dated 19.6.2015

6. <u>CIT Vs M/s.Alpha Mills Pvt. Ltd T.C.A. No. 309 of 2015 dt 15.07.2015</u>

The assessee filed its Return of Income before the due date claiming higher depreciation as per proviso to Rule 5(1A). It will be deemed that the assessee has exercised the option as per proviso to Rule 5(1A) and no separate letter for option is required to be filed.

<u>Overview of the case</u>:

- The assessee filed return of income on 30.11.2006 claiming depreciation on windmill at the rate of 80%. The assessee also claimed additional depreciation under Section 32(1)(iia) of the Act. Assessment u/s 143(3) was completed.
- Subsequently, the case was reopened and the reassessment order was passed, restricting the claim of depreciation to 7.69% instead of 80% as claimed by the assessee on the ground that the assessee had not exercised its option for claiming higher depreciation before the due date for filing of return as required under the second proviso to Rule 5 (1A) of the Income Tax Rules. The claim for additional depreciation was also disallowed.
- On appeal, the CIT(A) allowed the appeal of the assessee. On further appeal, the Tribunal upheld the order of the CIT(A).
- The department therefore filed an appeal before the High Court. The Hon'ble Madras High Court relied on *Kikani Exports Pvt. Ltd. Vs CIT T.C.(A) No.330 of 2013* and held that:
    - If the assessee filed its Return of Income before the due date claiming higher depreciation as per proviso to Rule 5(1A), it will be deemed that the assessee has exercised the option as per proviso to Rule 5(1A) it will suffice and no separate letter for exercise of option is required to be filed.
    - Moreover, if the claim for additional depreciation under Section 32 (1) of the Act is filed in time, then the assessee would be entitled to claim the relief as well.
- Cases referred:
    - Kikani Exports Pvt. Ltd. Vs CIT T.C.(A) No.330 of 2013

<u>Charitable Trusts</u>

7. <u>Alexandra School Vs CIT ITA No.190 of 2014 dt 30.07.2015</u>

The predominant purpose of the trust should be looked into and the genuineness of the activities determined before an application for registration can be refused.

Overview of the case:

- The issue in appeal is the denial of registration u/s 12AA.
- The assessee society is registered under the Societies Registration Act, 1860 since 15.03.1976. It filed an application for registration as a charitable institution under section 12AA on 30.10.2012.
- A notice was issued to the assessee, whereby it was asked to show cause why the registration should be granted, when the main purpose of the association as per its Memorandum of Association was to run a school catering to the Christian community.
- The assessee clarified that the school was affiliated with the ICSE Board and did not preach or teach Christianity. Though the school was run by members of the Christian society, it was totally secular and no special emphasis was being given to the students of Christian families or Christian staff employed. The percentage of students belonging to the said religion was also very small.
- However, the CIT relied on section 13(1)(b) and held that since the objectives of the trust was for the benefit of a particular religious community, it was not eligible for registration.
- On appeal, the Tribunal upheld the order of the CIT and held that imparting education primarily to the children of the Christian community is contrary to the law and hence, the assessee is not entitled to registration.
- On further appeal, the Hon'ble Punjab & Haryana High Court held that:
    - The Memorandum of the assessee makes it clear that apart from imparting education to the children of a particular religion, the purpose was also to provide for sound education to persons belonging to other communities regardless of caste, creed, colour or distinction of any kind.
    - The Objects further provide for creativity and a well rounded education to develop responsible citizens and to encourage appreciation of national and cultural heritage.

- Moreover, less than 10% of the students of a particular community studied in the previous year and during the earlier period, the percentage was even less.
- The CIT has to satisfy himself about the objects of the trust and the genuineness of the activities. An opportunity of hearing should also be given and then only can an application for registration be refused.
- Therefore, the appeal of the assessee is allowed as there is no doubt regarding the predominant purpose for which the trust was set

- Cases referred:
  - CIT Vs. Jodhpur Chartered Accountants Society [2002] 258 ITR 548
  - Ahmedabad Rana Caste Association Vs. CIT [1971] 82 ITR 704 (SC)
  - CIT Vs. Dawoodi Bohara Jamat (2014) 102 DTR Judgments 360

Penalty:

8. CIT Vs Sardar Exhibitors Pvt Ltd ITA No.378 & 379/2015 dt 06.07.2015

When all the particulars have been submitted before the authorities and the question itself was in dispute and appealed against, there cannot be said to be a concealment of income

Note: In CIT Vs Reliance Petroproducts Pvt Ltd 2010-TIOL-21, the Supreme Court held that merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue, that by itself would not attract the penalty under Section 271(1)(c). It is not every infraction or denial of claim for deduction or exemption that invites penalty.

Overview of the case:

- The assessee had entered into a Lease Agreement with the Ministry of Defence (MoD) whereby one premises in Kailash Colony, New Delhi was let out to the MoD for a period of 3 years at Rs. 1.75 lakhs per month.

- Upon expiry of the lease period, the MoD did not vacate the premises and the dispute was referred to arbitration. An arbitration award was passed by the sole arbitrator in favour of the assessee.
- The MoD challenged the award but failed at all levels up to the Supreme Court. Consequently, the assessee received Rs. 4.91 crores for rent and interest on arrears of rent minus the 'TDS' which worked out to Rs.10.04 lakhs.
- During the assessment proceedings, one question which arose was whether the arrears of rent and interest thereon were a capital receipt or a revenue receipt.
- The Tribunal held that held that the amount received by the assessee in terms of the arbitration award was a revenue receipt and had to be assessed on accrual basis year to year and not in any particular year or years.
- The order of the ITAT impugned in the present appeals arose from the consequential penalty proceedings. The question that arose in the said penalty proceedings was whether the assessee had deliberately failed to furnish accurate particulars of income by claiming the arrears of rent as capital receipt.
- On appeal, the CIT(A) held that all the facts were disclosed to the authorities and that the additions were made only on account of the difference of interpretation between the department and the assessee. The Tribunal confirmed the order of the CIT(A) and held that penalty was not leviable in this case.
- On further appeal, the Hon'ble Delhi High Court held that the question whether the assessee had deliberately claimed revenue receipt as capital receipt was the very issue in the assessment proceedings and hence, there is no deliberate concealment of income or misrepresentation of the income as a capital receipt by the assessee.

9. <u>PR CIT Vs Fortune Polymers Industries Pvt Ltd ITA No.385/2015 dt 13.07.2015</u>

When the assessee company is in liquidation at the time of initiation of penalty proceedings, the penalty is invalid.

Overview of the case:

- The assessee was engaged in the business of manufacturing paper. After the assessment order, the assessee was asked to wind up. Subsequently, the AO initiated penalty proceedings.
- The assessee went on appeal to the CIT(A) against the ex parte penalty order of the AO and the CIT(A) upheld the order.
- On further appeal, the Tribunal held that the assessee had justifiable reasons for the delay and hence deleted the penalty.
- On appeal before the High Court, the Hon'ble High Court held that the fact that the assessee company was in liquidation at the time of penalty proceedings was not disputed and therefore, the Tribunal order need not be interfered with.

10. ACIT (TDS) Vs Greater Hyderabad Municipal Corporation ITA No.164/Hyd/2015 dt 24.07.2015

The nature and terms of contract should be looked into. TDS provisions are not applicable to employer-employee relationship when the amounts payable are below the taxable limit.

Overview of the case:

- The appeal is against the CIT(A) order deleting the penalty imposed by the AO u/s 271C.
- On merits, the issue is that the assessee did not deduct tax at source on the payments made to contract workers. The assessee's contention was that the contract workers are its employees and the amount paid to each individual employee being less than the taxable limit, there was no requirement of deduction of tax at source.
- The AO observed that there was no employer/employee relationship between the assessee and the concerned workers. Since there existed a contract between the assessee and the said workers in the form of work orders, the assessee was liable to deduct tax at source u/s 194C from the payments made to the contract workers. Since the tax was not deducted, the AO treated as the assessee as

assessee-in-default and levied interest u/s 201(1A). Penalty proceedings u/s 271C was also initiated.

- On appeal, the CIT(A) held that the relevant payments made by the assessees to each member of the Self Help Group being far below the taxable limit, there was no question of any obligation to deduct tax at source from the said payments and consequently, penalty u/s 271C was not leviable.
- On further appeal, the Hon'ble Tribunal relied on the earlier year order of the assessee and observed that:
  - The assessee has engaged the self help groups and work has been allotted per unit by fixing the wages per person and also specifying the number of workers to be engaged for each unit/per shift.
  - The working hours of the workers as well as the shifts are also specified in the notification.
  - The payment is made on the basis of number of man-days and wages per day and it is not a fixed amount per month.
  - Therefore, it is not a contractor-contractee relationship but is more in the nature of employee-employer relationship.
  - The assessee is also making contributions to the EPF and ESI.
  - Therefore, the TDS provisions are not applicable and there is no question of imposing penalty.