Recent Judgments – June 2015

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1. Sibia Healthcare Private Limited Vs DCIT(TDS) I.T.A. No.90/Asr /2015 dt 09.06.2015

Demand in respect of levy of fees under section 234E by way of intimation u/s 200A cannot be made prior to June 1st, 2015.

Overview of the case:

- In this case, there was a delay in filing the TDS Returns. While processing the TDS returns, the Assessing Officer (TDS) raised a demand by way of an intimation issued under section 200A, for levy of fees under section 234 E for the delayed filing.
- The CIT(A) agreed with the AO's findings and dismissed the assessee's appeal.
- On further appeal, the Hon'ble Amritsar Tribunal held that:
    - Section 200A has been amended by way of the Finance Act 2015 to the effect that with effect from 1st June 2015, in the course of processing of a TDS statement and issuance of intimation under section 200A in respect thereof, an adjustment could also be made in respect of the *"fee, if any, shall be computed in accordance with the provisions of section 234E"*.
    - Prior to 1st June 2015, there was no enabling provision therein for raising a demand in respect of levy of fees under section 234E.
    - Therefore, the adjustment in respect of levy of fees under section 234E was indeed beyond the scope of permissible adjustments contemplated under section 200A.
    - This intimation is an appealable order under section 246A(a), and

therefore, the CIT(A) ought to have examined legality of the adjustment made under this intimation in the light of the scope of the section 200A.

- Instead, he has justified the levy of fees on the basis of the provisions of Section 234E, when the issue was whether such a levy could be effected in the course of intimation under section 200A.
- It is clear that the levy is bad in law and in the absence of any other provision enabling a demand in respect of this levy, no such levy could be effected.

Note: Recently, in the case of *Rashmikant Kundalia Vs. Union of India 2015-TIOL-325-HC-MUM-IT*, the constitutional validity of the fees being charged u/s 234E for delay in filing TDS returns was upheld by the Court of law.

2. Dharmayug Investments Ltd Vs ACIT ITA No.1284/Mum/2013 dt 10.06.2015

While computing the book profit u/s 115JB, the concept of indexation in computing the long term capital gain does not arise.

Overview of the case:

- The assessee is engaged in the business of investments, leasing and broking. Since the tax liability as per Sec 115JB was higher, taxes were paid as per the book profit.
- While computing the tax liability u/s 115JB, the assessee had shown capital gains on sale of shares of HDFC Bank, which was claimed as exempt u/s 10(38) under the normal provisions.
- The AO held that LTCG after indexation and deduction of STT paid cannot be accepted for computing book profit u/s 115JB and that the entire sale consideration should be considered.
- On appeal, the CIT(A) did not accept the assessee's contention that the CG should be calculated after giving effect to indexation and held that the book profit should be calculated as per the P&L A/c prepared by the assessee.

- On further appeal, the Hon'ble Mumbai Tribunal held that:
  - Sec 115JB is a complete code in itself; it lays down that every assessee for the purpose of this section "shall" prepare its Profit & loss account for the relevant previous year in accordance with the provisions of Part II & III of Schedule 6 of the Companies Act, 1956.
  - 'Explanation' to subsection (2) of section 115JB provides that, book profit means the net profit as shown in the Profit & loss account and as increased or reduced by certain adjustments as specified in the said explanation.
  - By the Finance Act 2006, w.e.f. 01.04.2007, Clause (f) has been amended to provide that book profit shall be increased by the amount or amounts of expenditure relatable to any income referred to in section 10.
  - However, specific exclusion to the income referred to in sub section (38) of section 10 has been provided.
  - Similar amendment has been brought in clause (ii) of the said Explanation to provide that book profits shall be reduced by the amount of income referred to in section 10 but here also, specific exclusion to the income referred to in clause (38) has been made.
  - A simultaneous amendment has also been brought in section 10(38) by the insertion of the 'proviso' whereby it has been provided that income by way of LTCG of a company shall be taken into account in computing the book profit and the income tax payable u/s. 115JB.
  - From the harmonious reading of the relevant provisions as discussed above, it is evident that, the book profit shall not be reduced by the amount of income to which provision of section 10(38) applies.
  - Thus, the income arising from transfer of long term capital asset is to be included in the book profit.
  - Therefore, LTCG after indexation and deduction of STT paid cannot be accepted for computing book profit u/s 115JB and the entire sale consideration should be considered for inclusion.

- The concept of indexation while computing the Long term capital gain cannot be imported to the computation of book profit u/s. 115JB as per the expressed provisions of the said section itself which is a complete code in itself.

3. Executive Officer, Jalandhar Improvement Trust Vs ITO I.T.A. Nos. 40 to 43/Asr/2015 dt 10.06.2015

The existence of a contract is essential for TDS u/s 194C. When the payments are made out of a legal obligation, the obligation of deducting tax at source does not arise.

Circular No. 681 dated 8.3.1994 requires that there has to be a written or oral contract between any person responsible for paying any sum to any resident and the recipient of the said sum for the payment to the covered u/s. 194C of the Act.

Overview of the case:

- The assessee is a public trust set up under Punjab Towns Improvement Act, 1922.
- A TDS survey was carried out on the premises of the assessee and it was noted that the assessee was making payments to Punjab Water Supply and Sewerage Board without deducting tax at source.
- Subsequently, demands under section 201(1) and 201(1A) r.w.s. 194C were raised on the assessee.
- On appeal, the CIT(A) upheld the action of the AO in principle but restricted the demand to the extent of the principal liability of the recipient remaining unpaid and the delay in eventual realization of tax.
- On further appeal, the Hon'ble Amritsar Tribunal held that:
  - The payments are out of legal obligations rather than contractual arrangements.
  - It is only when payments are made "in pursuance of a contract" that the provisions of section 194C come into play. The contract may be oral or written, express or implied but there must be a contract nevertheless.

- Therefore, the impugned demands are wholly devoid of any legally sustainable merits.

Note: Similar issue in *Ratnakar Sawant, Dinesh N. Shah & Co. Vs. ITO [2012] 22 taxmann.com 218 (ITAT Mum)* – where it was held that the existence of an oral or written contract is sine qua non for attracting the provisions of section 194C of the Act.

4. DCIT Vs Sh.Sham Sunder Sharma ITA No. 966/Chd/2014 dt 16.06.2015

The CIT(A) is subordinate to the Tribunal and cannot disobey the orders of the Tribunal. Once an order is set aside by the appellate authority, it no longer exists in the eyes of law.

Overview of the case:

- The case is regarding the allowability of Sec 80IB(10) benefit by simply relying on the order of the predecessor.
- The department had gone on appeal against the earlier CIT(A)'s order and the Tribunal had set aside the order.
- The Hon'ble Chandigarh Tribunal held that:
  - In such a scenario, the earlier CIT(A) order does not exist in the eyes of law. It cannot be taken into consideration for any purpose.
  - The CIT(A) has gravely erred in quoting a portion of the order of his predecessor and in further observing that the view taken by his predecessor was correct.
  - This is a clear disobedience of the order of the Tribunal.
  - The CIT(A) is a quasi - judicial authority and is subordinate in judicial hierarchy to the Tribunal.
  - The orders passed by the Tribunal are binding on all the revenue authorities functioning under the jurisdiction of the Tribunal.
  - The order of the CIT(A) cannot be sustained in law and the CIT(A) is warned to be careful in future in following the order of the Tribunal and in now showing any defiance.

5. ITO Vs Department of Tourism, Govt of Goa ITA Nos. 330 & 331/PNJ/2014 dt 16.06.2015

TDS arises even in cases where the contractor is allowed to retain a part of the sale proceeds received from selling scrap, to be adjusted against the final payment.

Where any such income is credited to 'Suspense Account' or to any other account assessee shall also be liable to deduct tax at source on such income.

Overview of the case:

- The assessee had entered into a contract with one M/s. Arihant Ship Breakers Pvt. Ltd., Mumbai for the removal of a stranded vessel which was stranded in the shallow waters off Sinquerim beach. The contract was for an amount of Rs. 99 crores.
- The Government approved valuers had valued the scrap from the vessel at Rs. 14.01 crores which was to be adjusted towards the final payment.
- The scrap from the vessel was sold and an amount of nearly Rs. 19.00 crores was collected.
- An amount of Rs. 10 crores was retained by Arihant Ship Breakers which was to be adjusted against the final consideration and the balance had been paid back to the assessee.
- The issue was whether the assessee should deduct tax at source on the 10 crores retained by Arihant Ship Breakers.
- The assessee contended that the contract was on "No Cure No Pay" basis and that as the complete scrap had not been lifted, no payment had been made to Arihant Ship Breakers and consequently, no TDS was liable to be made.
- The CIT(A) held that the amount of Rs. 10 crores which was lying with Arihant Ship Breakers was in effect only a deposit against the Bank guarantee and hence, no TDS was liable to be made.
- On appeal, the Hon'ble Panaji Tribunal held that:
    - As per the terms of the contract, Arihant Ship Breakers have been entitled to sell the scrap generated by way of removal on a daily basis

or on such intervals as they deem fit.

- The contract also permits them to retain the sale proceeds received by selling the scrap and adjust them against the final amount payable by the assessee to Arihant.
- The contract specifically allows Arihant to retain the sale proceeds and states that no payment or any benefit of whatsoever nature shall ensue to the contractor except when the entire work is fully completed satisfactorily in accordance with the terms of the agreement.
- Therefore, the amount of 10 crores is clearly payment received by Arihant in lieu of the contract and against the final amount of 99 crores.
- Just because the contract has not been completed, the payment made does not change its character from 'payment of consideration' to 'deposit'.
- Therefore, the provisions of section 194C are attracted and tax has to be deducted at source.

6. Bharat Heavy Electrical Ltd Vs ITO (TDS) ITA Nos.130 to 135/Del/2015 dt 19.06.2015

The CIT(A) should pass a speaking order on the merits of the case, when the merits of the order of the AO have not been tested by any appellate authority till date.

Overview of the case:

- The assessee is a power plant equipment manufacturer. During assessment, the AO raised a demand for six assessment years.
- The assessee filed an appeal before the CIT(A) and also a writ petition for stay before the Allahabad High Court.
- The Hon'ble High Court directed the Appellate Authority to endeavour to decide the interim stay application along with appeal preferably within 10 days from the date of receipt of the certified copy of the order.

- Considering the order of the High Court, the CIT(A) held that:
  - The applications for stay of demand for all 6 years were up for consideration and not the merits of the case.
  - The interest component worked out by the AO is a necessary charge once an assessee is held to be an assessee in default and hence, it cannot be considered for stay.
  - Therefore, in the interest of justice, the assessee is to pay 40% of the total demand as computed u/s 201 and 201(1A) till 30.10.2015 or disposal of the appeals, whichever is earlier.
  - As regards the balance demand, the assessee is to pay it in six equal installments, starting from April 22nd, 2015 and payable on or before the 22nd of every month.
  - In case of default in making the payment, the assessee shall be deemed to be an assessee in default and the AO shall take appropriate action for recovery of the entire outstanding demand as on that date.
- On appeal by the assessee, the Hon'ble Tribunal observed that:
  - The issue on merits is yet to be decided by the CIT(A). The merits of the order of the AO have not been tested by any appellate authority till date.
  - Therefore, the Revenue is to refrain from taking any coercive action against the assessee till the issue is decided on merits by the CIT(A).
  - The CIT(A) is directed to pass a speaking order on the merits of the case after giving the assessee a reasonable opportunity of being heard.
  - Likewise, the assessee is directed to fully and properly cooperate with the CIT(A) to complete the hearing.

7. Kulgam Holdings Pvt Ltd Vs ACIT ITA No.2990/Ahd/2011 dt 19.06.2015 (2007-2008)

No disallowance u/s 14A can be made when the Revenue has not brought any positive material on record to show that the assessee actually incurred any expenditure in relation to earning of the exempt income.

No disallowance can be made on estimate basis against exempt income. This should be a welcome decision for assessees who have not incurred any expenditure for earning exempt income.

Overview of the case:

- The assessee, an Indian NGO, received dividend income of Rs. 3.10 crores.
- The AO observed that:
  - No separate accounts have been maintained with regard to the earning of exempt income.
  - The management and maintenance of such investments always entail certain administrative expenditure.
- He therefore disallowed the proportionate amount of expenditure incurred out of the total expenditure incurred by the assessee during the year.
- On appeal, the CIT(A) held that it was hard to believe that no expenditure was incurred by the assessee to earn the dividend income and hence, upheld the order of the AO.
- On further appeal, the Hon'ble Ahmedabad Tribunal relied on *CIT Vs. Torrent Power Ltd., (2014) 363 ITR 474 (Guj)* and held that:
  - Before making a disallowance u/s 14A, it was imperative on the part of the Revenue to bring some material on record to show that the assessee actually incurred some expenditure in relation to earning the said exempt income.

8. CIT Vs Savitridevi Ringshia Income Tax Appeal No. 1060 of 2008 dt 29.06.2015

Amount received by the assessee as a result of an interim order does not accrue to the assessee until the finalization of the dispute.

Overview of the case:

- The assessee is in the business of civil construction.
- There were some disputes with Bombay Municipal Corporation (BMC) in respect of a contract awarded to her by the B.M.C.
- Subsequently, BMC terminated the contract and refused to make the payment

to the assessee.

- The assessee filed a suit in the City Civil Court for recovery of dues.
- The City Civil Court passed an interim order directing the BMC to make payment of Rs. 1.04 crores to the assessee against her furnishing a bank guarantee of Rs. 44 lakhs to BMC pending the disposal of the suit.
- The case was appealed against before the High Court which directed the dispute to be referred to Arbitration.
- The Tribunal, by the impugned order, held that the amount received by the assessee was subject to final resolution of the dispute.
- Therefore, the amount received under the interim order cannot be considered as an income of the assessee as there is yet no absolute right to receive the amount.
- The Tribunal further recorded that the BMC had also filed a counterclaim and it was likely that the assessee would have to pay more than what has been given to her by the interim order.
- On appeal, the Hon'ble High Court:
    - relied on *CIT Vs Hindustan Housing & Land Development Trust Ltd 161 ITR 524 (SC)* and *CIT Vs Saksaria Biswan Sugar Factory Pvt. Ltd. 195 ITR 778* and held that the amount did not accrue to the assessee until the finalization of the dispute pending.
    - Observed that the dispute between the assessee and BMC was resolved and that the entire amount received as compensation including the amount received consequent to the interim order has been offered to tax in the relevant subsequent year.

9. <u>ACIT Vs All E Technologies Pvt Ltd ITA No.838/Del/2013 dt 30.06.2015</u>

The gain in the sale price as a result of fluctuation in the foreign currency has a direct nexus; it has to be held as part of its business profits and there is no reason why the benefit of section 10A should not be allowed to the assessee.

Overview of the case:

- The assessee derives income from the business of software development.

- The AO treated the foreign exchange gain as Income from Other Sources and excluded the same while computing 10A deduction.
- The assessee went on appeal to the CIT(A) and contended that the basic character of the receipt would not change on account of foreign exchange fluctuation as any fluctuation in the foreign exchange would go to increase or reduce the figure of export turn over and at best it would impact the increase in sale price realized.
- The CIT(A) relied on the ITAT decision in *Sony India Pvt. Ltd. Vs DCIT [2009] 315 ITR (AT) 0150* and the jurisdictional high court judgment in *FAB India Vs CIT 130 ITR 143* and directed the AO to re-compute the deduction u/s 10A.
- On appeal by the department, the Hon'ble Tribunal held that:
    - The assessee engaged in the business of software development, realized a higher sale price on account of foreign exchange fluctuation.
    - The gain in the sale price as a result of fluctuation in the foreign currency has a direct nexus and is of the first degree and cannot be equated to situations where surplus funds are parked in Fixed Deposits yielding "interest income".
    - The increase in sale price as a result of currency fluctuation impacts the sale price on which the exemption is to be calculated.
    - It is not a case of the AO that the gain on account of foreign exchange fluctuation was on account of any ECB or on account of any capital expenditure or the assessee has any other business other than export of software on which foreign exchange gain was received.
    - Whatever gain the assessee has made, it was out of its business.
    - Therefore, whatever gain on account of foreign exchange fluctuation was there has to be held as part of its business profits and there is no reason why the benefit of section 10A should not be allowed to the assessee.

Note: The Bangalore Bench of ITAT in the case of *Sap Labs India (P) Ltd. Vs. ACIT (2011) 44 SOT 156 (Bang.)* has taken the view that Foreign Exchange Fluctuation

gains are required to be added to operating revenue.

10. DCIT Vs Fenoplast Ltd ITA Nos.1478 & 1480/HYD/2013 dt 30.06.2015

The restriction of 8 years for the carry forward of unabsorbed depreciation has been done away with by the Finance Act 2001.

Overview of the case:

- The assessee had unabsorbed depreciation for AY 1996-97 and 1997-98, which was allowed to be set-off by 154 order.
- Subsequently, the CIT(A) passed an order u/s 263 stating that the unabsorbed depreciation cannot be carried forward beyond 8 years and that the 154 order was bad in law. The AO passed the consequential order denying depreciation.
- The assessee went on appeal on this giving effect order of the AO and the CIT(A), after considering the amendment brought out by Finance Act, 2001, Circular No. 14 of 2001 dt. 22-11-2001 and also the decision of Hon'ble Gujarat High Court in the case of *General Motors India Pvt. Ltd. Vs. DCIT Special Civil Application No. 1773/2012 dt. 23- 08-2012*, allowed the assessee's appeal and directed the AO to allow the carried forward depreciation amounts.
- The department contended that:
    - The CIT(A) erred in allowing the carry forward of unabsorbed depreciation without any time limit
    - The CIT(A) should have dismissed the appeal as the 263 order was upheld by the jurisdictional ITAT.
- The Hon'ble Hyderabad Tribunal held that:
    - The restriction of 8 years was removed by the Finance Act 2001, which was supported and explained by Circular No. 14 of 2001. The Special Bench decision of the ITAT in *DCIT Vs Times Guaranty Ltd ITA No. 4917 & 4918/Mum/2008* relied on by the CIT(A) while passing the 263 order has been overruled by the subsequent Gujarat High Court judgment in *General Motors India Pvt. Ltd., Vs. DCIT Special Civil Application No. 1773/2012* where it has been held that the restriction is not valid and

that unabsorbed depreciation can be set-off against the profits and gains of subsequent years.

- Technically speaking, the CIT(A) could not have allowed the appeal when the consequential order was passed on the directions of the CIT(A) u/s 263. However, the orders of the ITAT were not placed before the CIT(A) and hence, the CIT(A) decided the issue on merits and as the law stands at this point, the assessee is entitled for set-off of carried forward depreciation.