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DIRECT TAXES

Judicial Pronouncements

Enercon Wind Farms (Krishna) Ltd. v. ACIT [IT Appeal No. 6794 (Mum.) of 2004]

Section 10B, read with sections 2(45), 28 and 72 of the Income-tax Act, 1961 - Export oriented undertaking – The term 'total income' used in section 10B(1) is total income as computed under Act. Therefore, total income determined in terms of section 10B(1) has to be treated as determined in terms of section 28.

Assessee, a domestic company, was engaged in business of exporting components of wind turbine generators manufactured by it. For relevant assessment year assessee in computation of its income had shown business income of Rs. 70,38,585 and after set off of unabsorbed depreciation of Rs. 2,61,656 determined profits at Rs. 67,76,929. Further assessee claimed exemption of Rs.62,10,828 under section 10B and, thus worked out, taxable income at Rs. 5,66,101. Out of this assessee claimed set off of loss of Rs. 5,66,101 out of loss of Rs. 7,55,789 incurred in the assessment year 1999-2000 and, thus, declared taxable income at nil. AO denied claim of set off of loss of Rs. 5,66,101 on ground that in view of provisions of section 10B(6)(ii), brought forward losses were not eligible to be set off against income available in impugned assessment year. Commissioner (Appeals) though agreed with assessee that provisions of section 10B(6) would not be applicable to instant case, but held that assessee's claim was hit by provisions of section 10B(1) read with section 72. He further held that since assessee profits were determined in terms of section 10B(1) and were not determined under head "Profits and gains of business or profession" or within terms of section 28, assessee was not entitled to set off of loss in question.

It was held that both lower authorities had not decided issue correctly. Since assessee had claimed set off of loss in question in accordance with relevant provisions of Act, assessee's claim for set off of loss deserved to be allowed.

Shree Shyamkamal Finance & Leasing Co. (P.) Ltd. v. ITO [IT Appeal No. 15 (Mum.) of 2006]

Section 14A of ITA - Expenditure incurred in relation to exempt income

Assessee company was engaged in business of finance and investment in equity shares. In relevant previous year, assessee paid interest on unsecured loan taken from two of its directors and claimed deduction of same. Further, assessee invested a major amount of unsecured loan in acquiring unquoted shares of its subsidiary company but received no dividend on said investment. AO disallowed interest expenditure by resorting to provisions of section 14A.

Held that since assessee had not received any dividend and further since it had not claimed any income exempted, provisions of section 14A were not applicable to instant case, therefore, disallowance of interest expenditure under section 14A was wrong.

Deputy Commissioner of Income tax, Ujjain v. Torqosiue Investment & Finance Ltd. (SC) Civil Appeal Nos. 4485, 4486, 4489, 4492, 4495 TO 4499-4502 OF 2007

Section 5 of the Income-tax Act, 1961, read with article XI of the Double Taxation Avoidance Agreement between India and Malaysia - Accrual of Income

Assessee company, engaged in investment and finance business, filed its return and claimed refund of certain amount on basis of credit of

deemed TDS on dividend received from a Malaysian company. AO, however, raised certain demand by rejecting credit claimed by assessee –

Held that in view of decision in case of CIT v. VR. S.R.M. Firm [1994] 208 ITR 400 (Mad) which was affirmed by Supreme Court in case of CIT v. P.V.A.L. Kulandagan Chettiar 267 ITR 654/137 Taxman 460, dividend income derived by assessee from a company in Malaysia was not liable to be taxed in its hands in India.

Bindals Developers (P.) Ltd. v.ITO [IT Appeal No. 468 (DEL) of 2005]

Section 27(iiib), read with section 269UA(f) of ITA - Income from house property - Owner of house property - Assessment year 2001-02]

One 'H' executed a lease in favour of assessee for a period of 9 years and 11 months. By said agreement, 'H' transferred certain rights to assessee including right to sublet premises and to realize rent from sub-tenants. Assessee sub-let premises to a company and realized rent from it. In turn, assessee paid rent to 'H' and was also liable to carry out other obligations mentioned in lease deed. Assessee claimed its rental income to be assessed as income from other sources. However, AO assessed it as income from house property.

Held that since rights exercised by assessee were referable only to agreement with 'H' who was owner of property, there could not be a second owner like assessee, nor assessee could be said to be beneficial owner of that property. Further, since period of lease in question was less than statutory period of 12 years as mentioned in section 269UA(f), assessee also could not be said to be deemed owner, therefore, rental income realized by assessee was to be assessed, under head 'other sources' and not under head 'house property'.

CIT v. Bareilly Development Authority (All. HC) (IT Reference No. 157 of 1989)

Section 221 read with section 201 of the Income-tax Act 1961 - Collection and recovery of tax - Penalty payable when tax in default

Assessee, a development authority, failed to comply with provisions regarding TDS from amount paid to various contractors. ITO levied penalty upon assessee under section 221. Tribunal had set aside penalty on three grounds, namely (i) tax and interest had been deposited before penalty proceedings was initiated, (ii) ITO's discretion to levy penalty had not been fairly exercised and (iii) no penalty could be levied for non-filing of form No. 26C.

Held that view of Tribunal that penalty could not be imposed on ground that TDS and interest due thereon had already been paid before initiation of penalty proceedings was not correct by virtue of Explanation to section 221. Since penalty proceedings were initiated for violation of provisions of section 201(1), Tribunal had misdirected itself in holding that no penalty could be levied for not filing Form No. 26C, however, Tribunal's finding that ITO's discretion to levy penalty on assessee had not been fairly exercised were based on appreciation of evidence and material on record could not be interfered with and, therefore, penalty was rightly deleted by Tribunal.

Claris Lifesciences Ltd. v. ACIT [IT Appeal Nos. 310 and 311 (AHD) of 2005]

Section 68 of the Income-tax Act, 1961 - Cash credits

Assessee received certain deposits on basis of application made by its employees. Said applications contained all particulars of depositors, i.e., name, address, signature, telephone Nos. PA

No., Ward Office etc. During course of assessment, assessee filed confirmations in respect of majority of deposits, and in respect of others, explained to AO that it was not possible to get confirmations from such depositors on account of their having left services of assessee and migrated abroad. However, in respect of deposits where confirmations were not filed, AO held that identity of depositors were not proved and, consequently, made addition to income of assessee under section 68 as unexplained cash credits.

Held that since depositors were ex-employees of assessee, their applications contained all particulars regarding their identity, deposits had been accepted and repaid through bank accounts and interest had been paid, it could be said that assessee discharged initial burden of proving said cash credits. Having accepted fact that depositors were ex-employees of assessee, AO should have carried out further inquiries by way of verifying record of assessee and having PA number on record, further inquiries could have been carried from department to rebut case of assessee. Therefore, cash credit in question could not be added to income of assessee as unexplained cash credit under section 68.

Section 35 of the Income-tax Act, 1961 - Scientific research expenditure –

Held that since section 35(2AB) nowhere suggests or implies that 'R&D' facility is to be approved from a particular date, same cannot be interpreted so as to provide a cut-off date for eligibility of weighted deduction of expenditure towards providing said facility. Once research and development facility is approved by prescribed authority, entire expenditure incurred by assessee on development of facility has to be allowed for weighted deduction under section 35(2AB) irrespective of date of its approval by prescribed authority.

Diversified Global Finlease Ltd. v. CIT [IT Appeal No. 206 OF 2007 (Delhi HC)]

Section 143 of the Income-tax Act, 1961 - Assessment - Additions to income.

Assessee was a lease finance company. It had paid certain amount to two persons which according to it was paid for rendering services. Assessee had also paid excess salary to some of its employees who were relatives of director. AO took notional interest on amounts given to two persons and added same to income of assessee. He also disallowed part of amount paid towards excess salary.

Held that since assessee neither furnished any materials or documents to show that said two parties rendered services to it nor established reasonableness of payment of excess salary, AO was justified in his action.

Seaking Infrastructure Ltd. v CIT [IT Appeal No. 4030(Mum.) of 2007]

Section 263, read with sections 10(23G), 36(1)(iii), 43B and 45 - Revision of orders prejudicial to interest of revenue

Commissioner examined assessment order passed by AO and having noticed that AO had allowed claim of assessee for exemption of capital gains under section 10(23G) arising out of conversion of certain equity share of a company 'G' as stock in trade in assessment year 2000-01 and subsequent sale of these shares in assessment year 2002-03 and had also allowed claim of interest of Rs. 1,87,06,108 on borrowed funds from a company 'M' used for purchase of shares as a business expenditure without verifying fact that conditions laid down in section 10(23G) had not been satisfied and interest paid

on funds utilized for purchase of shares held as an investment was a capital expenditure not allowable under section 36(1)(iii) and even otherwise interest paid to 'M' was covered by provisions of section 43B, set aside assessment order and asked AO to frame assessment *de novo.*

Held that since AO having examined detailed reply furnished by assessee had adjudicated issue by passing a speaking order and further since condition of section 10(23G) even otherwise stood satisfied by assessee and further since assessee had rightly claimed interest amounting to Rs 1,87,06,108 by way of deduction under section 36(1)(*iii*) and further since interest was also allowable under section 43B and further since nothing had been placed by revenue on record that view taken by AO was not a plausible view, Commissioner was not justified in invoking powers under section 263 for revising assessment order.

KCC Software* v. *DIT (2008) 167 TAXMAN (SC) [Civil Appeal No. 769 OF 2008]

Section 132B of ITA - Search and seizure - Application of retained assets

Held that where order passed under section 132B showed that certain amount withdrawn from assessee's bank account, which had been seized, was retained for estimated liability pending completion of assessment, there was no challenge to order passed under section 132B and assessment was yet to be completed, no relief to assessee against retention of amount could be granted.

Sterling Holiday Resorts (India) Ltd. v. ACIT [IT Appeal No. 335 (MDS) OF 2005]

Section 4 - Income that is received or deemed to be received in previous year is exigible to tax and obligation to use income in a particular manner does not remove it from category of income; there is absolutely nothing in Act to permit assessee to treat part of income as deferred income and to offer it for taxation as per its own sweet will. Assessee was engaged in business of sale of time share units promoted by it at different locations. In respect of said properties, assessee entered into a time share agreement with customers to extend usership rights along with various facilities to them for a period of 99 years. During relevant year, assessee received certain amount from customers, of which 45% was offered as income. As regards balance 55%, assessee claimed that same was advance subscription towards customer facilities to be provided by it in terms of agreement and was to be spread over period of agreement. However, no details were furnished by assessee as to expenditure actually incurred during relevant period towards providing customer facilities.

Held that in absence of such details, there was no rationale for assessee to exclude 55% income and, consequently, entire receipt was assessable as income of assessee in year in question.

CIT v. Dr. A.M. Singhvi [IT Appeal No. 16 of 2004]

Section 37(1) - Allowability of Business expenditure

Assessee, an advocate, occupied rented premises for office use. During relevant year, assessee carried out certain repairs and renovations in order to see that office premises was kept in a proper condition and professional activities were carried out effectively and smoothly.

Held that since expenditure incurred by assessee was in connection with profession/business and for smooth working thereof, leaving fixed capital untouched, expenditure in question was revenue

expenditure and, hence, allowable under section 37(1).

CIT v. Fenner (India) Ltd. [T.C.(A) No. 2712 of 2006]

Section 37(1) - Allowability of Business expenditure

Expenditure incurred by assessee on replacement of machinery without there being any acquisition of any new asset, much less capital of any enduring advantage, was allowable as revenue expenditure.

Dy. CIT v. Tata Investment Corporation Ltd. (2008) 113 TTJ (Mumbai) 512

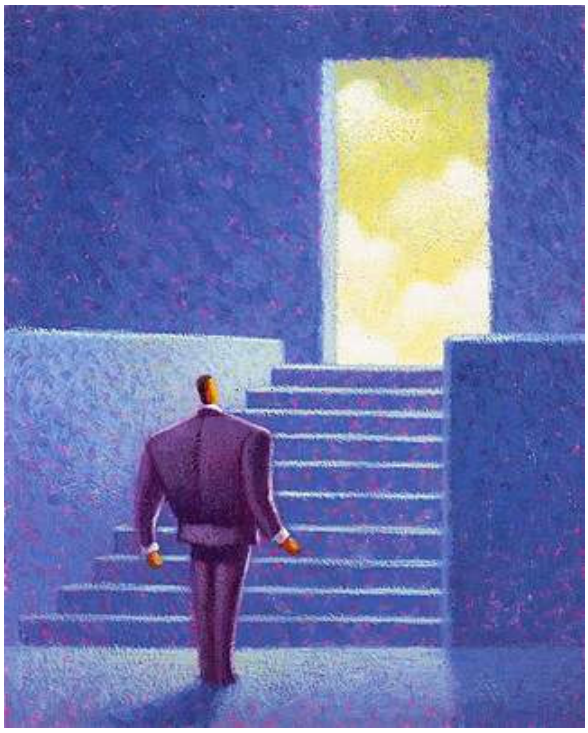
Salary expenditure relating to earning of dividends. Assessee being an investment company, the total infrastructure of the company is utilized for the purpose of attainment of its objects which include investment in group concerns and other companies. Certain part of the said salary expenditure is attributable to earning of dividend income. Such expenditure attributable to earning of dividend income is to be disallowed under the provisions of S. 14A.

CIT v. Mangal Tirth Estates Ltd. (2008) 214 CTR (Mad.) 253

Assessee following project completion method. Assessee company engaged in the business of construction and sale of multi-storied office cum shopping complex-centrally air conditioning facility provided by the assessee to the purchasers to built up area. By separate agreement, assessee was receiving service charges for providing air conditioning facilities for a period of 5 years and thereafter facility to be continued to be provided at no cost, i.e. after adjusting the cost of Plant& Machinery over a period of 5 years. Plant to be transferred to any person nominated by owners of less than 75% of shopping and office area after 5 years without any consideration

Ownership of plant and equipment rests with the assessee only on paper and the effective ownership only rests with apartment owner. What has been collected in the name of charges for air conditioning facility is in reality recoupment of charges for installation of the plant

Held that entire consideration was liable to tax in the year of receipt as per project completion method followed by the assessee- spreading over the so called service receipts over a period of 5 years was not permissible.



CIT v. Deep Nursing Home & Children Hospital (2008) 214 CTR (P&H) 144

TDS payment of professional charges- vis-à-vis salary. Professional charges paid by hospital to various doctors who were called for treatment of patients. Findings recorded by the Tribunal that the Doctors were visiting the hospital and were on call and that they were not in the service of the hospital as employees. Question with regard to employer-employee relationship is necessarily a question of fact. Therefore, provisions of TDS u/s. 192 are not attracted and there was no question of interest u/s 201(1A).

ACIT v. Alembic Glass Industries Ltd. [IT Appeal No. 1666 (AHD.) OF 2006]

Section 244A, read with sections 234B and 234C of the Income-tax Act, 1961 - Interest on Refunds

Held that in context of section 244A(1)(b), expression 'tax' would include interest also and

definition of tax in section 2(43) meaning 'income-tax' would not be applicable in context of section 244A(1). Assessee is entitled to interest on refund of interest charged under section 234B which was paid by assessee and, on appeal that interest was found not chargeable and, thus, became refundable to assessee.

CIT v. Silver Streak Trading Pvt. Ltd. ITA 1237/2007 (Delhi HC)

Notice under Section 143(2) of Income Tax Act-onus is clearly upon the Revenue to show that the notice was, in fact, served on the Assessee within the time prescribed by law

Circulars/Notifications/Press Release

INSTRUCTION NO-2/2008, Dated: February 22, 2008

'Benign Assessment Procedure' for assessees engaged in diamond manufacturing and/or trading.

The undersigned is directed to state that the 'Benign Assessment Procedure', in the case of assessees engaged in diamond business as announced by Hon'ble Finance Minister in his Budget Speech on 28.2.2007 shall be as under:

A. The procedure will apply to assessees engaged in the business of manufacturing and/or trading of diamonds (referred to below as such business).

B. If an assessee has shown a sum equal to or higher than 6% of his total turnover from such business as his income under the head 'profits and gains of business or profession' for a particular assessment year, the Assessing Officer shall accept his trading results.

C. (i) The assessee shall be required to maintain separate books of accounts of such business.

(iii) Acceptance of profit at 6% or above as per para (B) for a particular assessment year will not be a precedent for that assessee or for any other assessee.

D. The procedure shall not apply to an assessee for an assessment year -

(iv) Where assessment is being made pursuant to a -

i. search and seizure action under section 132; or

ii requisition made under section 132A; or

iii survey action 133A.

(v) where 50 per cent or more of the income from such business of an assessee is claimed as deduction under Chapter-III or under Chapter VI-A of the Income-tax Act.

(vi) where there is information regarding escapement of income.

E. The rate of profit as a percentage of turnover would be reviewed annually on the basis of revenue generation and results of scrutiny assessments, searches and surveys made during the year.

2. The above instruction is issued under section 119(1) of the Income-tax Act, 1961 and would be applicable for assessments made during Financial Year 2008-09. The instruction may be brought to the notice of all concerned in your Region.

F.No.153/7/2007-TPL(Pt.1)

Press Release No.402/92/2006-MC (10 of 2008)

Government of India / Ministry of Finance

Department of Revenue – CBDT dtd. 12th February 2008

All tax deductors / collectors are required to file the TDS/TCS returns in Form No.24Q (for salaries), Form No.26Q (for payments other than salaries) or Form No.27EQ (for TCS). These forms require details of all tax deductions with name and permanent account number (PAN) of parties from whom tax was deducted.

It had earlier been decided that Form No.24Q with less than 90% of PAN data and Form No.26Q & Form No.27EQ with less than 70% of PAN data will not be accepted for the quarter ending on 30.09.2007 and thereafter.

The said decision has since been reviewed. It has now been decided to enhance the threshold limit for PAN quoting without which TDS/TCS returns will not be accepted. The limit has been enhanced to 95% from 90% in case of Form 24Q and to 85% from 70% in case of Forms 26Q and 27EQ. The enhanced limits will be applicable for and from the quarter ending 31.03.2008. These threshold limits will also apply to all those TDS/TCS returns, which are filed for any of the earlier quarters on or after 01/04/2008.

Tax deductors and tax collectors are, therefore, advised to obtain correct PAN of all deductees and quote the same in their TDS / TCS returns. Deductees are also advised to furnish their correct PAN with their deductors, failing which they will not only have difficulty in getting credit of TDS/TCS in their income tax assessments but will also face penal proceedings under the Income Tax Act.

INDIRECT TAXES

Judicial pronouncements

City Gold Metal (P) Ltd. v. CCE & ST [Appeal No. ST/50 OF 2007]

Section 65 of the Finance Act, 1994-Clearing and forwarding agent. Assessee was co-ordinating execution of orders on behalf of a company. Service tax was demanded from assessee under category of `clearing and forwarding agent'.

Held that assessee being a mere co-ordinator without having control over goods of principal nor even as agent to deal with same activity carried out by assessee would not be classified under category of `clearing and forwarding agent'.

S.R. Kalyanakrishnan v. CCE (2008) 12 STT 454 (BANG-CESTAT)

Business support services - Section 65 of the Finance Act, 1994 - Period prior to 1-5-2006

Assessee was appointed by bank to verify correctness, fairness and authenticity of informations furnished by those seeking bank loans.

Verification of details given by loan seekers could not be treated as promoting bank's business and, hence, could not be treated as 'Business auxiliary service'. Services rendered by assessee would be covered under category of 'Business support service' which was taxable with effect from 1-5-2006, however, since service was rendered prior to 1-5-2006, assessee was not liable to pay service tax.

Sainik Mining & Allied Services Ltd. v. Commissioner of Central Excise, Customs & Service Tax (2008) 12 STT 433 (KOL-CESTAT)

Cargo handling service

Whether cargo in commercial parlance has a definite connotation, which is carried as freight in a ship, plane, rail or truck - Held, yes - Whether activity of mere mechanical transfer of coal from coal face to tippers and, subsequent, transportation of coal within mining area, does not come under purview of cargo handling service - Held, yes

New Mangalore Port Trust v. Commissioner of Service Tax (2008) 12 STT 450 (BANG-CESTAT)

Section 65 of the Finance Act, 1994 - Port service - Period July 2001 to March 2004]

Assessee-port trust had its railway yard and sidings. Railways collected from users of yards charges on behalf of assessee and remitted same to assessee.

Held that since railway siding charges collected for use of infrastructure put up by assessee were not in relation to vessels or goods and assessee also did not collect these charges from users, these charges did not represent money received by assessee for port service rendered by it, therefore, demand of service tax from assessee-port trust in respect of railway siding charges was not in accordance with law.

K.G. DENIM LTD. v. CCE Final Order No. 1337 of 2007 (CESTAT, Chennai Bench)

Rule 3 of the Cenvat Credit Rules, 2001 - Cenvat credit - Period from July, 2001 to October, 2001. Assessee paid Additional Excise Duty (AED) on inputs under Additional Duties of Excise (Textile and Textile Articles) Act, 1978 [AED (T&TA) Act] and utilized same for payment of Basic Excise Duty (BED) and AED paid under Additional Duties of Excise (Goods of Special Importance) Act, 1957 [AED (GSI), Act] on its final products as per rule 3(3). Revenue by invoking extended period of limitation issued a show cause notice on 24-4-2003 and denied benefit of Cenvat credit on ground that matter was governed by rule 3(6) and demanded duty along with interest and penalty. However assessee contended that non obstante clause in sub-rule (6) had nothing to do with sub-rule (3) and, therefore, right of a manufacturer of final products to utilize Cenvat credit of any of specified duties of excise paid on inputs, for payment of any duty of excise on any final products was not affected by anything contained in sub-rule (6).

Held that benefit provided under sub-rules (3) of rule 3 can be availed only to extent permitted under restrictive provision viz. sub-rule (6) of rule 3, therefore, assessee could have utilized Cenvat credit of AED (T&TA) only towards payment of same kind of duty of excise but since that was not done, cenvat credit was rightly denied to assessee.

Section 11A of the Central Excise Act, 1944 – Held that in view of facts stated under heading 'Cenvat credit', since assessee had been filing periodical returns and connected documents and had also supplied documentary materials to department at stage of switching over to deemed movat credit scheme which documents if verified would have disclosed that it had utilized AED (T&A) for payment of AED (GSI) and BED on final products during period of dispute, it could not be held to have suppressed any fact. Therefore, extended period of limitation under section 11A(1) could not be invoked for recovery of duty from assessee.

OTHER LAWS

FOREIGN EXCHANGE MANAGEMENT ACT

Circulars/Notifications/Press Release

Master Circular on Non-Resident Ordinary Rupee (NRO) Account - *Master Circular No. 3 /2007- 08, dated 21-2-2008*

Master Circular on Remittance Facilities for Non-Resident Indians/Persons of Indian Origin / Foreign Nationals - *Master Circular No. 4 /2007-08, dated 21-2-2008*

Master Circular on Miscellaneous Remittances from India - Facilities for Residents - *Master Circular No. 5 /2007- 08, dated 21-2-2008*

Due Dates of key compliances pertaining to the month of March-08:

5th March	Payment of Service Tax & Excise duty for February
6th March	Payment of Excise duty paid electronically through internet banking
7th March	TDS/TCS Payment for February
10th March	Excise Return ER1 / ER2 /ER6
15th March	PF Contribution for February, Excise payment by SSI
	Payment of last installment of Advance Tax and FBT
21st March	ESIC Payment for February
31st March	Service Tax payment for Individual/HUF for the period Jan to March Excise/Service Tax payment for March Filing of belated pending returns