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Direct Tax Newsletter

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NEWS FEED

- **Net Direct Tax collections for FY 2023-24 increased by more than 20.66%: CBDT**

1. Pendency of Review Petition Before Apex Court Can't Be a Ground to Interfere Order Passed by Lower Authority

In the instant case[1], the revenue filed the instant appeal against the order passed by the Tribunal. Revenue contended that Section 5 of the Prohibition of Benami Property Transactions Act, 1988, as amended by the Benami Transactions (Prohibition) Amendment Act, 2016 (2016 Act), will have retrospective effect.

The Tribunal passed an order relying upon the decision of the Supreme Court in the case of Union of India vs. Ganapati Dealcom P Ltd [2022] 141 taxmann.com 389 (SC). Against such decision, the Department already preferred a Review Petition in Diary No. 34619 of 2022 (Review Petition No. (Civil) 359 of 2023), and it is pending adjudication.

Thus, revenue submitted that the order passed by the Tribunal is contrary and liable to be interfered with.

The Madras High Court held that the Supreme Court, in the case of *Ganapati Dealcom (Supra)*, held that the provisions under section 5 of the 2016 Act, being punitive in nature, can only be applied prospectively and not retrospectively.
In the Review Petition (Civil) Diary No. 34619 of 2022, the Department sought to review the Supreme Court's order in *Union of India vs. Ganapati Dealcom Pvt Ltd.* Though the oral hearing was permitted by the order dated 25.01.2023, no stay order was issued by the Apex Court.

Thus, as of date, the decision of the Supreme Court in Ganapati Dealcom Pvt Ltd (Supra) holds the field. The argument that provisions of Section 5 of the Amended Act 2016 have to be applied retrospectively cannot be allowed.

The pending review of the *Union of India vs. Ganapati Dealcom Pvt. Ltd.* decision does not justify interference with the Tribunal's order. It is also well settled that mere pendency of the Review Petition will not be a ground to assail the orders impugned in the appeals. However, the revenue is open to proceed depending on the outcome of the review petition.

2. CIT Can't Extend Time Limit to Submit Special Audit Report u/s 142(2A) As Power Vests With AO Only

In the instant case[2], the Assessee-company is engaged in the construction and allied services business. It was subjected to a search under Section 132 of the Income Tax Act, 1961. Subsequently, the Assessing Officer (AO) informed the assessee to have a special audit under Section 142(2A).

Subsequently, CIT approved conducting a special audit of the assessee's accounts and appointed a Chartered Accountancy firm. The timeframe for completion of the audit was fixed as 120 days. However, at the request of the special auditor, CIT provided an extension of 60 days for furnishing the audit report.

[1] Deputy Commissioner of Income-tax (Benami Prohibition) v. Advance Infra Developers (P.) Ltd. [2023] (High Court of Madras)

[2] PCIT vs. Soul Space Projects Ltd. - [2023] (High Court of Delhi)

Against such an extention, the matter reached before the Delhi High Court.

The High Court held that since the initial timeframe for the conduct of the audit was mandatorily required to be fixed by the AO as per section 142(2C), the power to vary the original timeframe by way of extension under the proviso appended to it has been consciously conferred by the legislature only on the AO.

The answer to whether the power conferred on the AO can be exercised by an authority other than the AO lies in ascertaining the authority in which the legislature has invested statutory discretion. As long as the authority retains the power to exercise the discretion vested in it by the statute, no fault can be found if it employs ministerial means in effectuating the exercise of discretionary power by the authority in which such power is reposed.

Accordingly, the discretionary power invested in the specified authority should be exercised by that authority alone and none else, even if it causes administrative inconvenience, except in those cases where it is reasonably inferred to be a delegable power.

In the instant case, the AO transmitted the request received by the auditors to his superiors, who then processed the matter and directed a grant of extension of time for completion of the audit. The decision to get an audit conducted under Section 142(2A) is a step in the process of assessment proceedings and, therefore, is clearly not an administrative power; the appointment of a special auditor entails civil consequences.

Therefore, the initial exercise of the power has been explicated as one that is not administrative. The CIT could not have extended the time based on the AO's recommendation.

3. Tax Dept. is Liable to Lift Attachment If Bank Claims & Exercises Its 1st Charge Over Debt Under SARFAESI Act

In the instant case[3], the petitioner bank challenged the attachment order issued by the income tax department under Rule 48 of the Second Schedule of the Income Tax Act. The bank contended that the borrower had executed the mortgage by deposit of title deeds on 02.04.2009 and subsequently executed the memorandum of extension of equitable mortgage dated 17.04.2014. Thus, the bank has priority over the Income-tax department.

However, the Income-tax Dept. argued that the deposit of title deeds was not registered. The date of registered mortgage was on 17.04.2014, and as of 17.04.2014, the assessment proceedings were initiated. Thus, any mortgage executed during that period was void as per Section 281.

The High Court held that the deposit of title deeds dated 02.04.2009 falls under the "not compulsory" category. It was w.e.f. 01-12-2012, the registration of the instrument evidencing the agreement relating to the deposit of title deed was made compulsory under section 17(i) of the Registration Act.

Further, non-registration of the deposit of title deeds alone would not determine the party's rights. Income Tax Act has not provided any 1st charge of its debts. However, there is 1st charge over the bank's debt under the SARFAESI Act.

[3] City Union Bank Limited vs. Tax Recovery Officer - [2023] (High Court of Madras)

Thus, even though it is a statutory duty to attach the property to the Income Tax Department, as and when the bank claims and exercises its 1st charge over the property, the Dept. is liable to issue a no-objection certificate and lift the attachment.

4. Sale of Agricultural Land Not Taxable Though Purchaser Changed Land Use From Agriculture to Non-agriculture

In the instant case[4], during the year under consideration, the assessee sold four pieces of agricultural land to a company. The assessee contended that the land sold by him did not qualify as "capital asset" in terms of section 2(14)(iii) being "rural agricultural land", and therefore, the capital gain earned was not taxable.

Assessing Officer (AO) noted that the land was purchased for "industrial purposes" under section 63AA of the Gujarat Tenancy and Agricultural Lands Laws (Amendment) Act, 1997. Thus, he treated said land as "non-agricultural land".

On appeal, the Commissioner (Appeals) also upheld the finding of the AO, and the matter reached the Ahmedabad Tribunal.

The Tribunal held that section 63 of the Gujarat Tenancy and Agricultural Lands Laws (Amendment) Act, 1997, prohibits the transfer of agricultural land to non-agriculturists. However, Section 63AA provides an exemption in respect of agricultural lands which are designated for bona fide industrial purposes under section 65B of the Bombay Land Revenue Code, 1879. Such agricultural lands require no permission for change of land use and can be sold to non-agriculturists in terms of section 63AA of GT&ALL.

The GT&ALL prohibits the sale of agricultural land to non-agriculturists but relaxes this prohibition in case of lands designated for bona fide industrial purposes and requires no permission on change of land use as per the Bombay Land Revenue Code, 1879.

In the instant case, after the purchase of the agricultural land from the assessee under section 63AA of GT&ALL, the purchaser notified the purchase of agricultural land for bona fide industrial use. A certificate in this regard by the Collector was also issued verifying its user for bona fide industrial purposes. Thus, it was after the sale, land use was changed to non-agriculture purposes.

Moreover, considering that the assessee's sold land has been classified as agricultural land and there was no disagreement regarding its proximity to municipal limits, the land does not meet the criteria for being categorized as a "capital asset" under section 2(14)(iii). Thus, the assessee's assertion that the entire capital gain from the land is not subject to taxation aligns with legal provisions.

[4] Hiten Tulshibhai Engineer vs. Income-tax Officer - [2023] (Ahmedabad-Trib.)