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## Tax Digest

- Recent case laws

December 27, 2022



**ICAI CAN INITIATE INQUIRY AGAINST PNB AUDITORS IN NIRAV MODI SCAM RELYING UPON NEWS REPORTS: HIGH COURT:** ICAI has the power to initiate *suo motu* inquiry against CAs based on 'information' without the receipt of any complaint.

**CBDT exemptions :** Exempts Non Residents not having PAN from mandatory e-filing of Form 10F till 31-03-2023

**CBDT issues new SOPs on filing of appeals/SLPs by the Income-tax department in the Supreme Court**

### 1. Section 148A

#### **High Court sets aside order u/s 148A(d) as AO failed to disclose the bank accounts in which bogus entries were found**

In the instant case<sup>1</sup>, the assessee is a private limited company and was issued a notice under section 148A(b) alleging that the assessee had taken bogus accommodation entries from entities controlled by a third party. In response to the notice, the assessee filed a detailed reply wherein it was stated that the information on the basis of which the reassessment proceedings were sought to be initiated were incorrect as the assessee had never entered into any transactions with the said parties or any entities controlled by them. The assessee contended that the impugned order under section 148A(d) was passed without taking into consideration any of the facts.

*Per contra*, the Revenue stated that there was information available on the insight portal from a credible source which disclosed the modus operandi of tax evasion carried out by the assessee. It stated that the assessee's name along with its PAN was mentioned in the information relied upon against the transactions of Rs. 93 Lacs.

It was observed and noted by the Hon'ble High Court that the order did not specify in which bank account or account number the alleged amount had been received by the assessee. It was further noted that the order stated that the asset was represented by bogus accommodation entries in the form of bank deposits, yet no details of any such deposit had been mentioned in the order. It was thus held that the order passed under section 148A(d) as well as the notice issued under section 148 of the Act was to be set aside and the matter

was to be remanded back to the Assessing Officer for fresh determination.

### 2. Section 43B:

#### **Amendment disallowing employee's contribution to PF/ESI if deposited after the due date has a prospective effect**

In the instant case<sup>2</sup>, the assessee being a public limited company, during the F.Y. 2018-19, deposited its employees' contribution to the employee welfare fund beyond the due date specified under the relevant Act, but prior to the due date of filing of return of income under section 139(1). It accordingly claimed deduction under section 36(1)(va) of the Act.

The fact to be noted here is that the law regarding the above stood amended w.e.f. A.Y. 2021-22, that the "due date" would construe the due dates as per the respective Acts and not the due date u/s 139(1) of the Act.

During assessment, however, the assessee was denied deduction and an addition was made to the assessee's returned income under section 143(1) of the Act. The assessee, aggrieved, appealed before the CIT(Appeals) contending that amendments by way of Explanation 5 to section 43B and Explanation 2 to section 36(1)(va) which were introduced stating that the due dates would be the due dates under the respective Acts, would take effect only from assessment year 2021-22. The CIT(Appeals) denied the deduction at this stage.

On appeal before the Hon'ble ITAT, it was observed and held that as regards the aspect of the retrospective nature of the Explanations under

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<sup>1</sup> **Boutique International (P.) Ltd. vs. DCIT (High Court, Delhi) [2022]**

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<sup>2</sup> **Jabalpur Motors Ltd v. Assistant/Deputy Commissioner of Income tax CPC, Bangalore (ITAT Jabalpur) [2022]**

reference, there was no difference in the view expressed therein with that by the Hon'ble Tribunal in *Nikhil Mohine v. Dy. CIT* (supra), wherein It was held that the said Explanations have been proposed as prospective amendments, as stated in the Notes on the Clauses to and the Memorandum explaining the Provisions of the Finance Bill, 2021, with a view to, as explained, settle the controversy arising due to the contrary view expressed by some High Courts. There was, accordingly, no question of the same being given a retrospective effect. Hence, the same could not be applied in the instant case, i.e. A.Y. 2019-20.

The addition made was thus deleted and order passed in favour of the assessee.

### **3. Section 12AA : Registration of Charitable trusts**

#### **Private hospital turned into a foundation shall not be exempt from tax if it continues to function in same manner**

In the instant case<sup>3</sup>, the assessee was a private limited company and in August 2018, it converted the said company into a Section 8 Company and changed the name to "Fernandez Hospital".

The application of the assessee for registration to claim exemption u/s 11 was rejected by the Id. CIT(E) treating the same as *non-est*, due to ambiguity with regard to the name of assessee company and also list of directors. Further it was pointed out by the Id. CIT(E) that the assessee was involved in activities which are in the nature of trade and provides services at market rates. Besides that assessee had also violated the provision of section 13 of Income Tax Act 1961, as huge

amounts were paid to the directors/ interested persons.

Aggrieved with the order of the Id. CIT(E), the assessee preferred an appeal before the Hon'ble ITAT.

It was observed and held that where the company owning the hospital was converted from private limited company to section 8 company and the hospital continued to charge the patients at market rates even after such conversion, and the treatment at concessional rates provided by the hospital to patients accounted for less than 1% of revenue, the CIT(E) was justified in denying registration/approval u/s 12AA, 10(23C)(vi) & 80G(5)(vi) to the section 8 company.

In the present case, neither the activities, nor the management, nor the place of services, nor the charges for treatment had changed in any manner by conversion and only the name of the assessee had changed. Earlier the assessee was known as "Fernandez Hospital Private Limited" and presently known as "Fernandez Foundation". The assessee could do charity by either bringing down its profit by providing services at reasonable rate or by utilizing the surplus for helping medical aid / facilities to the poor / needy persons at free of cost. Nothing of this nature, if at all done by the assessee, has been brought on record by the assessee. It had only provided the treatment to 65 indoor patients for an amount of Rs. 84,48,709/- and 5,569 outdoor patients for Rs.39,65,102/- on concessional rates and the said amount was a meagre amount when compared to its total revenue collection of the assessee i.e., Rs. 141.90 crores for the period under consideration. By that standard alone the activities of the assessee cannot be said to be doing charitable activities.

It was held that the Ld.CIT(E) was correct in holding that the assessee was charging on the basis of commercial rates from the patients, either

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<sup>3</sup> [Fernandez Foundation v. CIT \(ITAT Hyderabad\) \[2022\]](#)

outdoor/indoor and the assessee has failed to demonstrate that the charges / fee charged by it were on a reasonable markup on the cost. Considering the totality of the facts and circumstances of the case, there was no error in the decision of Id. CIT(E). Accordingly, the orders of Id.CIT(E) were upheld and the appeal of the assessee was dismissed.

#### **4. Section 56 : Income from other sources**

##### **AO can't reject Discounted Cash Flow (DCF) method if there were just minor differences in the projected and actual financials: ITAT Chennai**

In the instant case<sup>4</sup>, the Assessee/Appellant is engaged in the business of servicing pipes and tanks for petrochemical industries, filed its return of income for the Assessment year 2015 - 2016 on 30-9-2015 admitting the current year loss amounting to Rs. 2,51,69,106/-. During the financial year relevant to the Assessment Year 2015 - 2016, the Assessee company had issued 2,15,955 equity shares of Rs. 100/- each as face-value and with a premium of Rs. 8/- per share to the existing shareholder of the company viz. M/s. Arjun Chemicals Private Limited. The Assessee has justified issue of shares with a premium of Rs. 8/- on the basis of the valuation report issued by a Chartered Accountant, wherein the value of the equity shares have been arrived at Rs. 107.95/- on the basis of the Discounted Cash-Flow Method. The Assessing Officer however was not convinced with the explanation furnished by the Assessee, as according to the Assessing Officer, the Discounted Cash-Flow [DCF] Method adopted by the Assessee for valuation of shares is not correct and thus rejected the DCF Method and had adopted the

Net Asset Value [NAV] Method, as prescribed under the Rule 11UA of the Income-tax Rules and had determined the share price at Rs. 18.97 per share as against the issued price of Rs. 107.95 [Rs.108] per share. Thus, the excess amount received by the Assessee company as share premium of Rs. 1,92,15,676/- has been treated as income u/s.56(2)(vii)(b) of the Income-tax Act, 1961.

Being aggrieved by the assessment order, the Assessee preferred an appeal before the learned Commissioner of Income-tax (Appeals). Before the learned Commissioner of Income-tax (Appeals), the Assessee justified the allotment of the equity shares at Rs. 108/- per share with a premium of Rs. 8/- per share on the basis of the valuation report and as per which the Assessee has determined the share price at Rs. 107.95 per share under the Discounted Cash-Flow [DCF] Method.

The Id.CIT(A) after considering the relevant submissions and also after going through the case-laws relied upon and also certain judicial proceedings, opined that there is no commercial expediency in the investment of the parent company at a premium of Rs. 8/- per share. Further, the Assessee has determined the share price on the basis of DCF Method. However, the projected cash flow considered by the Assessee when compared with the actuals at subsequent years, there is a huge difference between the projected financials and the actual financials. Therefore, the Assessee has not justified in determination of the share price of Rs. 108/- per share and thus, rejected the arguments of the Assessee and sustained the additions made by the Assessing Officer towards the share premium u/s. 56(2)(vii)(b) of the Income-tax Act, 1961.

Aggrieved by the order of the Commissioner of Income Tax (Appeals), the Assessee preferred an appeal before the Hon'ble ITAT, wherein it was held and observed that the AO had not pointed out any discrepancy in following the DCF Method. However, he had changed the method of valuation from DCF Method to Net Asset Value Method and determined

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<sup>4</sup> **SB Industrial Engineering (P.) Ltd. v. ACIT (ITAT Chennai) [2022]**

the share price accordingly. By doing so, the AO had exceeded his powers by changing the valuation method since as per law, the Assessing Officer cannot change the method followed by the Assessee for valuation of the shares as it is optional for the Assessee to choose a particular method for determining the share price.

As regards the difference in the projected financials when compared with the actual financials, it was held that projected financial figures is always a projection based on certain degree of estimation and which may not be equivalent to the actual. But, as long as there is a minor difference in the projected financials and the actual financials, there is no reason for the Assessing Officer to reject the DCF Method adopted by the Assessee by stating that there is a difference in the projected financials considered by the Assessee. Hence, the valuation adopted by the assessee was accepted and order was passed accordingly.