



2, India Exchange Place,
2nd Floor, Room No 10,
Kolkata – 700001

Ph: 033-22306990/ 40032841
Email id: info@acbhuteria.com

Tax Digest

- Recent case laws

March 13, 2023



- INCOME TAX DEPT SELECTS 68,000 HIGH-VALUE TRANSACTION CASES FOR E-VERIFICATION
- E-VERIFICATION SCHEME HAS BEEN INTRODUCED BY ITD TO ENCOURAGE VOLUNTARY TAX COMPLIANCE & FACILITATE A TRANSPARENT & NON-INTRUSIVE TAX ADMINISTRATION.
- USING TECHNOLOGY, INFORMATION OF SUCH FINANCIAL TRANSACTION IS SHARED WITH TAXPAYERS AS IS UNREPORTED/UNDER-REPORTED IN THE ITR.

1. Section 56(1), 28(iv) :

Where pursuant to internal restructuring, the assessee company received shares of Dish TV as a gift at nil consideration from ECRPL (holding company) and PTCPL, another group company, since donor company was permitted by its memorandum/articles of association to make a 'gift', transfer of shares without consideration would be valid and receipt of same as gift by assessee could neither be chargeable to tax under section 56(1) or 28(iv)

In the instant case¹, the assessee company the assessee company was incorporated in 5th January, 2009 and is one of the promoter group entities of ZEE and ESSEL Group of companies. During the previous year relevant to the current assessment year, the assessee company became the whole owned subsidiary of ECRPL. It was mutually agreed that as part of the internal restructuring of the group for consolidation of media assets, ECRPL will transfer 44,99,19,548 equity shares in Dish TV India Ltd (Dish TV) to the appellant as a gift without consideration.

Dish TV India Ltd is also a company forming part of Essel group of companies and it is engaged in the business of providing DTH services. Dish TV India Ltd was a company in which public were substantially interested and its shares were listed in the Bombay Stock Exchange and National Stock Exchange.

An order was passed by the AO, claiming that receipt of shares was a colorable device and thus

taxable in the hands of the assessee at market value under Income from other sources.

The Hon'ble ITAT held that in the instant case, receipt of shares of Dish TV as gift did not arise out of any business activity or business dealings and thus, would not be taxable under section 28(iv). Moreover, the nature and source of share premium received by assessee on issue of shares stood explained, and no addition under section 68 could have been made in favour of the assessee company.

Residuary head of income under section 56 could be resorted to only if none of specific head was applicable to income in question and would come into operation only if preceding heads were excluded, since gift received by assessee was capital receipt in nature it could be brought to tax under head capital gain and provisions of section 56(1) could not be resorted to.

Also, since the assessee was recipient of shares of listed companies, provisions of section 56(2)(vii) would not apply. As long as a donor company was permitted by its memorandum/Articles of association to make a gift, transfer of shares without any consideration would be valid, permissible and genuine and there would not be any requirement of gift deed.

Thus, gift of shares could not be held to be sham transaction and receipt of gift by assessee could neither be chargeable to tax under Section 56(1) or 28(iv).

2. Section 148:

Where Assessing Officer had no subjective satisfaction while issuing notice of reopening and reopening on part of Assessing Officer was

¹ Assistant Commissioner of Income-tax vs. Direct Media Distribution Ventures (P.) Ltd (ITAT Mumbai) [2023]

essentially on audit party opinion and not on basis of his own conviction, it was not justified

In the instant case², the assessee company is a limited company and has a thermal power plant which has filed its return of income for the A.Y.2017-18.

The return was processed and the tax return of the petitioner was processed and his case was selected for scrutiny under CASS. The detailed scrutiny was undertaken and the assessment was completed without making any addition or disallowance of any expenses.

The revenue issued a reopening notice under Section 148 asking the petitioner to file return of income to which the assessee complied, and sought for reasons for reopening and approval u/s 151 of the Act. The revenue provided the assessee company with the same. An objection was raised challenging the validity of the notice. The revenue disposed off those objections.

Thus, the case was further taken to the Hon'ble High Court wherein reliance was placed in the decision of the Apex Court in the case of Commissioner of Income tax Vs. P.V.S. Beedies (P) Ltd. and held that "Section 147 of the Act permits initiation of reassessment proceedings only when the Assessing Officer has a reason to believe that income has escaped the assessment. Whenever the audit party raises objections, it may provide information, however, eventually it is the Assessing Officer who should be satisfied himself & form a belief of his own that taxable income escaped the assessment." The AO cannot abdicate his decision by choosing to solely rely on the objection raised by the audit party or follow such direction.

² **Adani Power Maharashtra Ltd. V. ACIT [High Court of Gujarat] [2023]**

Therefore, it was observed that the assessee had succeeded on this ground and notice of reopening needs to be quashed. Subjective satisfaction of the Assessing Officer for the purpose of reopening of the assessment is lacking in the instant case and therefore, the AO having the jurisdiction to issue notice on the belief that the income has escaped the assessment in fact had no belief while issuing notice and, therefore, as held in the case of *Adani Exports Vs Dy CIT* it was a colourable exercise of jurisdiction by the Assessing Officer by recording the reasons for which he obviously had no conviction, had initiated the reassessment proceedings solely at the instance of the audit party which cannot be sustained. The Hon'ble High Court held that the AO initiated the reassessment proceedings without his own conviction and only at the instance of audit party and so the same was unsustainable.

3. Section 72A:

Where assessee-company took over a partnership firm in March 2018, since assessee had filed complete details showing that it had fulfilled all stipulated conditions under sections 47(xiii) and 72A(6) and all assets of partnership firm became assets of assessee after merger, it was entitled to carry forward and set off unabsorbed depreciation of erstwhile firm against income of relevant year for whole 365 days and not only for 31 days i.e. in proportion with merger

In the instant case³, the assessee company is engaged in the business of manufacturing and exports of ready-made garments in India. The assessee company filed its original return of income

³ **Assistant Commissioner of Income-Tax Vs. Srinivasa Fashions (P.) Ltd. [In the IAT Bench C, Chennai]**

for the A.Y. 2008-09 and thereafter, revised its return of income showing "Nil" income after claiming deduction for its SEZ unit and loss for its DTA unit.

The case was further selected for scrutiny proceedings, and a notice u/s 143(2) was issued demanding from the assessee all supporting documents. The AO reopened the assessment on the ground that unabsorbed depreciation claimed by the assessee company in its return of income was being wrongly allowed. The AO held that the assessee company can set off depreciation only to the extent of 31 days only and not for the whole year and hence added the claim of balance unabsorbed depreciation.

After giving opportunity to assessee, the AO held that since the assessee company took over the firm only from 1-3-2018 onwards, it can set off depreciation only to the extent of Rs. 8,26,151/- (31 days) only as against Rs. 97,53,913/- allowed in the original assessment and hence added Rs. 89,27,762/-.

Dissatisfied with the remarks of the AO, the assessee company filed an appeal before the Hon'ble Tribunal (ITAT) and the ITAT remitted back the matter to Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) after taking into account all the relevant supporting documents and reasons produced by the assessee company the order was passed in favour of the assessee company and full amount of claim was allowed.

Aggrieved by the order of the Commissioner of Income Tax (Appeals), the revenue filed an appeal before the Tribunal.

The AR for the assessee

company stated that the assessee company is eligible for claim of depreciation for full 365 days and not in proportion due to merger. The Ld. AR also drew the attention of the Tribunal towards the provisions of the Income tax Act relating to carry forward and set off of accumulated loss and unabsorbed depreciation allowance in case of amalgamation or demerger, etc. The accumulated loss and the unabsorbed depreciation of the predecessor firm or the proprietary concern, shall be deemed to be the loss or allowance for depreciation of the successor company for the purpose of previous year in which business re-organisation was effected. Also, provided that if any of the conditions laid down in the section 47 are not complied with, the set off of loss or allowance of depreciation made in any previous year in the hands of the successor company, shall be deemed to be the income of the company chargeable to tax in the year in which such conditions are not complied with." Further, he referred to the provisions of the Act, "transactions not regarded as transfer" and argued that all the conditions in the present case are fulfilled and also filed relevant details.

After admitting the factual aspects and as per the provisions of the law, the Tribunal detained that the assessee has complied with all the conditions and hence, entitled for claim of deduction with regards to unabsorbed depreciation and carry forward of depreciation.

Therefore, the order of Commissioner of Income Tax (Appeals) was confirmed and this issue of Revenue's appeal was dismissed.

4. Section 144B:

Where Assessing Officer issued on assessee a show cause notice regarding discrepancy in sale/purchase figure of assessee and GSTR-1 returns of various parties since assessee had not been given five days time and effectively it had only 48 hours to submit reply and there was total violation of principles of natural justice, matter was to be remanded back to Assessing Officer for fresh consideration.

In the instant case⁴, the Assessing Officer issued on assessee a show cause notice dated 14-9-2022 regarding discrepancy in sale/purchase figure of assessee and GSTR-1 return of various parties and asked to give response by 19-9-2022. The Assessee submitted an interim reply on 19-9-2022 (the same day) pointing out that the time granted was insufficient to submit a reply and further made a specific request to provide details regarding GSTR-1 returns of various parties as it was not privy to date based on which show cause notice was issued calculating difference of certain amount. The Assessing Officer did not extend time on ground that five days were given to assessee to submit a reply and no reply was received within the stipulated time.

He then passed an assessment order without considering the assessee's contentions. Since the assessee had not been given five days time and effectively it had only 48 hours to submit reply and there was nothing on record to indicate that assessee was put on notice that GST portal was kept open and it could do verification so as to reconcile any discrepancy, the Hon'ble High Court concluded

that the assessment had been completed by the officer with utmost haste without affording a reasonable opportunity for the appellant to put forth its contentions especially when the allegation was one of "mismatch".

This was in violation of principles of natural justice. The matter was thus remanded back to Assessing Officer for fresh consideration after providing necessary documents sought for by assessee and after affording reasonable. Accordingly, the appeal was allowed and the order passed in the writ petition was set aside.

⁴ [Green Valliey Industries Ltd. vs. Assessment Unit, Income-tax Department \(Calcutta High Court\) \[2023\]](#)