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Tax Digest

- **Recent case laws**

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LINKING OF PAN WITH AADHAAR TO BE DONE BY 31-03-2023 MANDATORILY -

- *For every person allotted a PAN*

- *As per Central Board of Direct Taxes (CBDT) Circular No. 7 of 2022, dated March 30, 2022, the PAN allotted to a person shall become inoperative if it is not linked with Aadhaar by March 31, 2023 and shall be liable to all the consequences under the Income-tax Act, 1961 for not furnishing, intimating or quoting the PAN.*

- *There could be restrictions on securities and other transactions until the PAN and Aadhaar are linked.*

1. Income from Transfer of Listed Shares held for a period of more than 12 Months taxable as Capital Gains at the Desire of the Assessee: Calcutta HC

Where CBDT's Circular 6/2016, which bars AO from disputing assessee's treatment of listed shares held for more than 12 months as capital assets, is retrospectively applicable

In the instant case[1], the assessee is engaged in the sale of plywood and related products. It being a company, filed its return of income for the relevant A.Y. declaring a total income Rs. 3.42 crores. The case was selected for scrutiny and an order was passed wherein Rs. 4.33 crores was treated as business profit as against capital gains as declared by the assessee.

The assessee responded seeking clarification as to why the profit from the sale of shares/mutual fund units should be treated as business profits. The assessment officer (AO) stated that looking at the frequency of the transactions it was *prima facie* clear that the assessee was transacting in shares as a business. The assessee submitted that all investment transaction was shown in the books of accounts under the head 'Investment' which represented idle funds invested with a long term view. It also submitted that there were only a few investment transaction compared to several other normal business activities (plywood, dealing in other products, etc.).

The assessee placed reliance on the CBDT Circular 4/2007 dated 15.06.2207 which had stated that CBDT wishes to emphasize that it is possible for a taxpayer to have two portfolios, i.e., an investment portfolio comprising securities which are to be treated as capital assets and a trading portfolio comprising stock-in-trade, which are to be treated as trading assets.

The AO rejected the response of the assesssee on the ground that the memorandum and articles of association clearly specified that the main object of the company was to undertake business in the shares and securities.

Aggrieved, the asesssee preferred an appeal before the Ld. CIT(A) who affirmed the order passed by the AO.

On appeal before the Hon'ble ITAT, it was noted that in the earlier assessment years, i.e. A.Y. 2005-06 and 2008-09, the facts were the same and the transactions were charged to capital gains. Thus an order was passed favoring the assessee.

On the Revenue's appeal before the Hon'ble High Court, it was held that CBDT's Circular 6/2016, dated 29-2-2016, was beneficial to assessee in that it clarifies that in respect of listed shares and securities held for a period of more than 12 months immediately preceding the date of its transfer, if the assessee desires to treat the income arising from transfer thereof as capital gains, the same shall not be put to dispute by the AO. It was further stated that once such stand was taken by the assessee in a particular assessment year, it shall remain applicable in subsequent assessment years also and the taxpayers shall not be allowed to adopt a different/contrary stand in this regard in subsequent years. Reading the circular in its entirety will show that on account of dispute which had arisen while interpreting the directions issued by the Courts and Tribunal, the Board thought fit to issue appropriate instructions to the field formation. Therefore, it was to be understood that the Circular would be retrospective in operation

[1] **Commissioner of Income-tax, Kolkata-IV vs. Century Plyboards (I) Ltd. (Calcutta High Court) [2023]**

and would apply to assessment years prior to issue of the Circular also. Thus, the appeal was dismissed.

2. Section 56(2)(viib) :

Where additional shares were issued by assessee-company to its existing shareholders on a pro rata basis, on basis of their existing shareholding, provisions of section 56(2)(viib) could not be invoked in such case

In the instant case[2], the assessee-company had allotted 5,000 shares having a face value of Rs. 10 each at a premium of Rs. 90 per share, i.e at Rs. 100 per share. On account of the said allotment, the assessee-company raised capital including share premium of Rs. 4.5 lakh. As the FMV of the unquoted equity shares of the assessee-company as per sub-rule (2) of rule 11UA of the Rules, 1962 was Rs. 85 per share, therefore, the AO held the excess amount of Rs. 15 per share so received by the assessee as its income from other sources under section 56(2)(viib). Accordingly, the AO on the basis of his aforesaid deliberations made a further addition and passed his order u/s 143(3).

Aggrieved, the assessee carried the matter in appeal before the Ld. CIT(A) and submitted that sine the additional shares of the company were issued and allotted on a pro rata basis to the existing shareholders, i.e., based on their existing shareholding, therefore, the shareholding percentage before and after allotment of the aforesaid shareholders remained the same and therefore, in view of Circular No. 10 of 2018, dated 31-12-2018 provisions of section 56(2)(viib) could not be invoked for making addition.

The Ld. CIT(A), despite a specific ground of appeal having been raised by the assessee before him had however failed to adjudicate the same.

On appeal before the Hon'ble ITAT, it observed that in sum and substance, as long as there was no disproportionate allotment of shares, i.e., shares were allotted on a pro rata basis to the shareholders based on their existing holding, then, pursuant to allotment of the additional shares there would only be an apportionment of the value of their existing holding over a larger number of shares.

In fact, the CBDT vide its Circular No. 10 of 2018, dated 31-12-2018, had earlier clarified that the provisions of section 56(2)(viia) shall not be applicable in cases of receipt of shares by the specified company or firm as a result of fresh issuance of shares including those by way of issue of bonus shares, right shares and preference shares. Although the aforesaid circular was, thereafter, withdrawn, but the provisions of section 56(2)(vii) were introduced as an anti-abuse measure to prevent laundering of unaccounted money in the garb of gifts after abolition of Gift-tax Act, therefore, there is no justifiable reason to depart from the understanding that the said provisions were in the nature of counter evasion mechanism to prevent laundering of unaccounted money. In the case of issuance of bonus shares, allotting of shares to existing shareholders in proportion to their existing shareholding (akin to issue of right shares), there is neither any increase or decrease in the wealth of the shareholder (or of the issuing company) on account of a bonus issue and his percentage holding therein remains the same. What in effect transpires is that a share gets split (in the same proportion for all the shareholders). Such allotment of additional shares would be akin to changing a one thousand rupees note for two five

[2] **Chhattisgarh Metaliks and Alloys (P.) Ltd. vs. Income-tax Officer (ITAT Raipur Bench) [2023]**

hundreds rupees notes. Accordingly, the provisions of section 56(2)(viib) in the backdrop of the facts of the case could not have been triggered. Accordingly, appeal of the assessee is allowed.

3. Section 115JB:

Section 115JB deals with only those companies which are registered under Companies Act and not deemed company as per provision of section 2(17) or 2(26) and, thus, assessee, a financial corporation could not be termed as a company within meaning of section 2(17) and consequently, section 115JB could not be made applicable to it.

In the instant case[3], the assessee was a financial corporation incorporated under the State Financial Corporation Act, 1951 and was engaged in financing of industries. The AO calculated tax liability on basis of Minimum Alternate Tax (MAT) under section 115JB. The assessee, aggrieved, preferred an appeal before the Ld. CIT(A) and contended that MAT provisions would not be applicable in the case of the appellant since it was not a company. Accordingly, the appellant sought for appropriate relief against the AO's order.

In instant appeal, revenue raised additional ground and contended that considering amendment made in law and definition of company under section 2(17) assessee was liable to MAT provisions.

The Hon'ble ITAT held that section 115JB being a special provision and it is a code itself defines the coverage of the assessee covered in sub-section (2) of section 115JB. This section neither deal with the company or Indian company it deals with the assessee being company and provision of the sub-section (2) very well defines it coverage. Thus, on considering the arguments of the department but considering the provision of section 11JB(2) and the decision of the Jurisdictional High Court in the case of the assessee there was no force in said argument whether the Jurisdictional High Court has considered the provision of section 2(17), 2(18) or 2(26) dealt with or not. Here the charging section deals and considered only those companies which are registered under the Companies Act and not deemed company as per provision of section 2(17) or 2(26). Therefore, it is viewed that even though revenue has revised its ground to substantiate its case in accordance with the definition of the company its contention could not be accepted that since that definition includes the corporation but provision of section 115JB deals only charge of tax of a company and it refers the section 129 of the Companies Act only. The charge of tax being a separate code and the section clearly cover the type of company under the tax net the same cannot be widened based on the definition given in the Act for the other purposes. To substantiate this view, the memorandum explaining the definitions of company as amended in 1971 has been gone through. The purpose of including the corporation under this definition is to give the benefit of a company and not to tax them as company.

Thus, based on these observations, the grounds raised by the revenue was held to have no merits and the same stood dismissed.

4. Section 147/148:

Where a reopening notice was issued upon assessee company, engaged in business of electronic appliances, on ground that an information was received on insights portal that high risk transactions had taken place in case of assessee which was required to be verified, since there was no any mention about "cash credits and subsequent debits" in reasons recorded and there

[3] **Deputy Commissioner of Income-tax vs. Rajasthan Financial Corporation (ITAT Jaipur Bench) [2023]**

was no live link or nexus between said information received and income escaping assessment, impugned reopening notice was unjustified

In the instant case[4], the assessee was engaged in the business of electronic appliances. It filed its return of income which was accepted and an assessment order was passed. Later on, an information was received on Insight Portal that high risk transactions had taken place in case of assessee which was required to be verified. On the basis of the same, the Assessing Officer issued a reopening notice upon assessee and it was noted that there was no any mention about "cash credits and subsequent debits" in reasons recorded. Moreover, as per reasons itself transactions were to be verified. Further, there was no new tangible material as contended by revenue - Debits and Credits could not in any way disclose nature of transactions or lead to an inference of income escaped assessment.

There was no live link or nexus between information received and income escaping assessment. Further, the assessee was carrying on a retail business of electronic appliances. Usually, appliances would be supplied to clients wherever required and payment would be received in cash upon delivery. Therefore, cash deposits from various places could not be doubted be considered suspicious transactions . Since the assessee had fully and truly disclosed all material facts, the impugned reopening notice issued upon assessee was held to be set aside.

[4] **Digi1 Electronics (P.) Ltd. Vs. Assistant Commissioner of Income Tax (Bombay High Court) [2023]**