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## Direct Tax Newsletter

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October 9, 2023

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- **Govt. Keeps Interest Rates of Small Savings Schemes Unchanged for 3rd Quarter of FY 2023-24** : Office memorandum F.No.1/4/2019-NS, dated 29-09-2023
- **More Than 30 Lakh Audit Reports Filed Till September 30, 2023** | CBDT : Press Release, dated 02-10-2023

### **1. Section 292B Couldn't be Invoked to Cure a Mistake of Issuing Notice in Name of Different Entity**

In the instant case<sup>1</sup>, the Assessing Officer (AO) passed an order under section 148A(d), and subsequently, the assessee received a notice under section 148, which was in the name of a different entity. In the meantime, the AO, by a letter intimated the assessee that the notice had been issued to it. He further passed a reassessment order on the assessee and issued a demand and penalty notice.

The Assessee challenged the notice before the Delhi High Court.

The Delhi High Court held that the notice issued under section 148 had various errors, namely incorrect name and PAN of the assessee, wrong assessment year and document identification number, which shows that the notice issued under section 148 does not concern the assessee.

If these defects were excised, quite clearly, nothing would remain of the notice, and it would cease to be a notice bearing the imprint of section 148.

According to a straightforward interpretation of section 148, the Assessing Officer (AO) must, before conducting an assessment, reassessment, or re-computation under section 147, serve the assessee with a notice, along with a copy of the order issued if deemed necessary under clause (d) of section 148A.

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<sup>1</sup> **AVS Infrabuild (P.) Ltd. V. Assistant Commissioner of Income-tax - [2023] (High Court of Delhi)**

Therefore, the reassessment proceedings can only commence once notice under section 148 is issued. It is a step AO must take before he assumes jurisdiction, inter alia, for reassessing the case.

Insofar as the reliance placed on section 292B was concerned, a mistake, which can be corrected under section 292B, should be such that if excised, it does not change the tenor and scope of the documents/proceedings referred to therein. Undoubtedly, there was a misstep on the part of AO since he has not assumed jurisdiction as per law.

Therefore, the impugned notice issued under section 148, the reassessment order, notices of demand and penalty, and the order issued under section 148A(d) deserve to be quashed.

### **2. Trust Having Multiple Objectives Can't Be Said Solely Exist for Educational Purposes | No Sec. 10(23C)(vi) Exemption**

In the instant case<sup>2</sup>, the assessee-trust was running colleges for imparting higher education on Diploma, Degree, and Master (P.G.) courses of Engineering, Pharmacy, Management, Computer Application, Ayurveda, Homeopathic Medical, Physiotherapy, etc.

The objects of the trust were medical treatment for poor people, undertaking general activities related to public health, organizing Family Planning Centres, undertaking activities for education from pre-primary to higher education at university levels, providing and taking forward necessary

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<sup>2</sup> **Parul Arogya Seva Mandal Trust v. Commissioner of Income-tax (Exemption) [2023] (Ahmedabad-ITAT)**

help/assistance for the development of educational activities in different branches/faculties of education.

The assessee filed an application seeking exemption under section 10(23C)(vi). The Commissioner (Exemption) denied exemption on the ground that the assessee had multiple objects in the trust deed, which did not satisfy the conditions of section 10(23C)(vi).

Aggrieved by the order, the assessee filed an appeal to the Ahmedabad Tribunal.

The Tribunal held that section 10(23C)(vi) emphasizes the word 'solely' for education. 'Education' connotes the process of training and developing students' knowledge through normal schooling. The assessee submitted clarification regarding its medical object but remained silent regarding its other non-educational objects, such as organizing Family Planning Centers, undertaking activities for upbringing, etc.

Thus, it proves that the assessee does not exist "solely for the purpose of education". The assessee trust has not submitted documentary evidence which could establish its contention that those students have used such scholarships for education. Thus, the assessee's contention that the trust activities are only for education is incorrect.

Considering the facts of the case, the assessee's trust having multiple objects cannot be said to exist 'solely for the purpose of education'. Therefore, the exemption under section 10(23C)(vi) was rightly denied to the assessee.

### 3. Assessee Couldn't File Petition Under CrPC Against Initiation of Criminal Prosecution by AO

In the instant case<sup>3</sup>, the Assessee, an individual, did not file an income tax return along with the audit report within due time as mandated under section 139(1). Later, the assessee furnished return of income belatedly under section 139(4) but failed to pay self-assessment tax along with the return. The tax was paid only after receipt of notice from the Assessing Officer (AO).

AO issued a notice against the assessee for committing offences under sections 276CC and 276C and initiated criminal prosecution proceedings against the assessee for committing offences under said section. Assessee filed an instant petition under section 482 of the Code of Criminal Procedure against the initiation of criminal prosecution against him.

The High Court held that the important issue to be considered was whether there was wilfulness on the part of the assessee in filing the returns with delay. To deal with this issue, one cannot avoid section 278E. This provision brings in a statutory presumption with regard to the existence of a culpable mental state.

Therefore, the issue of whether there was wilfulness in not filing the returns on time and not paying the tax on time is only a matter of fact, which can be ascertained only through the appreciation of evidence.

In the light of this provision, the Court, exercising its jurisdiction under section 482 of the Code, cannot presume innocence or absence of wilfulness on the part of the assessee. On the other hand, what can be presumed is only culpable mental status, and the

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<sup>3</sup> **D.M. Kathir Anand v. N.S. Phanidharan, Assistant Commissioner of Income-tax - [2023] (High Court of Madras)**

onus is upon the petitioner to prove the contrary, which can be done only at the time of trial.

Under such circumstances, the Court, exercising its jurisdiction under section 482 of the Code, cannot disregard the statutory presumption. The High Court also cannot go into the facts of the case nor the defence taken by the assessee to discharge the onus since it will be beyond the jurisdiction under section 482 of the Code. This exercise can be carried out only during the trial since determining a culpable state of mind is primarily a determination of fact, which requires an appreciation of evidence.

#### **4. Sum Received for Giving Up Rights to Buy a Property is Taxable under Head Capital Gains**

In the instant case<sup>4</sup>, the assessee entered into an agreement to purchase a property in 2005 and paid consideration of Rs. 14 lakhs. However, the seller could not transfer such property to the assessee and refunded Rs. 28 lakhs to the assessee in the year 2012 (relevant assessment year).

While furnishing the return of income for the relevant assessment year, the assessee considered the amount of Rs. 14 lacs as purchases and availed the indexation benefit, thereby offering such income to tax under the head of Capital Gains in accordance with the provisions of Section 45. The Assessing Officer (AO) accepted the sale consideration of Rs. 28 lakhs and accepted the purchase value of Rs. 14 lakhs but assessed the difference of Rs. 14 lakhs straight away as income from other sources instead of Capital Gains.

On appeal, CIT(A) upheld the order of AO. Aggrieved by the order, the assessee filed an appeal to the Tribunal.

The Tribunal held that as per the contents of the compromise agreement, the seller was unable to get the sale deed of said land executed in favour of the assessee, and both parties decided to settle their dispute without any litigation. For that purpose, both parties decided to abandon their respective claims, and the assessee agreed to forgo his right to buy the land. Consequently, the assessee was entitled to a payment of Rs. 28 lacs, and the original agreement to sell became null and void.

In the instant case, the amount so received by the assessee was towards relinquishment of his rights to buy the property, and the same would qualify as property of any kind and, thus, a capital asset. Where such an asset is transferred by way of relinquishment, the compensation for such relinquishment so received is chargeable to tax under the head of "Capital gains", and the amount initially paid shall be treated as cost of acquisition for acquiring such rights.

Therefore, the income was rightly offered to tax under the head of "Capital gains", and the same cannot be brought to tax under the head of "Income from other sources".

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<sup>4</sup> **Sukhwant Singh v. Income-tax Officer [2023] (Chandigarh - Trib.)**