A.C. Bhuteria & Co.
Chartered Accountants

16, Strand Road, Diamond Heritage,
Room No. H-703,
Kolkata – 700001

Ph: 033-46002382/ 40032841
Email id: info@acbhuteria.com

Direct Tax Newsletter

# Tax Digest

- Recent case laws

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## CBDT Specifies Situations Where Enquiries/Verification Tasks by Verification Unit Not to Be Communicated Electronically

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Section 144B(5) provides that all communications between the NFAC and assessees, his authorised representative, or any other person shall be done exclusively by electronic mode. Further, all internal communication between the NFAC and various units shall be done exclusively in electronic mode. However, these provisions shall not apply to certain enquiries or verifications conducted by the Verification Unit in the circumstances as may be specified by the CBDT on this behalf.

In this respect, the CBDT has issued an order specifying that inquiry or verification functions by the Verification Unit should not be communicated electronically under section 144B in some cases.

## 1. Tax Liability Cannot Be Shifted to an Entity That Was Shown as a Vendor in Registered Sales Deed

In the instant case[1], the assessee, a Hindu Undivided Family (HUF), initiated execution proceedings to implement a consent decree passed in connection with a suit. During the hearing, the counsel of the judgment-debtor undertook before the Court that his client would comply with all the requisite obligations under the consent decree and further undertook that his client would file an affidavit stating that the tax responsibility of the relevant transaction shall be upon the judgment-debtor.

Subsequently, the judgment-debtor refused to submit such an undertaking. The decree-holder filed an application before the Court praying for direction upon the judgment-debtors to give an undertaking that any tax liability arises out of the sale and/or transfer of the office space shall be the liability and responsibility of the judgment-debtors and not of the assessee or of the decree holders.

The Calcutta High Court held that the executing Court could not direct a person other than the vendor of a registered deed to shoulder the tax responsibility in connection with a transaction where the sale value of the property is lesser than the value adopted or assessed by the Authority for the purpose of payment of stamp duty in respect of such transfer.

In the instant case, as per the consent decree, the assessee, along with other defendants, was to execute a transfer deed in respect of the office space in favour of the judgment-debtor. As the name of the company has been shown as the vendor and as the relevant provisions of the Income-tax Act direct the vendor to shoulder the tax responsibility, the Court cannot direct the then director or the vendee to shoulder the tax responsibility personally.

Further, the undertaking given by the concerned lawyer shows that it was given against the provisions of law. Even if such an undertaking is not respected, the Court cannot direct the concerned party to shoulder the tax responsibility since if it does so, it would go against the provisions of the Income-tax Act, 1961, and also against the intention of the Legislature.

## 2. Compensation Received From Flipkart for Diminution in Value of ESOPs Is Taxable as Perquisite

In the instant case[2], the petitioner was an employee of Flipkart Internet Private Limited (FIPL). Flipkart Private Limited Singapore (FPS) implemented the Flipkart Stock Option Scheme, 2012 (the FSOP 2012). Under the FSOP 2012, employees' stock options (ESOPs) were granted to the petitioner as an Employee. Subsequently, FPS announced compensation in view of the divestment of its stake in the PhonePe business, and described such payment as being made although there is no legal or contractual right thereto under the FSOP 2012.

Such compensation was paid to the petitioner by deducting tax at source under Section 192 of the I-T Act by treating it as falling under the head "salary". On the basis that the amount received as compensation was a capital receipt, which is not liable to income-tax, the petitioner applied for a 'nil' tax deduction certificate under Section 197 of the I-T Act for financial year 2023-24. However, such application was rejected.

[1] Sushant Agarwal (HUF) vs. Anmol Agarwal & Ors. - [2024] (High Court of Calcutta) [2024]

[2] Nishithkumar Mukeshkumar Mehta vs. DCIT - [2024] (High Court of Madras)

Aggrieved by the order, the assessee filed a writ petition before Madras High Court.
The High Court held that section 2(14) of the Act defines capital asset. It means property of any kind held by an assessee, whether or not connected with his business or profession. Further, explanation 1 specifies that "property" includes and shall be deemed to have always included any rights in or in relation to an Indian company, including rights of management or control or any other rights whatsoever.

ESOPs, by contrast, are rights in relation to capital assets, i.e. rights to receive capital assets (shares) subject to the terms and conditions of the ESOP scheme. Since the petitioner has no rights in the Indian company of which he is an employee (other than as an employee), Explanation 1 is also not attracted. ESOPs are, therefore, contractual rights that may qualify as actionable claims or choses in action in certain circumstances.

ESOPs are not a source of revenue or profit-making apparatus for the holder because these actionable claims are, intrinsically, not capable of generating revenue (notional or actual) and cannot be monetised, whether by transfer or otherwise, until shares are allotted. Even at the time of allotment, there is notional but not actual benefit. Actual benefit accrues only upon transfer provided there is a capital gain.

In this case, the compensation was not towards the loss of or even sterilization of a profit-making apparatus but by way of a discretionary payment towards – potential, as regards Unvested Options, or actual, as regards Vested Options – diminution in value of contractual rights.

Therefore, ESOPs do not fall within the ambit of the expression "property of any kind held by an assessee" in Section 2(14) and are, consequently, not capital assets. As a corollary, the receipt was not a capital receipt. Since it was concluded that a capital asset was transferred, the conclusion that the compensation qualifies as a perquisite and not a capital receipt is affirmed.

## 3. Loss Due to Robbery of Stock-In-Trade of Prior Year Allowable in Subsequent Year if Recovery Seems Unlikely

In the instant case[3], the Assessee, a partnership firm, was engaged in the business of gold ornaments. The assessee filed a return of income for the relevant assessment year and declared the loss due to robbery of gold ornaments in the return of income.

During the assessment proceedings, the Assessing Officer (AO) contended that the robbery occurred in the preceding year, and the assessee could not furnish any evidence to prove the robbery. Thus, the loss due to robbery was not allowed to be carried forward to the relevant assessment year.

On appeal, the CIT(A) upheld the additions made by the AO. Aggrieved by the order, the assessee filed the instant appeal before the Rajkot Tribunal.

The Tribunal held that the assessee furnished the copy of the FIR and newspaper cuttings. It was noted that the Gold stock robbery occurred while the partner brought the stock from home on the way to the shop. The assessee immediately filed an FIR on the same day at the registered number. The Police Department also started the investigation immediately. The assessee was hopeful that the remaining gold would be recovered.

[3] Shri Meenawala Castings vs. DCIT - [2024] (Rajkot - Trib.)

The assessee had the gold seized by the police department. The assessee also submitted the summons issued by the police department to the witness in the case. It was understood that there was little possibility of recovering the remaining gold. Thus, the remaining stock was debited to the trading account.

The loss due to the robbery was not debited to the trading account in the year ended 31.03.2014, as at the initial stage, the robbers were apprehended, and there was hope for recovery. Subsequently, the assessee lost hope and debited the loss in the profit and loss account for the year ended 31.03.2015.

The loss due to embezzlement, theft, dacoity, etc., is an allowable deduction if it can be proved to have arisen out of the carrying on of the business, and the same must be incidental to it. The assessee made possible efforts to recover the lost gold. It is settled law that the loss arising by embezzlement/robbery of money by a stranger to the business is also a trading loss, and the loss is liable to be allowed as a deduction, provided the loss is incidental to the normal operation of the business.

Thus, the assessee is entitled to claim the loss for robbery.

## 4. Order Passed by an Authority Without Jurisdiction Is Void Ab Initio; Can't Be Enforced

In the instant case[4], the assessee's assessment was completed by the Kolkata Assessing Officer (AO). Subsequently, the Commissioner of Income Tax, Kolkata, passed an order under section 263 for the same assessment year. Later, the jurisdiction over the assessee was transferred to the Commissioner of Income Tax – 11 (CIT-11), Kolkata.

The AO, Ward No.9(1), Kolkata, passed a consequential order under section 143 for the assessment year 2014-15. Aggrieved by the order, the assessee preferred an appeal to the CIT(A), which the CIT(A) confirmed. The assessee then preferred an appeal to the Tribunal, contending that the CIT had no jurisdiction to pass the order under section 263.

The Tribunal held that CIT-IV, Kolkata, who passed the order under Section 263 dated 19.01.2016, did not have jurisdiction over the assessee. Therefore, the ITAT concluded that the order passed by CIT-IV, Kolkata, under Section 263 of the Act, was without jurisdiction.

Aggrieved by the order, the department filed an instant appeal to the High Court.

The High Court held that the power of CBDT to confer jurisdiction under the Act is undisputed. Neither the AO disputed the issuance of Notification dated 22.10.2014 by the CBDT, nor has learned counsel for the AO disputed it that the Jurisdictional CIT with respect to the assessee was the CIT-11, Kolkata when the order dated 19.01.2016 under Section 263 of the Act was passed.

Thus, on the date the order under Section 263 was passed by the CIT-IV, Kolkata, he was not the jurisdictional CIT, and, thus, he inherently lacked jurisdiction to pass the order under Section 263.

Where an authority or court lacks inherent jurisdiction in passing a decree or order, the decree or order passed by such authority or court would be without jurisdiction, non-est and void ab initio. The lack of territorial jurisdiction of the CIT-IV to exercise supervisory jurisdiction goes to the root of the matter and strikes at his very authority to pass the said order. Such defect is basic and fundamental, and therefore, the order passed by the said CIT

[4] PCIT v. Divine Light Finance LTD. - [2024] (High Court of Calcutta)

having no territorial jurisdiction over the assessee is a nullity.