Communiqué

Direct Tax

December 2022

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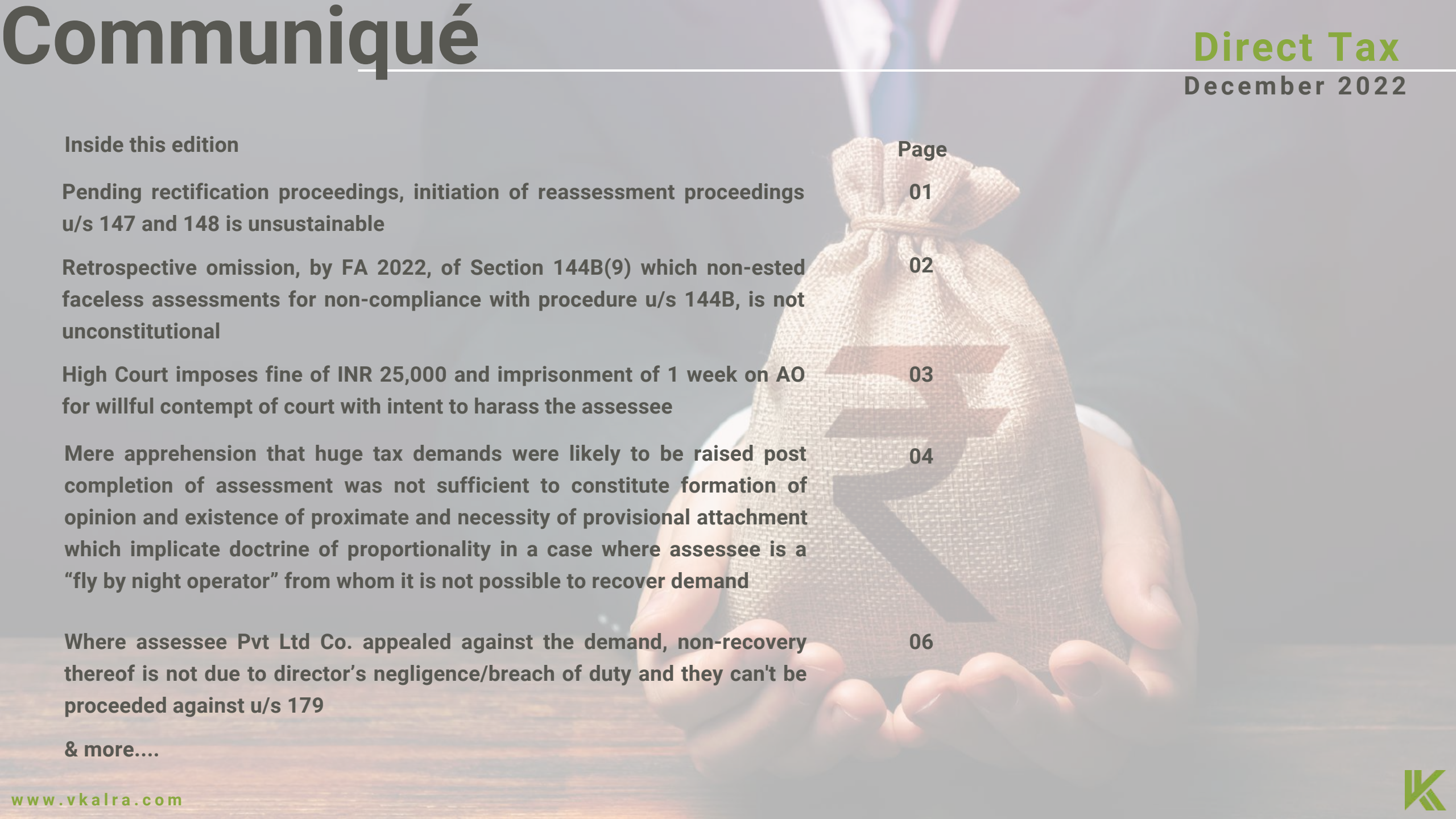

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Pending rectification proceedings, initiation of reassessment proceedings u/s 147 and 148 is unsustainable

Facts

The assessee claimed the benefit u/s 80 HHC for the AY 1995-96. However, in the subsequent AY, the assessee claimed bad debt on the ground that, in the earlier year, the export was not materialized and therefore, the proceedings u/s 154 were initiated by the Department. During the pendency of the said proceedings, the Department also initiated the proceedings u/s 147-148 and reopened the assessment for the AY 1996-97. The AO passed the assessment order. The same was carried before the ITAT who quashed and set aside the assessment proceedings which were re-opened u/s 148 by holding that as the proceedings u/s 154 initiated against the assessee were pending, no re-opening proceedings u/s 147/148 could have been issued/initiated. Consequently, the ITAT quashed and set aside the assessment order. The order passed by the ITAT was the subject-matter of appeal before the High Court. The High Court, by the impugned judgment and order, has allowed the said appeal preferred by the Revenue and remanded the matter to the ITAT by observing that as the proceedings u/s 154 were beyond the period of limitation prescribed u/s 154(7), the said notice was invalid and therefore, the re-opening proceedings u/s 147/148 would be maintainable.

Ruling

SC held that High Court has committed serious error in observing and holding that the notice u/s 154 was invalid as the same was beyond the period of limitation as prescribed/provided u/s 154(7). It is required to be noted that the proceedings u/s 154 were not the subject-matter before the High Court. Nothing was on record that, in fact, the notice u/s 154 was withdrawn on the ground that the same was beyond the period of limitation prescribed u/s 154(7). In the absence of any specific order of withdrawal of the proceeding's u/s 154, the proceedings-initiated u/s 154 can be said to have been pending. During the pendency of the proceeding's u/s 154, it was not permissible on the part of the Revenue to initiate the proceedings u/s 147and 148 pending the proceedings u/s 154. The High Court has erred in presuming and observing that the proceedings u/s 154 were invalid because the same were beyond the period of limitation. Impugned judgment and order passed by the High Court is unsustainable and the same deserves to be quashed and set aside. The impugned judgment and order passed by the High Court was quashed and set aside and the order of the Tribunal was restored.

Source: Supreme Court in the case of S. M. Overseas (P.) Ltd. vs CIT vide [2022] 145 taxmann.com 375 (SC) on December 07, 2022

Retrospective omission, by FA 2022, of Section 144B(9) which non-ested faceless assessments for non-compliance with procedure u/s 144B, is not unconstitutional

Facts

The assessee company is engaged in a business of running a Flour mill, manufacturing of Flour from Wheat. It filed its return of income for AY 2013-14 declaring a total income of INR 32.32 lacs. The notice u/s 148 was issued to the assessee against which he filed return. The detailed objections were filed by the assessee challenging the jurisdiction of the AO, in response to the notice u/s 148 which was disposed of. The show cause-cum-draft assessment order was then served upon the assessee proposing to make certain additions in the return of total income. The assessee filed response to the said notice with the request for hearing in the matter through video conferencing as envisaged in the show cause-cum-draft assessment order. Thereafter, no response had been received by the assessee and he kept waiting for personal hearing in the manner. The impugned assessment order was thus passed in gross violation of the principles of natural justice, inasmuch as, no oral/personal hearing in the matter was granted to the assessee, neither any communication was received of rejecting the request of the assessee seeking personal hearing. With the above submissions, learned counsel for the assessee sought to impress upon the Court that Section 42 of the FA, 2022, omitting Section 144B(9) be held unconstitutional, being ultra-vires to the Constitution.

Ruling

SHC stated that in the facts and circumstances of the case and having noticed that the assessee herein had participated at every stage of the proceeding and submitted reply to the notices issued to him from time to time, the reply to the show cause-cum-draft assessment order given by the assessee runs into about 20 pages

The assessee had specifically asked for grant of opportunity of personal hearing through video conferencing by communication on the website and the said request had been acknowledged by the respondent authorities. We, however, do not find any good reason for denial of such an opportunity to the assessee. As from the material on record of the writ petition, it becomes evident that personal opportunity of hearing was not granted to the assessee, we do not find any good reason to grant any time to file response/counter affidavit. HC held that the impugned assessment order is, thus, found to be in violation of the principles of natural justice and against the procedure set in place for conducting reassessment proceeding. Being deficit in essential procedural compliances, the assessment order is hereby set aside and the matter is remitted back to the competent authority/National Faceless Assessment Centre for passing fresh assessment order after providing due opportunity of hearing to the assessee by fixing a date for personal hearing through video conferencing on receipt of the copy of this order.

Source: High Court, Allahabad in the case of Sapna Flour Mills Ltd. vs Union of India vide Writ Tax No. 718 of 2022 on December 09, 2022

High Court imposes fine of INR 25,000 and imprisonment of 1 week on AO for willful contempt of court with intent to harass the assessee

Facts

The assessee assailed a notice issued by the respondent in respect of AY 2012-13 on the ground that the said notice was de hors the provisions contained u/s 124 and has been issued in excess of jurisdiction conferred upon the respondent. Submission of ld. counsel of the assessee is that the jurisdiction to assess the assessee at Lucknow is conspicuously absent in the Income-Tax authorities at Lucknow and that the assessee can only be assessed by the AO at New Delhi, where the assessee had filed his returns for AY 2013-14 but the opposite party - contemnor has issued notices for manual scrutiny in respect of AY 2013-14 and in spite of objection filed by the assessee, the opposite party has threatened to finalize the proceedings ex-parte. The Ld. counsel for the assessee submitted that address of the assessee had been scored out and replaced by the Lucknow address, which is indicative of the fact that the respondent was endeavoring to assume jurisdiction for holding assessment proceedings against the assessee. The Ld. counsel further submitted that the opposite party – contemnor has been acting in an outrageously contemptuous manner and is endeavoring to proceed with the assessment proceedings for the AY 2013-14 in blatant disregard and violation of judgment and order passed in Writ Petition No.9525 (M/B) of 2013 and as such, he is liable to be hauled up, tried and punished for contempt of the order passed by the Division Bench of this Court.

Ruling

This Court had set aside the notice on the ground of jurisdiction with further direction that as the notice has already been quashed, consequential order, if any, are also quashed. Meaning thereby, the outstanding showing on the web portal against the assessee was to be deleted immediately after the judgment but the authorities have permitted to continue the outstanding amount on the web portal for a period of seven months, which clearly violates the judgment and the order. HC further held that the action of the opposite party is deliberate in nature, for which he is liable to be punished. In the opinion of this Court, the action of the opposite party is not only contemptuous but is also malicious. He took care with the money of the applicant in spite of clear direction of this Court and there is no justifiable reason for the said action. If the action of Ld. DCIT, Lucknow is considered in the background by the allegations made against him, it was his purposeful act to harass the applicant in spite of order of the writ Court. Unnecessarily mens rea is not required to be proved in a case of contempt but in the present case the violation is willful, deliberate and coupled with intention and motive to harass the applicant. For the reasons given above, this Court finds the opposite party to be guilty u/s 12 of Contempt of Courts Act, 1971. Accordingly, a fine of INR 25,000 along with imprisonment for a period of one week was given to the Ld. DCIT. In case of default, he would suffer one day's further simple imprisonment.

Source: High Court, Allahabad in the case of Prashant Chandra vs DCIT vide Contempt Application (Civil) No. 562 of 2016 on December 16, 2022

Mere apprehension that huge tax demands were likely to be raised post completion of assessment was not sufficient to constitute formation of opinion and existence of proximate and necessity of provisional attachment which implicate doctrine of proportionality in a case where assessee is a “fly by night operator” from whom it is not possible to recover demand.

Facts

The assessee is a private limited company engaged in the business of procurement, supply and distribution of Xiaomi products in India bearing various brand names including mobile phones, accessories, computers etc., as part of its business. The assessee has to pay royalty to Qualcomm and Beijing Xiaomi Mobile Software Company Ltd. During the period from 2019 to March 2022, there were proceedings between the respondents and I-Tax Department in relation to alleged payment of income tax by the assessee. Meanwhile, the Enforcement Directorate passed a seizure order seizing the bank accounts of the assessee to an extent of INR 5,551 crores under the Foreign Exchange Management Act. The said order having been challenged by the assessee in W.P.No.9182/2022, the Court passed an interim order staying the operation of the seizure order, subject to the condition that the assessee was not entitled to make payments to foreign entities in the form of royalty or any other form. Subsequently, Court issued a further clarification that the assessee was at liberty to take overdrafts and make payments from such overdrafts to foreign entities excluding payment of royalty. Subsequently, by final order, this Court disposed of W.P.No.9182/2022 by relegating the assessee to the competent authority i.e., Commissioner of Customs (Appeals) and directed that the earlier interim orders to continue till disposal of the proceedings. Subsequently, the TPO passed an order u/s 92CA (3) whilst making transfer pricing adjustment.

Pursuant to the said order, the AO issued a notice u/s 142(1) inter alia calling upon the assessee to show cause, as to why payment of royalty to the foreign entity i.e., Qualcomm and Beijing Xiaomi Mobile should not be disallowed. The assessee submitted a detailed response along with documents contesting the said notice and proceedings. The Respondent after taking appropriate approval passed the impugned order u/s 281B provisionally attaching the subject fixed deposits of the assessee in a sum of INR 3,700 crores for a period of six months. Aggrieved by the impugned order, assessee is before this Court by way of the present petition.

Ruling

Under these peculiar/special facts and circumstances obtaining in the instant case and in the light of the specific contention of the respondents that the assessee has been diverting profits outside India under the guise of payment of royalty coupled with the undisputed fact that this Court have not permitted the assessee to make payment of royalty to foreign entities in any of the proceedings till today, HC is of the considered opinion that in the interest of justice, it would be just and appropriate to direct the assessee not to make payment in the form of royalty or any other form to any entities outside India till conclusion of assessment proceedings by the respondents. However, interest of justice would also be met if the assessee is reserved liberty to take/obtain overdrafts on the subject fixed

deposits and make payments from such overdrafts from the respective banks to foreign entities in accordance with law.

During the pendency of the present petition, the 1st respondent passed a draft assessment order u/s 144C(1) after concluding the proceedings. It is needless to state that the assessee would be entitled to contest the said draft assessment order and proceedings pursuant thereto before the respondents. However, having regard to the undisputed fact that the subject matter of the impugned attachment order included the AY 2018-19 in relation to which draft assessment order was passed during the pendency of the present petition, in the peculiar/ special facts and circumstances of the instant case and in the light of the categorical statement made by the respondents in its written submissions that it would complete the draft assessment proceedings for the AYs 2019-20, 2020-21 and 2021-22 within 8 months. HC also held that it just and appropriate to direct the concerned respondents to complete the draft assessment proceedings for the aforesaid three AYs as expeditiously as possible and at any rate on or before March 31, 2023.

Source: High Court, Karnataka in the case of Xiaomi Technology India Private Limited vs DCIT vide Writ Petition No. 16692 of 2022 (T-IT) on December 16, 2022

Where assessee Pvt Ltd Co. appealed against the demand, non-recovery thereof is not due to director's negligence/breach of duty and they can't be proceeded against u/s 179

Facts

The assessee's were appointed as the Directors of M/s. Nakoda Syn-tex Pvt. Ltd. Respondent No 1 carried out assessment against the said company for AY 2014-15 and passed the assessment order u/s 143(3) with addition of INR 7 crore on account of bogus unsecured loans. Consequently, demand notice u/s 156 was issued upon the said company raising a demand of INR 3.07 crores. Being aggrieved by the assessment order, the said company preferred an appeal before the CIT(A), Surat. Before finalization of the appeal proceedings, Respondent No 1 issued a recovery notice demanding payment of the outstanding dues from the said company. Pursuant to recovery notice, the said company filed a stay application before the Respondent No 1 appraising about the appeal filed by the said company. It is the case of the assessee that Respondent No 1 rejected the stay petition without affording any opportunity of hearing to the Directors of the said company. Respondent No 1 thereafter issued SCN u/s 179. Further, Respondent No 2 issued a certificate u/s 222 and notice of demand calling upon the assessee's to pay the outstanding dues of the company within 15 days of receipt of notice. The assessee did not have adequate means to pay such a huge demand and therefore, could not comply with the said notice. Respondent No 2 therefore, passed an order under Rule 48 of the Second Schedule. Being aggrieved by the impugned action of the respondents, the assessee's have preferred the present petition wherein it has been submitted that for invoking jurisdiction u/s 179, twin conditions with regard to the amount of tax dues from a private limited company which is not recovered from such company is attributable to the gross neglect, misfeasance or breach of duty of the Director, is not satisfied in the present case. It was submitted that in the facts of the case there is nothing on record to suggest that the respondent authorities have been satisfied before invoking powers u/s 179 vis-a-vis the recovery of the outstanding dues of the Pvt. Ltd. Co. and there is no finding that such non-recovery of taxes is attributable to the gross neglect, misfeasance or breach of duty of the assessee's. It was submitted that except issuance of recovery notice, Respondent No 1 has neither issued any notice of demand nor taken any assertive steps for the purpose of recovering the outstanding tax dues from the private limited company.

Ruling

HC held that on perusal of the above provisions, it is clear that the AO is required to make efforts for recovery of the outstanding dues from the assessee which has committed default in payment of the outstanding demand. The assessee's have prima facie shown that non-recovery cannot be attributed to any gross negligence, misfeasance or breach of duty as Directors of the assessee company. In the impugned order, the AO has failed to consider the fact that the assessee's have tendered their explanation and contended that the assessee's have challenged the order of assessment before the appellate authority and the assessee's have not remained negligent nor there is any misfeasance or breach of trust on part of the assessee's and only because the assessee's have been unable to deposit 20% of the demand raised in the assessment order to get stay from the appellate authority, the assessee's cannot be said to be negligent and Respondent No 1 cannot therefore, invoke jurisdiction u/s 179.

Reliance placed by the Ld. Advocate on the decision of Delhi High Court in case of Rajeev Behl vs PCIT is not helpful to the respondents inasmuch as the basic ingredients of section 179 are not complied with by the respondent authorities and therefore, impugned actions are without jurisdiction more particularly, when the assessee's have demonstrated that they have not remained negligent for non-recovery of the outstanding dues. In view of above foregoing reasons, petition succeeds and accordingly impugned order and consequential order and demand notice are hereby quashed and set aside.

Source: High Court, Ahmedabad in the case of Devendra Babulal Jain vs ITO vide Civil Application No. 12961 of 2019 on December 16, 2022

To reopen assessment u/s 147 beyond four years, two twin conditions must be satisfied (viz AO must have reason to believe that income chargeable to tax has escaped assessment and same was occasioned on account of either failure on part of assessee to make return of his income for that AY or to disclose fully and truly all material facts necessary for that AY)

Facts

The assessee is private limited company engaged in business of construction and engineering. For the AY 2011-12, the assessee submitted e-return declaring total income of INR 2.62 crores. The assessee received a notice u/s 142(1) calling for certain details which included details of scrutiny assessments of last three years and whether the assessee is in appeal against the same and whether appeal has been decided. The assessee's submitted copy of company's audit report, tax audit report as well as copies of previous three years' assessment orders and also clarified that it had preferred appeal against the order for AY 2009-10 before the CIT(A) which was pending disposal. The respondent thereafter issued notice u/s 142(1) wherein once again the assessee was required to submit assessment orders for AYs 2008-09, 2009-10 and 2010-11, if they were selected for scrutiny. The assessee gave a detailed reply to the queries raised by the AO wherein the issue of disallowance of interest payment made to entities specified u/s 40A(2)(b) was considered and allowed and the issue u/s 14A was also considered. The assessee thereafter submitted its written submissions and provided the information that was called for by the respondent with regard to Guarantee Commission and details regarding investment in mutual funds, which is taken as tax free income u/s 14A. Thereafter, the respondent passed the assessment order u/s 143(3) disallowing an amount of INR 75,000 u/s 14A being dividend from cooperative bank.

The assessee thereafter received notice u/s 148 requiring to file return within 30 days from service of the notice. The assessee duly filed its return and also requested the respondent for copy of the reasons recorded which were duly provided by the AO. The assessee filed objections against the issuance of notice for reopening the assessment which were rejected. Being aggrieved by the action of the respondent, the assessee has preferred this petition submitting that the AO has initiated reassessment proceedings u/s 147 for AY 2011-12 after expiry of four years which is not permissible as first proviso to section 147 clearly lays down an exception whereby the AO is not permitted to exercise his jurisdiction for reopening the assessment beyond a period of four years from the end of relevant AY.

Ruling

HC opined that to confer jurisdiction to the AO to reopen the assessment u/s 147 beyond four years from the end of relevant AY, the two conditions must be satisfied namely, that the AO must have reason to believe that the income chargeable to tax has escaped assessment and that the same was occasioned on account of either failure on part of the assessee to make a return of his income for that AY or to disclose fully and truly all material facts necessary for that AY. In the present case, the entire material was available with the AO during the original assessment and therefore, there was no failure on part of the assessee to disclose truly and fully all material facts necessary for assessment and based upon such material supplied by

the assessee's, the AO passed the original assessment order. Further, it appears that the notice for reopening is based upon the audit objection and there is nothing on record to suggest that such reopening is made on account of new tangible material available on record. It is therefore, apparent that there is change of opinion by the AO to reopen the assessment for the AY 2011-12, more particularly, when the issue raised in the reopening assessment is already considered during the original assessment proceedings. The AO cannot have any jurisdiction to issue the notice u/s 148 for reopening the assessment for the year more particularly, when the assessment is sought to be reopened beyond a period of four years as held by the Supreme Court in case of Commissioner of Income tax v. Kelvinator of India Ltd. reported in (2010) 320 ITR 561(SC). HC stated that for the foregoing reasons, the impugned notice issued u/s 148 by the respondent exercising the powers to reopen the assessment for the AY 2011-12 is illegal and liable to be set aside. As a consequence, order of the AO disposing of the objections of the assessee's against the impugned notice is also liable to be set aside.

Source: High Court, Ahmedabad in the case of PC Snehal Engineers Private Limited vs ACIT vide Civil Application No. 16885 of 2018 on December 16, 2022

PCIT can't invoke jurisdiction u/s 263 where invoice of AY 2015-16 booked and claimed in AY 2016-17 when it crystallized for payment & tax rates for both AYs are same

Facts

The assessee had filed its return of income for the AY 2016-17 declaring a total income of INR 1062 crores. Subsequently revised return was filed declaring a total income of INR 1054 crores. The case was selected for scrutiny and notices u/s 143(2) and 142(1) were issued. In response to such notices and the queries raised, the assessee submitted documents. On certain discrepancies, the AO issued SCN for which reply was submitted by the assessee after which the assessment was completed by order u/s143(3). Thereafter, the PCIT issued the SCN u/s 263 pointing out the under mentioned:

- Firstly, that in the Schedule 19 of TAR, the amount admissible u/s 35 is only INR 20.61 crores whereas the assessee debited an amount of INR 21.96 crores to the P&L account (i.e. excess debit of INR 1.34 crores not been added back to the total income).
- Secondly, Schedule 27b of TAR reveals that the assessee company debited an amount of INR 9.89 lacs on account of advertisement to P&L, the expenditure is a prior period expenditure relating to the FY 2014-15 and as this expenditure does not relate to the year under consideration the same deserves to be disallowed.

According to the PCIT, the AO failed to verify the above issues and therefore it was proposed to invoke Section 263. With regard to the first query, the assessee in their response stated that the allegation is factually incorrect. It was stated that the assessee has suo moto added back INR 1.34 crores while computing the taxable income. The assessee also furnished break-up of the amount of INR 21.96 crores debited to the P&L account as reported in Schedule 19 of the TAR. After giving all the facts and the figures, the assessee stated that it is evident the said sum of INR 1.35 crores was added back in the COI which proves that the allegations mentioned in the SCN is factually erroneous and unsustainable in law. Further, the assessee stated that the AO had made due enquiries on the said issue and after being satisfied that the excess sum has been added back to the total income the assessment was completed u/s 143(3). The AO examined the details of scientific research expenditure as claimed as deduction vis-a-vis the amount debited to P&L including depreciation debited in books in relation to scientific research assets. Thereafter, another SCN was issued requiring the assessee to explain as to why the excess deduction claimed u/s 35(2AB) should not be allowed. For this query the assessee submitted their reply through which it was clear that the AO had not gone through the tax audit report, financials, income tax return, submissions in response to the notices after which he made further enquiries inter alia scientific research expenditure before completing the assessment. With regard to the second issue, the assessee pointed out that sum of INR 9.89 lacs pertains to the advertisement expenditure for employment charged by “LINKED IN” and bank charges therein and the details of the invoices raised by the “LINKED IN” were furnished. It was stated that though invoices were raised in the month of June 2014, they being a non-resident essential documents like copy of TRC, no PE certificate etc. were provided by them only during the FY 2015-16 and hence the assessee could account and pay for all the bills only during the FY 2015-16.

Further, the assessee referred to several decisions for the proposition that expenses pertaining to earlier years, which was quantified and crystallized during the previous year was allowable deduction.

The PCIT after briefly setting out the objections raised by the assessee to the SCN issued u/s 263 came to the conclusion that the AO has passed the assessment order without making enquiries or verification and therefore clause (a) of explanation (2) to Section 263 (1) is attracted and accordingly held the assessment order to be erroneous in so far as it is prejudicial to the interest of revenue.

Ruling

This aspect of the matter has been analyzed by the learned tribunal and it has found that the said sum was added back in the COI and therefore there was absolutely no basis for the PCIT to invoke his power u/s 263. Furthermore, records clearly show that the AO had issued notices to the assessee on the very same issue considered their reply thereafter pointing out certain discrepancies issued show cause notice for which reply was submitted by the assessee and after a detailed enquiry the assessment has been completed. Thus, it is not a case of lack of enquiry or lack of proper enquiry. The PCIT does not in as many words states that there was lack of enquiry or lack of proper enquiry and all that is said is that the assessing officer did not verify these aspects which is factually incorrect. Therefore, it is not a case where the PCIT could have invoked his jurisdiction u/s 263.

With regard to the second issue, the learned tribunal had noted the facts that the invoices issued by the “LINKED IN” towards advertisement expenses in June 2014 were admitted as liability and crystallized for payment in the year under consideration owing to the fact that the “LINKED IN” being non-resident had furnished the necessary documents in the such as TRC u/s 90(4) r.w. Rule 21 AB of the Rules and no PE certificate etc. only in the AY under consideration. Further, the tribunal noted it is not the case where these expenses were charged as deduction in the preceding year more importantly, the tribunal noted that there is no revenue implication and no prejudice is caused to the revenue since the tax rate applicable to the assessee during the AY 2015-16 to which invoices relates and the tax rates applicable for the AY 2016-17 in which the invoices were accounted and paid were the same.

Thus, for all the above reasons, we find that no questions of law much less substantial questions of law arises for consideration in this appeal. Accordingly, the appeal fails and is dismissed.

Source: High Court, Calcutta in the case of PCIT vs M/s Britannia Industries Limited vide ITAT/211/2022 on December 23, 2022

Registration and approval u/s 12AA, 10(23C)(vi) and 80G was rightly denied by CIT(E) as hospital charged commercial rates to patients

Facts

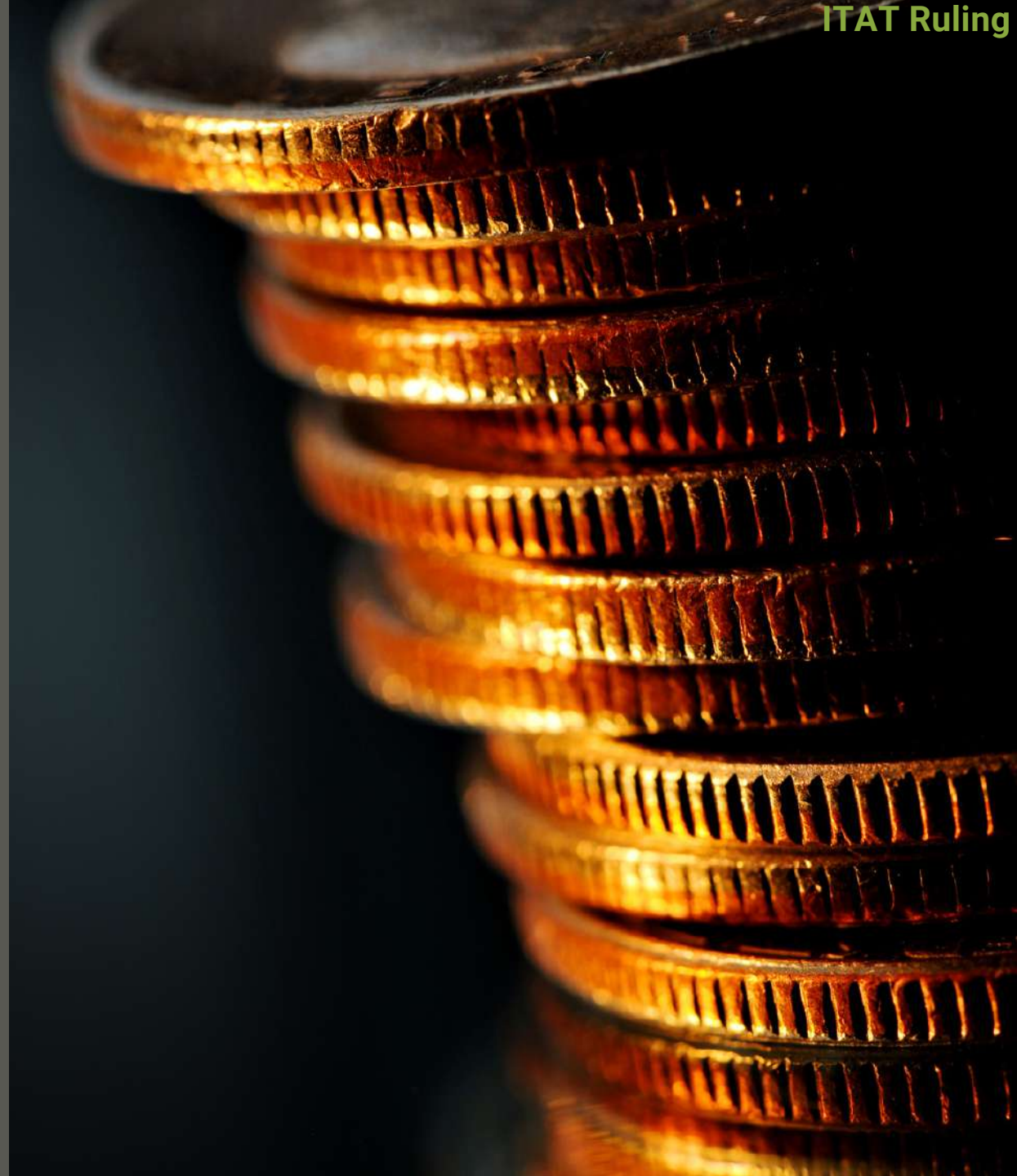
The assessee is a private limited company which was converted into a Section 8 Company and changed the name to “Fernandez Hospital”. However, while filing Form 10A/10G online, the assessee had given the name as “Fernandez Hospital Foundation”. The certificate issued by the Registrar of Companies was given to the assessee foundation as “Fernandez Hospital”. Further, the PAN data shows that the PAN was obtained in the name of “Fernandes Foundation”. Due to the mismatch in the name of the assessee from ROC to Form 10A/10G, a notice was issued to the assessee to the address mentioned in Form 10A / 10G to appear and produce its original MOA, Trust Deed for verification and to furnish a detailed reply on specific points. In response thereto, assessee had filed certain documentary evidence. On perusal of the evidence filed by the assessee, the application of assessee was rejected by the ld. 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 ld. CIT(E) that the assessee is 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, as huge amounts were paid to the directors/ interested persons. Feeling aggrieved with the order of ld. CIT(E), assessee is now in appeal before us. During the proceedings before the Tribunal, the Ld. DR further submitted that from the perusal of the P&L for the period ending with March 2018, it is clear that assessee had earned a profit of INR 23.54 crores on total revenue from operations of INR 141.90 crore, which indicates that the assessee company is a profit-making company. He submitted that on conversion into section 8 company and by mere mentioning in the Memorandum that the income and properties of the company can be used for public charity and disables its use for private benefit does not imply that the income of the assessee is used for public charity.

Ruling

ITAT held that we find that the ld. CIT(E) in the present case, after analyzing the said documents had recorded the finding mentioned in the impugned order whereby he held that the assessee was running the activities on commercial basis and that the activities of assessee are not of charitable nature. In our considered opinion, the approach of the ld. CIT(E) cannot be faulted merely because he had examined the data supplied by the assessee at the time of making the application. Further, the ld. AR for the assessee had failed to bring on record any comparative chart of diagnostic charges/procedure charges/test charges prior to the conversion of the assessee into section 8 company and thereafter to show that there was a major reduction in fee/charges charged by the assessee for the above said purposes. As nothing contrary had been brought to the notice of ld. CIT(E), hence in our view, assessee is not entitled for registration or approval u/s 10(23C) /12A. For the above said purposes, Tribunal fruitfully relied upon the decision of the Hon’ble Supreme Court in the case of Ashwini Sahakari Rugnalaya & Research Centre [2021] 130 taxmann.com 366 (SC). In our view, ld. CIT(E) was correct in holding that the assessee is charging on the basis of commercial rates from the patients, either 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, we do not find any error in the decision of ld. CIT(E). Accordingly, the order of ld. CIT(E) is upheld and the appeal of the assessee is dismissed.

Source: ITAT, Hyderabad in the case of Fernandez Foundation, Hyderabad vs CIT (Exemption) vide ITA No. 1884 & 1885/Hyd/2019 and ITA No. 299/Hyd/2020 on December 08, 2022



No TDS liability on contractor for sum paid to port authorities on behalf of contractee for delay in import clearance; No disallowance for TDS non-deduction w.r.t. expenses debited to P&L in respect of deductions by contractee out of payments due to assessee

Facts

The assessee is a Pvt. Ltd. Co. carrying on the activities of building, maintaining and operating Haldia Dock Complex, Kolkata Port Trust. The assessee discharges cargo from incoming vessels using ship unloader, conveyor and stacker in a sequence such that these machineries function as an integrated mechanized unit or system. Deed of license was executed between Board of Trustees for the Port of Kolkata and the assessee wherein assessee was entrusted with the project of building the facilities at Haldia Dock Complex to be utilized to handle the imported coal from Steel Authority of India Limited (SAIL). The Return of income was filed reporting a total income of INR 83.69 lacs. In the course of assessment proceedings, ld. AO noted that an amount of INR 5.02 crores has been claimed as expenditure in the P&L under the head "Repairs and Maintenance". This entire amount was paid to Portek Systems & Equipments Pte. Ltd., Singapore. The ld. AO was of the view that the repairs and maintenance undertaken by the assessee through Portek were in the nature of capital expenditure and disallowed the same. Further, the AO also disallowed a sum of INR 15.55 lacs incurred on account of customs duty by assuming it to be intrinsically linked with capital expenditure. During the year, assessee had undertaken repairs of two ship unloaders (identified as 'SUL#1' & 'SUL#2') which involved replacement, restorations and re-alignment of various parts of the machineries which had worn out either due to ageing or due to damage. Out of the two unloaders, SUL#2 was damaged due to a cyclone in 2006, which was repaired for permanent restoration after a series of temporary repairs undertaken till 2011. Portek undertook the repair work for SUL#2 for which it was responsible for engaging machineries and mobilizing manpower. It also had the responsibilities for modifying design of main trolleys so as to prevent accidents, keeping the main design intact. In the course of repair work, assessee also undertook upgradation of existing automation system. These equipment's were mounted by Portek in course of replacement of old parts but were commissioned by Nextgen. Expenditure on this upgradation of automation system amounting to INR 5.21 crores was capitalized by the assessee in its books of account and correspondingly a sum of INR 2.61 crores was deducted from the gross block of machinery on account of obsolescence. Ld. AO also invoked the provisions of Section 40(a)(i) r.w.s. 195 in respect of repair expenses disallowed by him of INR 5.21 crores. Further, ld. AO made a disallowance u/s 40(a)(ia) in respect of three expenses claimed by the assessee which, according to the ld. AO ought to have been subjected to TDS and on which no TDS was done. Assessment was thus completed by determining the total income at INR 6.93 crores. Aggrieved, assessee went in appeal before the ld. CIT(A) who deleted all the additions. Aggrieved, Revenue is in appeal before the Tribunal.

Ruling

ITAT stated that in the present case before us, ld. Counsel for the assessee has evidently demonstrated from the documents placed on record by referring to the inspection report for the inspection carried out in the year 2007 & 2008 as well as the terms of license agreement and the work order placed on Portek and a separate

work order placed on Nextgen for upgradation of new automation system. Assessee has also categorically demarcated the expenses incurred on account of repairs of revenue in nature and of capital in nature which have been duly accounted and reported in the audited financial statements. It is thus axiomatic that the expenditure incurred by the assessee in the facts of the case are on revenue account which have been rightfully allowed by the ld. CIT(A). We thus, find no reason to interfere with the findings given by the ld. CIT(A) in this respect. Accordingly, Ground Nos. 1 to 5 by the Revenue in this respect are dismissed.

In respect of disallowance made by the ld. AO u/s 40(a)(ia), on account of non-deduction of tax at source u/s 194C on railway siding charges of INR 20.61 lacs and demurrage charges of INR 9.36 lacs, we note that both these charges arose out of the failure on part of the assessee to complete the work within the prescribed time allotted by Haldia Dock Complex, Kolkata Port Trust to SAIL which was charged to SAIL who in turn deducted the same from the payments made by SAIL to the assessee. It is an admitted fact that assessee is contractually bound by SAIL to act as a handling contractor for imported coking coal and there is an agreement between the two parties to the effect that any incidental charges relating to handling job were to be deducted from the payments made to assessee by SAIL. In pursuance of this activity of handling contractor for SAIL, assessee had received the payments from SAIL after deduction of the two impugned expenses. Assessee has claimed these two expenses as admissible expenses in its Profit & Loss account.

In the present case before us, Haldia Dock Complex, Kolkata Port Trust levied charges on SAIL who in turn deducted the same from the payments made by SAIL to the assessee. The ld. AO has raised his doubts whether SAIL has made payments for these levies to Haldia Dock Complex, Kolkata Port Trust after deduction of applicable tax at source which is separate from of the contractual arrangement between SAIL and assessee for the handling job of imported coking coal. Considering the factual matrix of the case and the two legal maxims dealt above, we do not find any reason to interfere with the finding given by ld. CIT(A) in this respect. Accordingly, Ground Nos. 6 to 8 by the Revenue in this respect are dismissed.

Source: ITAT, Kolkata in the case of DCIT vs International Seaports (Haldia) Pvt. Ltd. vide ITA No. 997/Kol/2018 on December 14, 2022

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