VERENDRA KALRA & CO
CHARTERED ACCOUNTANTS

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DIRECT TAX REVIEW

MARCH 2019

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SUPREME COURT RULINGS OF THE MONTH

SC granted SLP against HC's ruling that sec. 80-I relief was allowed without reducing sec. 80HH deduction

For the assessment year 1994-95, Tribunal held that deduction under section 80-I should be given on profit without reducing deduction under section 80HH. High Court upheld order passed by Tribunal. SLP dismissed against order of High Court holding that deduction under section 80-I should be given on profit without reducing deduction under section 80HH.

Source: SC in CIT Vs Hindustan Level Ltd

SLP No. 4232 of 2019, date of publication March 13, 2019

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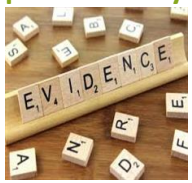
SC slams lower authorities for deleting sec. 68 additions on share premium relying on assessee's evidence



Assessee Company in its return of income for relevant year showed that money aggregating to Rs. 17.60 crores had been received through share capital/premium. Assessing Officer added back INR 17.60 crores to total income of assessee on ground that assessee had failed to discharge onus by cogent evidence either of creditworthiness of so-called investor-companies, or genuineness of transaction. On appeal, Commissioner (Appeals), deleted addition on ground that assessee having filed confirmations from investor companies to show that entire amount had been paid through normal banking channels, and hence discharged initial onus under section 68 for establishing credibility and identity of shareholders. Tribunal as well as High Court confirmed order passed by Commissioner (Appeals).

SC held that "*The lower appellate authorities appear to have ignored the detailed findings of the Assessing Officer from the field enquiry and investigations carried out by his office. The authorities below have erroneously held that merely because the respondent company - assessee had filed all the primary evidence, the onus on the assessee stood discharged. The lower appellate authorities failed to appreciate that the investor companies which had filed income tax returns with a meagre or nil income had to explain how they had invested such huge sums of money in the assessee company - respondent. Clearly the onus to establish the credit worthiness of the investor companies was not discharged. The entire transaction seemed bogus, and lacked credibility. The Court/Authorities below did not even advert to the field enquiry conducted by the Assessing Officer which revealed that in several cases the investor companies were found to be non-existent, and the onus to establish the identity of the investor companies, was not discharged by the assessee".*

Source: SC in PCIT Vs NRA Iron & Steel (P.) Ltd

Civil Appeal No. 2463 of 2019, date of publication March 06, 2019

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Land purchased for extension of school building can't make assessee ineligible for exemption u/s 10(23C) (vi)

Assessee educational society filed application for grant of registration under section 10(23C) (vi). Commissioner (Exemption) denied same on ground that no evidence that assessee had utilised its income for educational purpose was adduced. Tribunal after examining records found that during assessment years, assessee had utilised its income for purchase of land for further extension of school building, thus, assessee was held to be covered within provisions of section 10(23C)(vi). High Court by impugned order held that since amount of receipt during assessment years exceeded more than INR 1 crore and assessee had utilized same amount for purchase of land for further extension of school building, which was for educational purpose only, exemption under section 10(23C)(vi) could not be denied. SC dismissed SLP against HC ruling.

Source: SC in CIT(Exemption) Vs Managing Committee, Arya High School, Mausa, Punjab

SLP No. 2765 of 2019, date of publication March 19, 2019

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SC: Dismisses SLP; Waiver of loan obtained for funding operations - capital-receipt not taxable u/s 41(1)

SC dismisses revenue's appeal against Karnataka HC holding that **waiver of loan obtained by the assessee for funding operations was capital receipt not taxable u/s 41(1)**, relies on co-ordinate bench ruling in Mahindra and Mahindra Ltd ; The assessee in order to recoup losses suffered and to fund the operations of the company obtained unsecured loans, however, unable to pay, it requested for conversion of the unsecured loan into equity share capital and waive the balance as not recoverable, the AO held that these loans were received during the course of assessee's business and that the liability of the assessee is a trading liability, taxed it u/s 41(1). HC noted that for the application of Sec.41(1), the condition precedent is that there should be an allowance or deduction in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee, however, holds that since the amount is claimed as capital receipt is in respect to which there was no allowance or deduction claimed by the assessee for the previous year, therefore, when the creditor has waived the repayment of the said amount, it amounts to a capital receipt and not a revenue receipt. HC held that "As the assessee did not have the benefit of any allowance or deduction in respect of the said amount, Section 41 is not attracted."

Source: SC in CIT Vs M/s Compaq Electric Ltd

SLP No. 19981 of 2012, date of publication March 08, 2019

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SC: AO's power to suo moto extend special audit time-limit, applicable retrospectively

SC rules in favour of revenue in a batch of appeals, **holds that AO was empowered to extend time limit for submission of the audit report u/s. 142(2A), on his own accord and without an application from assessee, even prior to insertion of the expression 'suo motu' with effect from April 1, 2008 in Sec. 142(2C)**, consequently grants benefit of extended limitation period u/s. 153B Explanation (ii). SC approves revenue's stand that the 2008 amendment to Sec. 142(2C) only intended to remove an ambiguity and was clarificatory in nature and

thereby dismisses assessee's plea that the amendment was prospective in nature. SC rejects assessee's stand that pre-2008 AO may extend the period specified u/s. 142(2C), only on an application made by the assessee and for good and sufficient reason. SC explains that the enactment of the proviso to Sec. 142(2C) was necessary to give a remedy to an assessee who, for genuine reason, is unable to comply with the direction issued in the first instance by the AO. SC remarks that "*The creation of a remedy under the proviso in favour of the assessee cannot be construed to detract from the authority which vests in the AO…";* Further remarks that "*it is well to remember that under the substantive part of sub-section (2C), the AO can fix time for the submission of the audit report. …the AO is fully clothed with the authority to determine the time within which the audit report should be submitted."* Further highlights that assessee's contentions if accepted will lead to absurd consequences whereby it will vest control with assessee on whether to seek an extension or not. Moreover, **SC states that there exists a presumption of retrospective application in regard to amendments which are of a procedural nature**, cites plethora of co-ordinate bench rulings including in case of Vatika Township (P) Ltd., Gold Coin Health Food P Ltd.; Overturns Delhi HC judgment in case of Bishan Swaroop Ram Kishan Agro Pvt. Ltd, further upholds P&H HC decision in case of Jagatjit Sugar Mills Co Ltd.

Source: SC in CIT Vs Ram Kishan Dass

Civil Appeal No. 3211 of 2019 (arising out of SLP (C) No. 2810 of 2012, date of publication March 27, 2019

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HIGH COURT RULINGS OF THE MONTH

Issue couldn't be re-examined by invoking sec. 263 if AO's order on said issue was merged with CIT (A)'s order

Assessee filed its return of income for the AY 2005-06 and AY 2006-07 claiming deduction under section 80-IC(2)(b)(iii) in respect of 59 oil wells, by describing itself as a mineral based industry situated in North Eastern Region. Assessing Officer denied deduction on ground that each oil well of assessee was not an undertaking. However, Commissioner (Appeals) had allowed assessee's claim but subsequently Commissioner initiated revision proceedings under section 263 on ground that AO had not examined or applied his mind on basic issue as to whether assessee was actually a mineral based undertaking.

High Court held in favour of the assessee by contending that in revisional proceedings, Commissioner had accepted during course of order that assessee had claimed deduction under section 80-IC claiming to be a mineral based industry and in that background when claim was disallowed by Assessing Officer but allowed by Commissioner (Appeals), issue would stand to be concluded and there would be no scope for re-examination in jurisdiction under section 263 as assessment order having merged in appellate order.

Source: HC of Guahati in PCIT Vs Oil India Ltd

ITA Nos 7 to 10 2016, date of publication March 29, 2019

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Rentals from letting-out shops in Mall, constitutes Builder's business income, not house-property

Assessee Company engaged in the business of construction and promotion of residential and commercial complexes. The assessee constructed a shopping mall and let out the shop rooms and offered the income as Income from business during AY 2009-10. The AO treated this amount as income from house property and after deducting municipal taxes and statutory benefit of 30%, computed tax. The CIT (A) upheld the AO's order. However, ITAT allowed the assessee's appeal.

Kerala HC dismisses revenue's appeal for AY 2009-10, rules that rental charges received by assessee-builder on letting out the shop rooms in the mall constructed by it was assessable as business income and not income from house property and accepts assessee's stand that letting out the shop rooms in the mall amounts to commercial exploitation of the building constructed by it. HC observes that management of the shopping mall was done by assessee involving a host of services, states that "it is not a letting out of property simpliciter*"; HC rules that "Where the assessee company has developed the shopping mall and let out the same by providing a variety of services, facilities and amenities in the mall, it can be found that the primary intention of the assessee was commercial exploitation of the property…".*Distinguishes Revenue's reliance on co-ordinate bench ruling in Attukal Shopping Complex, SC rulings in Shambhu Investment and Raj Dadarkar on facts.

Source: HC of Kerala in CIT Vs M/s. Oberon Edifices & Estates (P) Ltd, The Arcade, Karamana, Trivandrum

ITA No.116 of 2016, date of publication March 28, 2019

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Builder's compensation payment to prospective buyers for surrender of allotted commercial spaces, deductible

Assessee was engaged in the business of construction and sale of commercial spaces. The assessee had developed a 17 storied building. The case of the assessee was that since it follows the CCM [Completed Contract Method], income is not recognized till the completion of the project. All receipts were treated as 'advance' and all direct expenses were accounted for as 'capital work and progress'. Moreover, the project was completed for relevant AY 1995-96, wherein some of the allottees of the flats refused to take them for completion since the New Delhi Municipal Council (NDMC) changed the usage of the Lower Ground Floor (LGF). Thereby, the assessee started negotiating with the relevant flat buyers and persuaded them to surrender their ownership and allotment letters and decided to repay the advance money received from these flat owners. In addition, *the assessee also decided* to pay them additional compensation in lieu of surrender of their rights in the flat. This expenditure was claimed in the P&L account as 'revenue in nature'. AO held that the compensation paid to the flat owners could not be said to be business expenditure but rather was 'capital investment in purchase of stock and trade'. CIT (A) allowed the appeal of the assessee by allowing the claim.

On further appeal by revenue, ITAT reversed the order of CIT (A) and held that the payment was for 'extraneous consideration' and was not expenditure that was 'expedient to the assessee's business.

HC reverses ITAT order for AY 1995-96, allows compensation paid by assessee-builder to prospective buyers towards surrender of rights in relation to commercial space allotted to them, as business expenditure. HC observes that though the space buyer's agreement or the allotment letter did not mandate payment of compensation, it

holds that, "assessee has a plausible explanation for making such payment of compensation to protect its 'business interests' ", cites plethora of rulings including SC rulings in Nainital Bank Ltd., Shahzada Nand & Sons. Also clarifies that the mere fact that the recipients treated the said payment as 'capital gains' in their hands would not be relevant in deciding the issue whether the payment by assessee should be treated as 'business expenditure'.

Source: HC of Delhi in CIT Vs Gopal Das Estates & Housing Pvt. Ltd ITA No.210/2003, 609/2005,611/2015, 772/2015, 1134/2005, 400/2019, 742/2009, 55/2010, 548/2010, 581/2010, 2078/2010 of 2016, date of publication March 22, 2019

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ITAT RULINGS OF THE MONTH

An amount can't bear character of income just because payer deducts tax on it

Assessee, administrator of estate of NRI in India entered into development agreement with a company named Ferani to construct buildings upon land against 12 per cent sale price of said construction. Due to some disputes, assessee terminated said agreement and approached Bombay High Court for restitution of property in original form. Bombay High Court issued directions to Ferani to maintain the account of the amounts collected as sales consideration and deposited in the designated A/c and to make FDs out of same. Assessing Officer held that FDs with Indian Bank made by Ferani did not belong to assessee and as such interest on FDs made in did not constitute its income. CIT revised said order holding that interest of allegedly paid/credited on FDRs by Indian Bank was legally chargeable to tax as assessee's income. According to CIT, if the bank deducted the tax from interest and reported such tax deduction in Form -26AS of the assessee, then it was obligatory for the Assessing Officer to assess the income.

ITAT held that *"An amount/receipt is assessable as income of an assessee only on the basis of charging provisions of sections 4 & 5 of the Act. Section 4 is the charging provision of the Act & it is therefore necessary for the Assessing Officer to prove that the receipt though received by some other person, constituted income chargeable to tax in the hands of the person sought to be charged. If under the provision of section 4 an amount does not bear the character of income and, hence, not chargeable to tax then the same cannot be converted into an 'income' only because the payer of the sum deducts tax under misconception of law".*

Source: ITAT Mumbai in Administrator of Estate of Lt. Edulji Framroze Dinshaw Vs CIT
ITA No.1033 (MUM) of 2018, date of publication March 29, 2019

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CIT (A) can't impose Rule 11UA when taxpayer 'substantiated' higher valuation u/s. 56(2) (viib) before AO

Delhi ITAT deletes enhancement made by CIT (A) for alleged excess share premium receipt u/s 56(2)(viib) for AY 2013-14. During relevant AY, assessee (an India Today group of company) had issued certain shares to M/s. Living Media India Ltd. (shareholder) @ Rs. 30/- per share (of Face value Rs. 10/-) based on the valuation report certified by an independent Chartered Accountant, the AO did not disturb the method or value substantiated by assessee except for adjusting the value marginally for difference in percentage stake held by assessee in

its subsidiary co. (i.e. Mail Today News Paper Private Ltd.) as shown in subsidiary's report (vis-a-viz that shown under assessee's report), accordingly the AO had taken the value of shares @ 27.75 /- per share and made addition u/s. 56(2)(viib) for the differential Rs. 2.25/- per share. On appeal, CIT (A) had enhanced the addition based on several grounds and observes that in present case assessee has substantiated the higher valuation to the satisfaction of the AO by various precedence and material placed on record apart from Valuation report in terms of sub clause (ii) of Explanation (a) to Sec. 56(2) (viib). ***ITAT opines that "when AO has accepted the valuation method which was also based on several precedence on the date of the issuance of the shares, then Ld. CIT (A) cannot acquire jurisdiction to tinker with such a valuation or valuation method."***; Noting that the CIT (A) had doubted the substantiation on the ground that the valuer had not adopted the method prescribed in Rule 11UA, ITAT highlights that shares were allotted in September, 2012 and till that period Rule 11U / UA was not prescribed. Further, ITAT clarifies that CIT(A) cannot impose Rule 11U/11UA, remarks that *"When option of sub-clause (i) [of Explanation (a)] has not been exercised, then Ld. CIT (A) cannot resort to apply the same and reject the substantiation provided in sub-clause (ii).."*.Next, ITAT acknowledges that the value of assessee's shares is mainly being derived from the value of shares of Mail Today, however, rejects CIT(A)'s stand that since Mail Today is running into losses, the valuation of its shares @ Rs. 40 per share as determined by assessee cannot be accepted and that its value cannot be more than the Face value of Rs. 10 per share., With respect to CIT(A)'s objection that valuation method adopted by assessee [i.e. DCF valuation] to value its underlying asset was not correct considering losses incurred by Mail Today in actual, ITAT remarks that ***"Valuation under DCF is not exact science and can never be done with arithmetic precision, hence the valuation by a Valuer has to be accepted unless, specific discrepancy in the figures and factors taken are found. Then AO or CIT (A) may refer to the Valuer to examine the same."***

Source: ITAT Delhi in India Today Online Pvt. Ltd Vs ITO
ITA No.6453/6454/Del/2018, date of publication March 19, 2019

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ITAT Quashes over Rs.750 cr. assessment on Tata Sons, Addl. CIT lacked 'jurisdiction' to pass order u/s.143 (3)

Mumbai ITAT quashes assessment order passed u/s.143(3) by the Additional CIT (by way of exercising powers of AO) assessing total income at Rs.758.60 crores in the hands of Tata Sons Ltd. (assessee) for AY 2004-05, follows co-ordinate bench ruling in assessee's own case; With reference to Sec.143(2) notice issued by ACIT/DCIT and subsequent assessment being completed by Addl. CIT, co-ordinate bench had ruled that *assessment has to be completed by the authority who has initiated proceedings for making assessment and any other authority can take over proceedings only after a proper order of transfer u/s 127(1) or 127(2)*. On revenue's stand that Addl. CIT and ACIT have concurrent jurisdiction over the assessee, co-ordinate bench had remarked that the revenue mis-applied and ignored the distinction between the 'concurrent jurisdiction' and 'joint jurisdiction, it was ruled that the jurisdiction can be exercised by only one AO at any given point of time and the assignment/transfer of jurisdiction from one officer to the other can be made only through a formal order u/s 127. Further it was held that though Addl. CIT is included in the definition of "Assessing Officer" given u/s. 2(7A) amended vide Finance Act, 2007, but he can act so only if he is specifically directed u/s.120(4)(6)

Concludes that, "*the Addl. CIT in the absence of a valid order u/s 120(4)(b) as well as section 127(1) of the Act could not have exercised powers of an Assessing Officer to pass the impugned assessment order".*

Source: ITAT Mumbai in M/s Tata Sons Ltd Vs ACIT
ITA No.2519/2639/MUM/2018, date of publication March 15, 2019

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Compensation for sub-tenancy surrender, taxable as 'capital gains', not income from other sources

Mumbai ITAT dismisses revenue's appeal for AY 2014-15, rules that compensation received by assessee-individual (a doctor by profession) in the capacity of a 'sub-tenant' towards surrender of occupancy rights, taxable as 'capital gains' and not 'income from other sources' (IFOS). During relevant AY, a deed of transfer and assignment of tenancy was entered into between outgoing tenant (i.e. assessee's spouse), assessee (the sub-tenant) as the confirming party, the landlord and the incoming tenant (in whose favour the tenancy / occupancy rights were transferred and assigned by assessee's spouse), assessee had received Rs. 1.4 crore as confirming party, which was offered as capital gains for having transferred the occupancy rights and Sec. 54F exemption was claimed. ITAT accepts assessee's plea that the sub tenancy interest/rights in the property amounted to capital asset u/s 2(14) and was a bundle of rights, remarks that, "***we do not find any reasons that when tenancy is recognized as capital asset within meaning of Sec 55(2), as to why sub-tenancy in favour of the assessee cannot be treated as capital asset" more so when capital asset is so widely defined u/s 2(14).*** On revenue's stand that no agreement was produced by assessee for holding any sub-tenancy rights, ITAT observes that was oral agreement between husband and wife and rentals paid by assessee were included in the spouse's return and were offered to tax. Further, observes that in order to get peaceful possession, it was important for the incoming tenant to pay consideration to the assessee, which was clearly in the nature of assigning rights/title/ interest for capital gain purposes.

CIRCULARS/ NOTIFICATIONS OF THE MONTH

Co's fulfilling conditions of 'Angel Tax Notification' eligible for Sec. 56(2) (viib) relief: CBDT

The Central Board of Direct Taxes (CBDT) has issued a new notification clarifying that the provisions of Sec. 56(2) (viib) shall not apply to consideration received by a company for issue of shares that exceeds the face value of such shares, if the said consideration has been received by a company which fulfils the conditions as specified in the para 4 of DPIIT notification dated 19-02-2019.

Source: CBDT Notification No. SO 1131(E) [NO.13/2019 (F.NO. 370142/5/2018-TPL (PT))], dated 5-3-2019

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Giving effect to the judgement(s)/order(s) of Hon'ble Supreme Court on Aadhaar-PAN for filing return of income

As per clause (ii) of sub-section (1) of section 139AA of the Income-tax Act, 1961, with effect from 01.07.2017, every person who is eligible to obtain Aadhaar number has to quote the Aadhaar number in return of income.

In a series of judgments i.e. (i) Binoy Viswam Vs. Union of India reported in (2017) 396 ITR 66 (ii) Final Judgment and order of the Constitution Bench of Hon'ble Supreme Court dated 26.09.18 in Justice K. S. Puttaswamy (Retd.) and another {Writ Petition (Civil) No. 494 of 2012}; & (iii) Shreya Sen & Anr. In SLP (Civil) Diary No(s) 34292/2018 dated 04.02.2019, Hon'ble Supreme Court has upheld validity of Section 139AA.

In light of the aforesaid judgement(s)/order(s) of Hon'ble Supreme Court, from 01.04.2019 onwards, to give effect to the above judgements/orders, it has been decided by **the Board that provision of clause (ii) of sub-section (1) of section 139AA of the Act would be implemented and it is mandatory to quote Aadhaar while filing the return of income unless specifically exempted** as per any notification issued under sub-section (3) of section 139AA of the Act. Thus, **returns being filed either electronically or manually cannot be filed without quoting the Aadhaar number.**

Returns which were filed prior to 01.04.2019 without quoting of Aadhaar number as an outcome of any decision of different High Courts in a specific case or returns which were filed during the period when the online functionality for filing the return without quoting of Aadhaar number was so available in the aftermath of decision of Delhi High Court dated 24.07.18 in W.P. C.M 7444/2018 & C.M. Application No. 28499/2018 in case of Shreya Sen vs. Union of India & Ors., till it was withdrawn post decision of Constitution Bench of the Hon'ble Supreme Court dated 26.09.18, would also be taken up for processing without causing any adverse consequence for non-quoting of Aadhaar as per provision of section 139AA of the Act.

Source: CBDT Circular No. 06/2019, dated 31-3-2019

Last date of linking Aadhaar with PAN extended to 30.09.2019

The CG, hereby notifies that every person who has been allotted PAN as on the 1st day of July, 2017, and who is eligible to obtain Aadhaar number, shall intimate his Aadhaar number to the Principal Director General of Income-tax (Systems) or Principal Director of Income tax (Systems) in the form and manner specified in Notification no. 7 dated 29th of June, 2017 issued by the Principal Director General of Income Tax (Systems) **by 30th of September, 2019.**

Source: CBDT Notification No.31/2019, dated 31-3-2019

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