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DIRECT TAX REVIEW
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SUPREME COURT RULINGS

Third proviso to Section 254(2A), introduced by Finance Act, 2008, resulting in automatic vacation of a stay upon expiry of 365 days even if delay in disposing of appeal is not attributable to assessee, would be both arbitrary and discriminatory and, therefore, liable to be struck down as offending Article 14 of Constitution of India.

Facts

The Respondent-assessee is an Indian company incorporated on 24-2-1989 and is engaged in the business of manufacture and sale of concentrates, fruit juices, processing of rice and trading of goods for exports. The assessee is a group company of the multi-national Pepsico Inc., a company incorporated and registered in the United States of America. The assessee-company merged with Pepsico India Holdings Pvt. Ltd. w.e.f. 1-4-2010, in terms of a scheme of arrangement duly approved by the Hon'ble Punjab and Haryana High Court. A final assessment order for AY 2008-09 was passed on 19-10-2012 which was adverse to the assessee, aggrieved by which, the assessee filed an appeal before the Income-tax Appellate Tribunal. A stay of the operation of the order of the assessing officer was granted by the Tribunal for a period of six months. This stay was extended for another 6 months. Since the period of 365 days as provided in Section 254(2A) of the Income-tax Act was to end after this period, beyond which no further extension could be granted, the assessee, apprehending coercive action from the Revenue, filed a writ petition before the Delhi High Court on 21-5-2014 challenging the constitutional validity of the third proviso to Section 254(2A) of the Income-tax Act. By a judgment dated 19-5-2015, the Delhi High Court struck down that part of the third proviso to Section 254(2A) of the Income-tax Act which did not permit the extension of a stay order beyond 365 days even if the assessee was not responsible for delay in hearing the appeal. It is this judgment and several other judgments from various High Courts that have been challenged by the revenue in these appeals. The revenue is in appeal against the order of the Court.

Ruling

The Hon’ble Apex Court held that there can be no doubt that the third proviso to Section 254(2A) of the Income-tax Act, introduced by the Finance Act, 2008, would be both arbitrary and discriminatory and, therefore, liable to be struck down as offending Article 14 of the Constitution of India. First and foremost, as has correctly been held in the impugned judgment, unequals are treated equally in that no differentiation is made by the third proviso between the assessees who are responsible for delaying the proceedings and assessees who are not so responsible.

Since the object of the third proviso to Section 254(2A) of the Income-tax Act is the automatic vacation of a stay that has been granted on the completion of 365 days, whether or not the assessee is responsible for the delay caused in hearing the appeal, such object being itself discriminatory, in the

sense pointed out above, is liable to be struck down as violating Article 14 of the Constitution of India. Also, the said proviso would result in the automatic vacation of a stay upon the expiry of 365 days even if the Appellate Tribunal could not take up the appeal in time for no fault of the assessee. Further, vacation of stay in favour of the revenue would ensue even if the revenue is itself responsible for the delay in hearing the appeal. In this sense, the said proviso is also manifestly arbitrary being a provision which is capricious, irrational, and disproportionate so far as the assessee is concerned.

Consequently, the third proviso to Section 254(2A) of the Income-tax Act will now be read without the word "even" and the words "is not" after the words "delay in disposing of the appeal". Any order of stay shall stand vacated after the expiry of the period or periods mentioned in the Section only if the delay in disposing of the appeal is attributable to the assessee.

Source: SC in DCIT vs. Pepsi Foods Ltd.

Civil Appeal Nos. 1106 to 1139/2021 dt. April 6, 2021

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HIGH COURT RULINGS

Unless it is determined that the unaccounted transactions unearthed during search were liable for payment of tax, penalty or interest, no prosecution could be launched on the ground of attempt to evade such tax, penalty or interest

Facts

During the search action under section 132 of the Income-tax Act, the assessee took out a piece of paper from his wallet and tore it in front of the officers. The officers immediately reassembled the said piece of paper. The investigation carried out with reference to the said piece of paper which was attempted to be destroyed by the respondent contained certain unaccounted loan transactions with several persons/entities. In continuation of the investigation, on the basis of the entries found in the said piece of paper, the officers conducted search/survey in premises of others which revealed that the said persons/entities were having unaccounted financial transaction with the respondent. The respondent had advanced huge amount of loan to these persons/entities. He did not disclose the said unaccounted financial transaction in his returns of income and further, the statements of several persons disclosed that the respondent had received huge amount of interest on the said unaccounted loan, which was not reflected in the books of accounts or in the returns of income.

Prosecution proceedings were initiated under section 276C(1) of the Act, questions of law before the Court were as under:

- Whether the complaints presented by the authorized officer are without authority of law?
- Whether the PDIT (Investigation) Bangalore was competent to issue authorization to prosecute the respondent for the alleged offences punishable under section 276C(1) of the Income-tax Act, 1961 read with sections 201 and 204 of IPC?
- Whether in the facts and circumstances of the cases, the Special Court was justified in discharging the accused under section 245 of Cr.P.C.?

Ruling

Regarding point number 1 & 2, the Court held that going by the notification issued by the Government of India, Ministry of Finance dated 13-11-2014, in exercise of the powers conferred by sub-sections (1) and (2) of section 120 of the Income-tax Act, 1961, the authorization made by the AO is in consonance with the provisions of the Income-tax Act and does not suffer from any error or illegality as sought to be made out by learned Senior Counsel for respondent and hence, the contentions urged by learned Senior Counsel for respondent in this regard are rejected.

As regards point number 3, indisputably, the respondent was sought to be prosecuted under section 276C(1) of the Income-tax Act. The offence under section 276C is a non-cognizable offence. Likewise, sections 201 and 204 of IPC are also classified as non-cognizable offences. As per the scheme of the Code, Section 201 IPC is either cognizable or non-cognizable offence depending upon disappearance of evidence caused. Since the main offence alleged against the respondent is non-cognizable one, sections 201 and 204 of IPC necessarily to be treated as non-cognizable offences.

In the backdrop of the above provisions, section 280B of the Income-tax Act, offences punishable under the Act are triable only by the designated Special Court. Thus, a conjoint reading of the above provisions make it abundantly clear that the Special Court has no original jurisdiction to take cognizance of the offences under Chapter XXII of Income-tax Act unless the accused is committed for trial. These provisions therefore lead to the conclusion that a complaint seeking prosecution of the accused for commission of the offences under Chapter XXII of the Act could be initiated only before the jurisdictional Magistrate and not directly before the Special Court. In the instant cases, the complaints were lodged by the authorized officer directly before the Special Court and the records of the proceedings indicate that on receiving the complaints, the Special Court straightaway issued summons to the accused without even taking cognizance of any of the offences.

Firstly, provisions of the Criminal Procedure Code, 1973 are applicable to the prosecution under Chapter XXII of the Income-tax Act as per Section 280D. Furthermore, in view of the proviso (b) of section 280B of the Income-tax Act, the Special Court is debarred from taking cognizance of the offences under Chapter XXII of the Income-tax Act without the accused being committed to the Special Court for trial. In the instant cases, the only circumstance relied on by the learned counsel for petitioner/complainant in support of the alleged charges is that, during the search action, certain unaccounted loan transaction with the several persons/entities were detected and it was ascertained that the respondent had advanced huge amount of loan to these persons/entities and the said unaccounted financial transactions were not disclosed in his returns of income for the relevant years and that the respondent had received huge amount of interest on the said unaccounted loan. These allegations, even if accepted as true, the same do not prima facie constitute offences under section 276C(1) of the Income-tax Act. Tax, penalty or interest could be evaded provided tax or penalty is chargeable or imposable in respect of the above transactions. There is no presumption under law that every unaccounted transaction would lead to imposition of tax,

penalty or interest. Therefore, until and unless it is determined that the unaccounted transactions unearthed during search were liable for payment of tax, penalty or interest, no prosecution could be launched on the ground of attempt to evade such tax, penalty or interest. As a result, the very prosecution launched against the respondent being premature and illegal cannot be allowed to continue.

For the above reasons, the Court did not find any justifiable reason to interfere with the impugned orders. As the prosecution initiated against the respondent is bad in law and contrary to the procedure prescribed under the Code of Criminal Procedure and the provisions of the Income-tax Act, the revision petitions are liable to be dismissed and are accordingly dismissed.

Source: Karnataka HC in ITO vs. DK Shivakumar
CRPC No. 329-331 of 2019 dt. April 5, 2021

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FAQ 70 of VSV Scheme 2020 only applicable in case where action was initiated pursuant to sections 153A or 153C

Facts

Additions were made by the Assessing Officer on the basis that petitioner had booked artificial long term capital gains of 5.70 crores and claimed exemption under Section 10(38) of the Income-tax Act thereon by selling shares of a company. The case of the Assessing Officer was that the price of this share was artificially rigged by certain operators, the details of which were divulged in the course of a search under Section 132 of the Income Tax Act carried out by the Kolkata Investigation wing of the Income Tax department during which certain statements were recorded under Section 132(4). By an Order dated 18th February 2019 under Section 154 of the Income-tax Act, the addition under Section 68 of the Income-tax Act was revised with additions, against which the assessee had preferred an appeal before the CIT(A). Assessee opted for Vivaad se Vishwas Scheme, wherein taxes at 100% were declared by the assessee against 125% computed by the designated authority, which forms the ground for the current appeal.

Ruling

Referring to circular No. 4/2021 dated 23 March 2021, the court held that action pursuant to sections 153A or 153C had not been initiated in the case of petitioner. Further, the assessment was not done on basis of search initiated under Section 132, or requisition etc. made under Section 132A of the Income-tax Act. The present case therefore was not a search case. The Court ordered the revenue to pass a fresh order in Form No. 3 determining tax payable by the assessee as a non-search case in accordance with the DTVSV Act read with Rule 4 of the DTVSV Rules, as per Circular no. 4/2021 dated March 23, 2021 within a period of two weeks from the date of receipt of this order.

Source: Bombay HC in Bhupendra Harilal vs PCIT
WPC No. 586 of 2021 dt. April 27, 2021

ITAT RULINGS

No addition on agricultural lands sold in cash where no banking facilities existed in villages; Rule 6DD(e)(i) which covers payment made for the purchase of agricultural or forest produce applied.

Facts

Assessee being an individual claimed to have been carrying on business of real estate and during the year under consideration,

purchased some agricultural lands on cash basis, developed into plots, converted into stock-in-trade and later on sold and admitted profit on sale of such plots and hence the provisions of section 40A(3) were not applicable. However, the AO made disallowance under section 40A(3) of the Act and consequently made the addition. The Ld. CIT(A) deleted the addition in part qua 05 agriculturists who are residing in the village wherein there was no bank facility available during the period of transactions, however, sustained part addition made cash payments towards purchase of agricultural lands and vacant site respectively, on the ground that the said payments are not covered by any exception laid down in rule 6DD.

Ruling

The Tribunal held that Rule 6DD lays down certain exceptions, under which no disallowance under sub-section (3) of section 40A shall be made, which include Rule 6DD (e) (i) which covers the payment made for the purchase of agricultural or forest produce. Here in this case,

this is un-controversial fact that the lands sold were agricultural lands and the sellers were agriculturists, and their identity are also not in dispute and the payments in cash, were also made for the purchase of agricultural lands only, because it clearly reflects from the remand report that the AO through ITI thoroughly investigated the matter by making elaborate enquiry and not only confirmed the identity of the sellers but also clarified that it is general practice that agriculturists always insist on cash payments and on account of lack of literacy they do not approach the banks excerpt perhaps. From the facts narrated in the report of the ITI, it is clear that there is business expediency in the said cash payments and the sellers are agriculturists and have insisted on cash payments. It was further mentioned in the remand report that the sellers have specifically stated that cheques are not reliable and that the reasons why they have insisted upon cash payments. In the light of these facts, the Assessee could not have carried the business but or the cash payments for purchase of lands which were initially acquired as an investment and then after obtaining necessary land conversation, these lands were introduced as stock in trade and then put to sale. In the remand report, it was finally submitted that cash purchases are inevitable and thus prove the business expediency in this case. From the record and arguments raised by the parties, we could not get any contrary facts and/or material against the remand report and/or admission of the AO with regard to business expediency and insistence of the sellers on cash payments.

Source: ITAT Vishkhapatnam in Mohammed Ali Shaik vs. ITO
ITA No. 148 of 2020 dt. April 7, 2021

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CIRCULARS & NOTIFICATIONS

CBDT extends certain income tax due dates in view of fresh surge in COVID-19 PAN India

To grant respite to taxpayers amidst a severe COVID-19 pandemic raging unabated across the country, CBDT extended the following income tax due dates under the Income-tax Act, 1961 (hereinafter called 'the Act'), to June 30, 2021:

- Time limit for passing of any order for assessment or reassessment the time limit for which is provided under section 153 or section 153B of the Act thereof;
- Time limit for passing an order consequent to direction of DRP under subsection (13) of section 144C of the Act;

- Time limit for issuance of notice under section 148 of the Act for reopening the assessment where income has escaped assessment;
- Time limit for sending intimation of processing of Equalisation Levy under sub-section (1) of section 168 of the Finance Act 2016.
- Time limit for payment of amount payable under the Direct Tax Vivad se Vishwas Act, 2020, without an additional amount.

Vide Press release dated May 1, CBDT in view of the severe ongoing pandemic in the country, further extended the following income tax due dates under the Income-tax Act, 1961 (hereinafter called 'the Act'), to May 31, 2021:

- Date of filing of appeal to Commissioner (Appeals) under Chapter XX of the Act for which the last date of filing under under that section was April 1, 2012 or thereafter;
- Due date of filing of objections to Dispute Resolution Panel (DRP) under section 144C of the Act for which the last date of filing under that Section was April 1, 2021 or thereafer;
- Due date of filing of Income Tax Return in response to notice under section 148 of the Act, for which the last date of filing was April 1, 2021 or thereafter;
- Filing of belated return under section 139(4) and revised returns under section 139(5) for AY 20-21 which was required to be filed on or before March 31, 2021
- Payment of tax deducted under section 194-IA, 194-IB and 194M of the Act and filing of challan-cum-statement of tax deducted which were otherwise required to be paid and furnished by April 30, 2021 under rule 30 of the Income Tax Rules, 1962
- Statement in Form No. 61, containing particulars of declarations received in Form No. 60, which was due to be furnished on or before April 30, 2021.

Source: Press Release dt. April 24, 2021 & May 1, 2021

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HIGH COURT RULINGS

Protocol appended to the DTAA forms integral part of DTAA; other country need not be an OECD member on the date of execution of the DTAA

Facts

Taxpayers request for issuance of a certificate at a lower withholding tax rate of 5%, was rejected, despite there being a DTAA between India and Netherlands. The AO stipulated a withholding tax rate of 10% on dividends receivable by the petitioners. Relief sought was for quashing the certificate wherein the withholding tax rate is pegged at 10%.

Although the subject DTAA provides for a withholding tax rate of 10% on dividends received by an entity residing in the Netherlands from an entity residing in India, the petitioners sought a lower rate withholding tax certificate of 5% by placing reliance on the Most Favoured Nation Clause obtaining in the protocol appended to the subject DTAA. It was contended that since India had entered into DTAAs with other countries which were members of OECD, the lower rate or the restricted scope in the DTAA executed between India and such a country would automatically apply to the subject DTAA. This argument was based on the provision made in the preface of the protocol which inter alia stated that the protocol "shall form part an integral part of the Convention" i.e., the subject DTAA.

The AO on the other hand held that a bare reading of Clause IV (2) of the protocol appended to the subject DTAA would show that the benefit of the lower rate of withholding tax or a scope more restricted would be available only if the country with which India enters into a DTAA was a member of the OECD at the time of the execution of the subject DTAA. Since no amendment has been made to the subject DTAA, the withholding tax cannot be lower than 10%. AO held that clause IV (2) of the protocol appended to the subject DTAA is like a contingent contract and before any benefits availed by the residents of OECD countries are extended to those who reside in Netherlands, the following two contingencies are required to be fulfilled:

a) The other country should be a member of the OECD on the date when the subject DTAA was executed and also on the date when a claim for the lower rate of withholding tax is made by a resident of the Netherlands.

b) The more beneficial provisions should have been extended to the residents of countries who are members of the OECD post the execution of the subject DTAA.

Therefore, Clause IV (2) of the protocol will have no applicability.

Ruling

The Court held that a perusal of Clause (1) and (2) of Article 10 of the subject DTAA would show that when dividends are paid by a company which is a resident of one of the contracting State, to a resident of

other State, it may be taxed in that other State. However, such dividends can also be taxed in the contracting State of which the company paying dividends is a resident according to laws of that State, and if the recipient is the beneficial owner of the dividend, the tax so charged shall not exceed 10% of the gross amount of the dividend. The point of inflection was the rejection of the request of the deductees made to respondent no. 1 that the rate of withholding tax should be pegged at 5% and not 10% (as indicated in the impugned certificates) in consonance with Clause (IV) of the protocol appended to the subject DTAA. A perusal of the aforesaid extract of the protocol would show that the protocol forms an integral part of the Convention. Therefore, plainly read, no separate notification is required, insofar as the applicability of provisions of the protocol is concerned.

A bare perusal of Clause IV (2) shows that it incorporates the principle of parity between the subject DTAA and the Conventions/DTAAs executed thereafter qua the rate of withholding tax or the scope of the Conventions in respect of subject remittances. Therefore, the argument advanced on behalf of the revenue, that the beneficial provisions contained in the Conventions/DTAAs, executed both prior to or after the coming into force of the subject DTAA, i.e., 21.01.1989, could not be made applicable to the recipients of remittances covered under the subject DTAA even though the concerned third State was a member of the OECD is, to our minds, completely misconceived and contrary to the plain terms of Clause IV (2) of the protocol appended to the subject DTAA. A lot of emphases is laid on behalf of the revenue on the word "is" mentioned in the following part of Clause IV (2) in the context of the aforementioned third States with which India has entered into Conventions/DTAAs after the execution of the subject DTAA "... which is a member of the OECD". The Court held that, the word "is" describes a state of affairs that should exist not necessarily at the time when the subject DTAA was executed but when a request is made by the taxpayer or deductee for issuance of a lower rate withholding tax certificate under Section 197 of the Act. The word 'is'- is both autological and heterological. An autological word is one that expresses the property that it possesses. Opposite of that is a heterological word, i.e., it does not describe itself.

Referring to the contents of the decree issued by the Kingdom of Netherlands on 28.02.2012 [No. IFZ 2012/54M, Tax Treaties, India] which was published on 13.03.2012, the Court observed that the Netherlands has interpreted Clause IV (2) of the protocol appended to the subject DTAA in a manner, indicated hereinabove by us, which is, that the lower rate of tax set forth in the India-Slovenia Convention/DTAA will be applicable on the date when Slovenia became a member of the OECD, i.e., from 21.08.2010, although, the Convention/DTAA between India and Slovenia came into force on 17.02.2005.

Relying on principle of 'Common Interpretation', also recognized in private international law with regard to conflict rules, the Court quashed the impugned certificates with lower deduction tax rates of 5% and ordered fresh certificates with withholding tax of rate 5% to be issued.

Source: Delhi HC in Concentrix Services Netherlands B.V. & Anr. vs. ITO; W.P.(C) 9051/2020, dt. April 22, 2021

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ITAT RULINGS

Emoluments earned by non-resident via foreign assignment cannot be taxed in India, Tribunal observes 'impossibility of performance' in support of non-submission of TRC.

Facts

Assessee was a non-resident individual. During the assessment proceedings pursuant to selection of his return of income for scrutiny under CASS, the assessee was required to furnish certain information and the said information was furnished by the assessee. Further, on verification of the total income filed by the assessee along with the return of income for the A.Y 2014-15, the Assessing Officer found that the assessee has claimed double taxation relief under section 90 of the Act and admitted NIL total income but claimed TDS in his return. Therefore, the assessee was required to furnish TRC and assignment letter by Employer, which he could not furnish. Accordingly, the AO made additions to the returned income of the assessee, which is the context of the current litigation.

Ruling

Referring to the case of Sreenivasa Reddy Cheemalamarri vs. ITO in ITA No.1463/Hyd/2018, the Coordinate Bench of the Tribunal at Hyderabad vide order dated 5.3.2020, which had considered similar issue, the Court cited:

"*11. I have considered the rival submissions and carefully perused the material on record. From the Orders of the Ld. Revenue Authorities, I find that the Ld. AO has disallowed the exemption claimed by the assessee under Article 15(1) of the India-Austria DTAA only for want of Tax Residence Certificate (TRC) from Austria. The submission of the assessee in this regard was that despite best possible efforts he was not able to procure TRC from country of residence and the situation may be treated as "impossibility of performance".*

13. Therefore, in the case before me the following conditions are required to be satisfied to claim exemption under Article 15(1) of the India-Austria DTAA:

- The person should be a resident of Austria and

- The salary and other remuneration should be earned in respect of employment exercised in Austria."

Assessee qualifies as a non-resident in India and as a tax resident in Austria. The salary and allowances are earned by the assessee in respect of employment rendered in Austria due to his foreign assignment. He was not able to procure TRC from country of residence and the situation may be treated as "impossibility of performance". *The Tribunal held that the assessee's claim of exemption in regard to his salary income as per the provisions of Article 15(1) of the India-Austria DTAA in the return of income filed by him is appropriate.*

Source: ITAT Hyderabad in Ranjit Kumar Vuppu vs ITO
ITA No. 86/Hyd/2021 dt. April 21, 2021

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