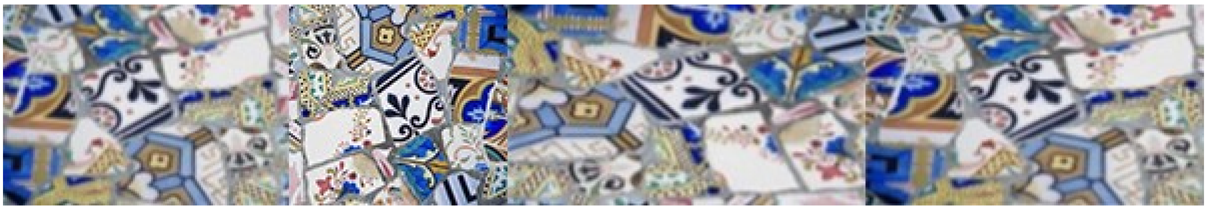

B K KHARE & Co
CHARTERED ACCOUNTANTS

Monthly Newsletter
Direct Tax
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Volume 9, Issue 3

Income Tax Appellate Tribunal

In this newsletter we have covered some of the noteworthy decisions of the Income-tax Appellate Tribunal and Authority for Advance Ruling, which v hope will be of interest to you.

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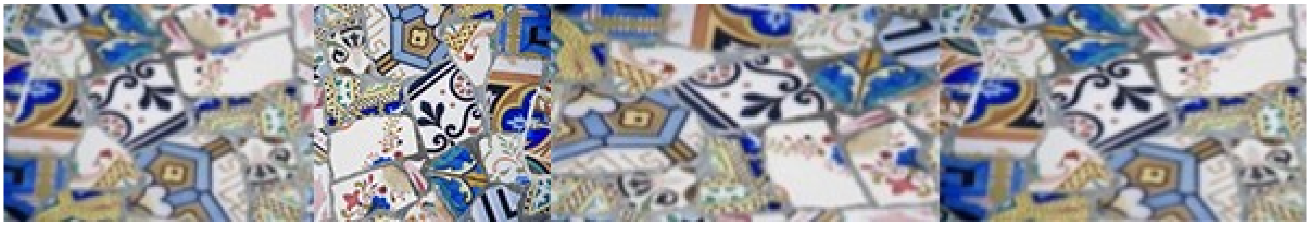


CHNY ITAT: Deletes Addition Of Demonetisation Deposits As Source Explained, Despite RBI Notification Violation

Facts & Issue:

The Assessee, is a company engaged in the business of distribution of pharmaceutical goods, surgical and diagnostics goods. The assessee's case was selected for scrutiny due to huge cash deposits made during the year. The assessee, as per the Gazette notification dated 09.11.2016, was not permitted to accept specified bank notes during the demonetisation period. Accordingly, the Assessing officer (AO) treated the said cash deposits as unexplained investment u/s 69 and 115BBE of the Income Tax Act,1961 ("the Act") and added to the total income of the assessee. Aggrieved by the assessment order, the assessee preferred an appeal before the CIT(A). The CIT(A) sustained the addition made by the AO. Aggrieved by the order of CIT(A), the assessee preferred as appeal before the tribunal.

Contentions of the Assessee:

The assessee contended that the AO ignored the business model of the assessee in which it was a normal trade practice to accept cash as a mode of payment. The assessee contented that the sales consideration realised in cash was deposited with the banks. The assessee submitted that the AO never identified major deviations in cash collections during demonetization period when compared to the earlier financial year. The additions were made only for the reason that the assessee was not eligible to accept specified bank notes after 09th November, 2016. The assessee contented that sales made in cash before demonetization period were duly accounted and relevant taxes were paid.

Contentions of the Revenue:

The revenue observed that a notification was issued by the RBI and Government of India, specifically allowing certain categories of entities to accept specified bank notes up to 31st December, 2016. The revenue contented that the assessee was not included under any of the categories permitted by the Government to accept specified bank notes. Thus, the assessee could not explain the source of cash deposits made during the demonetisation period.

Observations & Ruling of the Tribunal:

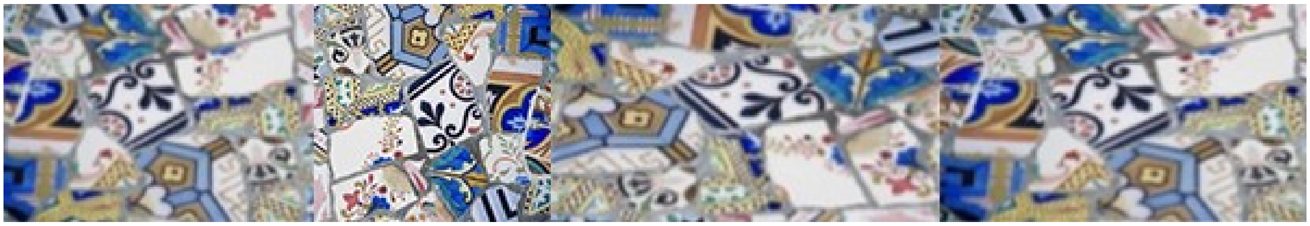
The tribunal held that merely because of violation of RBI/ Government of India notification in transacting in specified bank notes, the genuine explanation offered by the assessee towards source of cash deposit could not be rejected. The tribunal, basis the comparative analysis of sales, opined that there was no deviation of cash sales and cash deposits when compared to earlier financial year and demonetisation period. Thus, the Tribunal held that the assessee had satisfactorily explained the source of cash deposits made during the demonetisation period in specified bank notes and revenue erred in making the addition u/s 69 of the Act. Hence the tribunal directed deletion of the additions made towards cash deposits.

Citations

Purani Hospital Supplies Private Limited [TS-303-ITAT-2023(CHNY)]

Our Comments

This is a very useful decision since there would be numerous such assessees facing a similar predicament. While there is indeed a violation of the RBI notifications etc. if the fact remains that this indeed is the way business happens before, during and after the demonetisation period, the ground realities cannot be brushed aside so as to question the bonafides of such cash deposits, other things remaining constant. Needless to say, the assessee must maintain robust documentation to prove the genuineness of the cash deposits in order to overcome this aberration.



DEL ITAT: Expounds On Scope Of Revised Return For 'Loss Carry-Forward' & ITAT's Fact-Finding Powers

Facts & Issue:

The Assessee, an investment Holding Company was set up to acquire and hold shares of NDTV Ltd. During the assessment proceedings, the assessee filed a revised return making a fresh claim of long term Capital loss. The said claim for carry forward and setoff was denied by the Assessing Officer ('AO') in the assessment order. Aggrieved by the said assessment order, the assessee preferred an appeal and the CIT(A) also determined the issue against the assessee. Aggrieved by the said CIT(A) order, the assessee preferred an appeal before the tribunal.

Contentions of the Assessee:

The assessee contended that since the original return was filed on or before the due date u/s139(1) of the Act, the assessee was entitled in law to revise the return u/s139(5) of the Act, within due date prescribed therein. The assessee contented that the original return and the revised return were filed within the prescribed due date as per section 139(1) and 139(5) of the Act respectively. Thus, the long-term capital loss was not hit by the embargo placed u/s80 of the Act. Hence, the assessee submitted that denial of carry forward of losses claimed in the revised return was opposed to the scheme of the Act as interpreted by the judicial dicta and hence was required to be reversed.

Contentions of the Revenue:

The revenue contended that the losses were not at all claimed in the original return and came into vogue by virtue of revised return which was filed subsequent to the due date prescribed u/s139(1) of the Act. Thus, the revised return, seeking to make a new claim giving rise to losses could not be allowed in defiance of the provisions of the Act regardless of the fact that revised return had been filed within the due date prescribed u/s139(5) of the Act. It was also contended that such omission to claim the loss in the original return was prima facie wilful to evade the transactions from the knowledge of the department and thus the benefit of the loss claimed by filing the revised return should not be granted to the assessee.

Observations & Ruling of the Tribunal:

The Tribunal relied on the Supreme Court ruling in case of Kumar Jagdish Chandra Sinha wherein it was held that "*revised return cannot be filed to cover up deliberate omission etc, in the original return*". The tribunal noted that section 80 of the Act, by a non obstante clause, prohibited claim of carry forward of losses unless determined u/s139(3) which, in turn, mandates, the loss return must be filed within time limit prescribed u/s139(1) of the Act. The tribunal observed that the original return filed u/s139(1) of the Act did not make reference to existence of any capital loss at all and the loss had been claimed for the first time in the revised return, which triggers Section 80 of the Act leading to denial of carry forward of loss u/s74 of the Act. The tribunal held that Assessee failed to furnish any explanation whatsoever on the nature and character of transactions resulting in such capital loss and thus an unsubstantiated and uncorroborated claim was untenable in law. Accordingly, tribunal dismissed assessee's appeal.

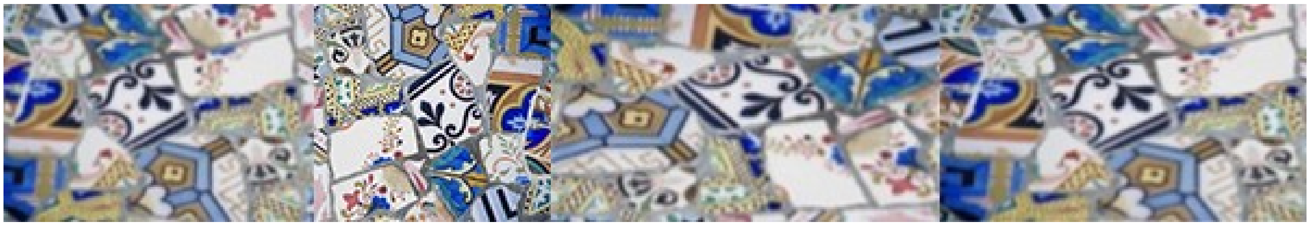
Citations

RRPR Holding Private Limited [TS-341-ITAT-2023(DEL)]

Our Comments

Revised return is meant to correct any omission and any wrong statement. Omission simply meansan

act of not including something. The noun 'omission' is not further qualified or limited in any manner. So, omission could be inadvertent or bonafide or even strategic or deliberate. It could be argued that all kinds of omissions entitle an assessee to revise a return of income. The more crucial interpretation is that if the original return is a profit return and the revised return is a loss return, this is a challenge, as this decision has shown, that the said loss cannot be said to be determined in terms of a return filed u/s 139(1). It would appear that, all that s 80 requires is that the loss has to be determined pursuant to a return filed in accordance with the provisions of section 139(3) which in turn refers to a return filed u/s 139(1). There is a case of arguing that all that is required is that the return has to be filed in time if the loss has to carried forward. A revised return can be filed only if the original return is validly filed. This decision is going to queer the pitch for many assessees as they are often advised to file some contentious claims via revised returns.



KOL ITAT: Condones 1600 Days' Delay In Appeal-Filing, Endorses Substantial Justice Over Technicalities

Facts and issue

In this case the appeal filed by the assessee was late by 1639 days out of which some portion was covered by extension of limitation granted by the Supreme Court (SC) on account of disruption caused by COVID 19. Notwithstanding this, rest of the delay was substantial. The assessee had also not appeared before the CIT(A) because of change of address which resulted in an ex parte order by the CIT(A).

Contentions of the Assessee

The reasons adduced by the assessee were that there was change of address and that the assessee became aware of the impugned order only when the department sought to recover the demand. It was also submitted that the Advocate entrusted to file the appeal was aged and had filed the appeal late.

Contentions of the Department

Needless to say, the Department strongly opposed condonation of the delay primarily for the reason that the delay was long.

Ruling of the Tribunal

The Tribunal felt that the delay was for sufficient and reasonable cause. It was also of the view that by delaying the filing of the appeal the assessee did not stand to benefit and that the assessee had not sought to avoid litigation with the revenue.

The Tribunal relied on the celebrated decision of the SC in the case of Mst. Katiji[1] and also its decision in the case of N Balakrishnan[2].

The Tribunal accordingly condoned the delay, admitted the appeal and restored the matter to the AO for adjudication on merits.

Citation:

TS-319-ITAT-2023(Kol)

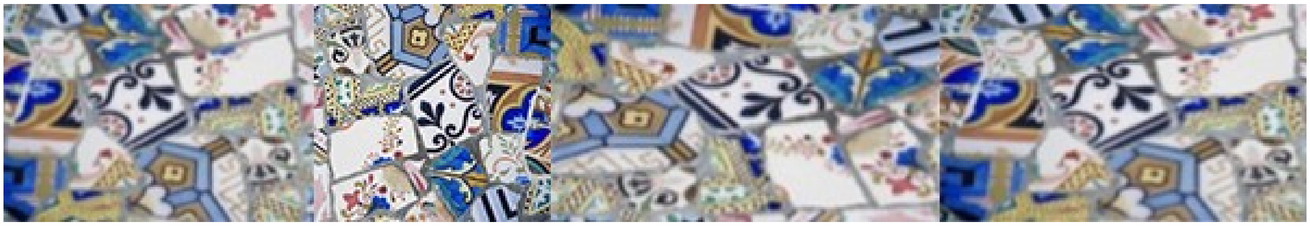
Our Comments

The decision of the SC in the case of Mst. Katiji is of supreme and eternal value. The propositions laid down therein have been the fountain-head of all subsequent jurisprudence on the issue of condonation of delay. The SC appreciated that the litigant does not stand to gain by delay in filing the appeal etc. It held that, refusing to condone the delay, would result in a meritorious matter being thrown out at the threshold. Also, that, in appreciating the number of days delay, a pedantic approach should not be adopted; a rational, common sense and pragmatic approach should be adopted so that substantial justice should be preferred over technicalities. In Balakrishnan's case it has been held that rule of limitation is not to destroy the rights of parties. They are merely meant to see that the parties do not adopt dilatory tactics but seek their remedy promptly. It was held that there is no presumption that the delay on the part of the litigant was deliberate.

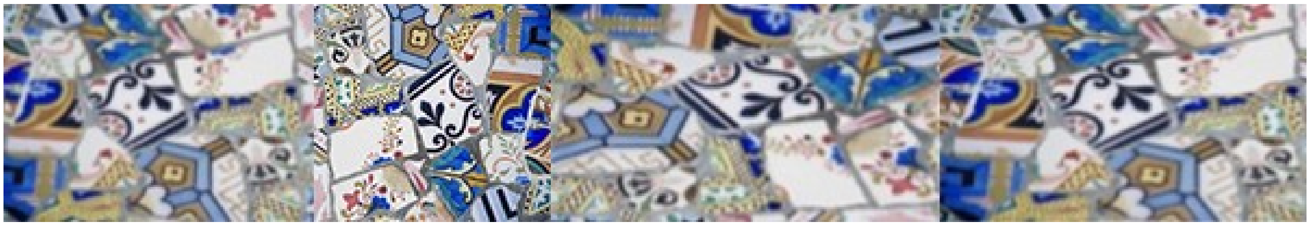
All these principles are merely guidelines to the judges to be applied to the facts of each case. There are numerous cases where even shorter periods of delay have not been condoned on an appreciation of the facts of the case and the conduct of the litigant concerned. These principles must therefore be borne in mind while assessing chances of the delay being condoned. Ultimately it is for the forum to decide and adjudicate and administer justice. The legal maxim *Vigilantibus*

[1] 1987 AIR 1353

[2] (1998) 7 Supreme Court Cases 123



Non Dormientibus Jura Subveniunt – law assists only those who are vigilant and not those who sleep over their rights – truly sums up the position that everyone must bear in mind.



MUM ITAT: 200% Penalty Not Imposable Unless Revenue Specifies Misreporting Instance U/S 270A(9)

Facts & Issue:

Saltwater Studio LLP (assessee) filed its return of income for AY 20 17-18 dated 31.10.2017 declaring income of Rs. 21,21,750/-. Later, the case of the assessee was selected for scrutiny. AO framed scrutiny assessment u/s 143(3) by order dated 10-12-2019 by making the inter-alia quantum addition of total Rs 3,94,996/- which action was assailed by assessee before the Ld. CIT(A).

Meanwhile, the AO levied penalty u/s 270A of the Act, wherein AO imposed penalty equal to 200% of tax, which was held by him to be mis-reported by the assessee, by order dated 06-08-2021, which has been challenged by the assessee before the CIT(A). However, CIT(A) confirmed the same by passing the impugned order and therefore assessee being aggrieved, was filed an appeal before Tribunal.

Contentions of the Assessee:

Assessee contended that AO has not stated under which of the six situations, the appellant's case falls, so as to levy higher penalty at 200%. Merely mentioning that the appellant has misreported income without bringing out how the additions has led to misreporting of income cannot result in levy of penalty of 200%. The AO erred in levying penalty, which action shows total non-application of mind and arbitrary use of power to levy penalty. He further contended that the AO has passed the penalty order with a predetermined mind and in a whimsical manner which cannot be sustained in the eyes of law.

Contentions of the Revenue:

Revenue contended that the assessee has clearly intentionally misreported its income so as to attract section 270(A)(9) of the Act.

Observations & Ruling of the ITAT:

Mumbai ITAT deletes penalty levied u/s 270A as Revenue failed to bring quantum additions under the misreporting clauses (a) to (f) of section 270A(9). The Tribunal held that this was a case of non-application of mind on the part of the AO and also violation of principles of natural justice; also, that provisions dealing with levy of penalty need to be strictly interpreted.

Citation

Saltwater Studio LLP [TS-300-ITAT-2023(Mum)]

Our Comments

It is arguable that, having regard to the language of clauses (a) to (f) of section 270A(9), an element of *mens rea* has to be established before levying penalty for misreporting of income. Also, as held by the Tribunal, penalty provisions have to be strictly interpreted and it would be for the department to establish how the case falls strictly within the four corners of these clauses.

CHNY ITAT Ocean Freight Charges Paid To Korean AE, Covered By Art.8; Deletes Section 40(A)(I) Disallowance

Facts & Issue:

Doosan Power Systems India Pvt. Ltd.(assessee) was carrying on business of execution of turnkey projects of steam generating equipment, supply of spares and providing related services. In turn, assessee paid ocean freight charges to its AE M/s. Doosan Corporation Korea amounting to Rs.5,13,63,114/- but no TDS was deducted on this u/s 195 of the Act. Therefore, the DRP directed the AO to disallow this ocean freight charges paid by assessee to M/s. Doosan Corporation Korea by invoking the provisions of section 40(a)(i) of the Act. For this, the AO issued notice u/s.154 of the Act.

Contentions of the Assessee:

Assessee argued that ocean freight charges would not fall within the scope of fees for technical services or royalty u/s 9(1)(vii) of the Act or under Article 13 of the India Korea DTAA. Assessee also stated that this ocean freight services would be in the nature of business provided under Article 7 of the DTAA and since M/s. Doosan Corporation Korea did not have any business activity in India, the same would not be taxable in India.

Contentions of the Revenue:

Revenue considered Article 12 of the DTAA and noted that royalty means payment made as a consideration for the use of or the right to use any industrial, commercial or scientific equipment. DRP considered the decision of Hon'ble Supreme Court in the case of Transmission Corporation of AP Ltd., 105 taxman 742, as payment to non-resident under contract entered into is under obligation to TDS u/s 195 of the Act but the obligation is limited only to appropriate proportion of income chargeable under the Act.

Observations & Ruling of the ITAT:

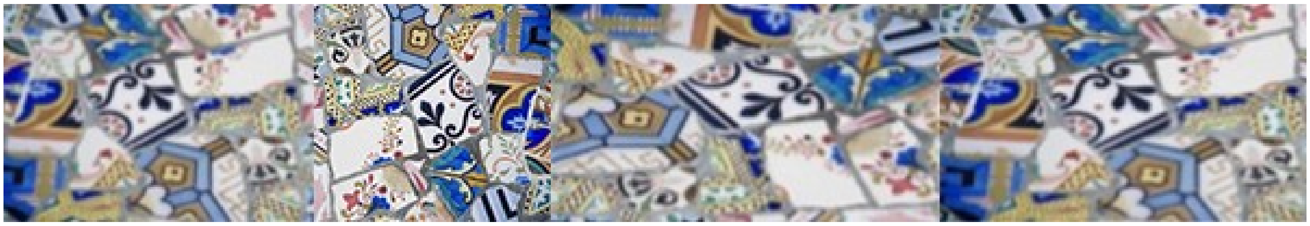
Chennai ITAT deleted the disallowance made u/s 40(a)(i) for non-deduction of tax u/s 195 on ocean freight charges paid to its Korean AE; holds that the ocean freight charges paid by the assessee is covered under Article 8 (Shipping and Air Transport), which provides that the income shall be taxable in the contracting state, i.e. Korea and not in India. ITAT notes assessee's submission that the rental or ocean freight charges were paid to its Korean AE for hiring of ships for travelling in international waters and not within India

Citation

Doosan Power Systems India Pvt. Ltd [TS-350-ITAT-2023(CHNY)]

Our Comments

Rental ocean freight charges paid are covered by Article 8 of India-Korea DTAA, being in the nature of profit from the operation of ship and shall be taxed in the contracting state i.e. Korea and not in India. This decision demonstrates the position in law that provisions of the Act or of a DTAA, which ever are more beneficial, will prevail.



MUM ITAT: Deduction U/S 80G Is Allowable On CSR Expenses

Facts of the case:

Synergia Lifesciences Pvt. Ltd. ('Assessee'), engaged in the business of manufacturing and undertaking research and development activities in fermentation and life science products, incurred CSR expenses of Rs. 11 crores during the AY 2020-21. The Assessee disallowed the CSR expenses u/s 37(1) and claimed deduction u/s 80G, to the extent available. As per the Assessee, there is no restriction imposed on claiming deduction u/s 80G, even if the expenses have been incurred for corporate social responsibility, provided the payment is made to eligible entities (as listed u/s 80G).

The Assessing Officer did not agree with the submissions of the Assessee and was of the view that u/s 80G, the 'sums paid' need to be 'donation' for the purpose of being eligible for deduction u/s80G. It was further held that the amount paid by the Assessee should be 'voluntary' to become eligible for deduction u/s 80G. In the instant case, the same was paid by the Assessee as a mandatory requirement as per section 135 of the Companies Act, 2013. The Assessing Officer further held that there should be an element of charity and voluntary for being considered as a donation for the purpose of claiming deduction u/s 80G of the Act, which was missing in the instant case. Accordingly, the Assessing Officer disallowed the deduction claimed u/s 80G of the Act.

The CIT(A) upheld the view taken by the Assessing officer and the Assessee preferred an appeal before the Mumbai ITAT.

Contentions of the Assessee:

The Assessee contended that the CSR expenses were incurred for the purpose of education, medical, etc. and reference was also made to the donation receipts. The Assessee placed reliance on various decisions of the co-ordinate bench of the ITATs, including the decision of the Bangalore ITAT in the case of Allegis Services (India) Pvt. Ltd. v. ACIT (ITA no. 1693/Bang./2019), which was decided in favour of the taxpayer.

Contentions of the Revenue:

The Revenue relied upon the views expressed by the lower authorities.

Observations and Ruling of the Mumbai ITAT:

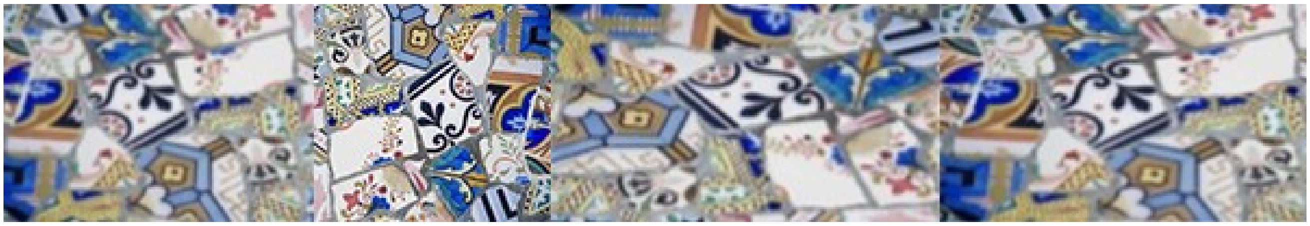
The Mumbai ITAT accepted the contentions of the Assessee and allowed the deduction u/s 80G on CSR expenses, by relying upon the decision rendered by Bangalore ITAT in the case of Allegis Services (India) Pvt. Ltd. (cited supra), wherein the deduction was denied on a similar basis. However, since the lower authorities had denied the deduction, without verifying the conditions as stipulated u/s 80G, the ITAT remitted the issue to the Assessing Officer for verifying the same.

Citation:

Synergia Lifesciences Pvt. Ltd. [TS-340-ITAT-203(Mum)]

Our Comments:

The allowability of deduction u/s 80G on CSR expenses has been a litigious issue and most of the lower authorities are disallowing the same on the ground that CSR expenditure is not done voluntarily and therefore, the same cannot be considered as ‘donation’. There are number of arguments in favour of the taxpayers, involving technical interpretation of the provisions of section 80G. Further, there are number of decisions rendered by the ITAT (like, Naik Seafoods Pvt. Ltd. v. PCIT (ITA No. 490/MUM/2021, Finastra Software Solutions (India) (P.) Ltd. v. DCIT (2023) 147 taxmann.com 515 (Bang. Trib.), JMS Mining (P.) Ltd. v. PCIT (2021) 130 taxmann.com 118 (Kolkata Trib.)), which are in favour of the taxpayers and deduction has been allowed u/s 80G of the Act. Further, in many decisions, it has been noted that the ITAT has set aside the matter for verifying the condition of section 80G and hence, it would be appropriate, if at the time of assessment proceedings, adequate factual documents (like, donation receipts, etc.) and submissions are made before the Assessing Officer.



DEL ITAT: Sec.44BB 'Computation Provision', Inapplicable Sans PE; Rejects Offshore Supply's Taxability In India

Facts and issue

The assessee was incorporated in and was a tax resident of UK. The assessee, along with four other members, formed a consortium which was awarded a contract by ONGC. Under the contract the assessee was required to manufacture sub-sea production system components. It was the submission of the assessee that income from such supply was not taxable in India since neither the assessee had a PE in India nor could the provisions of section 44BB be invoked in the case of sale of equipment made outside India.

On the other hand, the AO, in the draft order, concluded that the assessee had a PE in India and applied section 44BB to the total receipts, on the premise that there was no bifurcation of the said receipts. For this, the AO relied on the response of ONGC to notice u/s 133(6) sent by the AO.

The DRP on the other hand held that non-existence of a PE did not prevent applicability of section 44BB. It also concluded that section 44BB applied even to off-shore supplies, based on certain case law.

Contentions of the Assessee

In the appeal before the ITAT the case of the assessee was primarily that, in the absence of a PE, section 44BB did not apply. It was also submitted that the Revenue had not established when and in what manner assessee's PE was established in India. Also, how the offshore supply of equipment was attributable to the said alleged PE. The assessee relied on various case law in support of both the above propositions.

Contentions of the Revenue

The case of the DRP was that a project office would constitute a PE. Also, that the contract was a composite contract and hence applicability of section 44BB was automatic.

Ruling of the Tribunal

The Tribunal held that section 44BB was a computation provision which provides for a computation mechanism but which does not override the provisions of section 5, 9 and 90 of the Income tax Act[1]. The Tribunal also held that the onus to establish existence of a PE was on the Revenue[2] and that, in the present case, the Revenue had failed to establish, on facts, that the assessee had a PE in India. It held that in the absence of a PE section 44BB would not apply[3]. The Tribunal relied on various case law in coming to this conclusion.

The Tribunal accordingly allowed the appeal of the assessee.

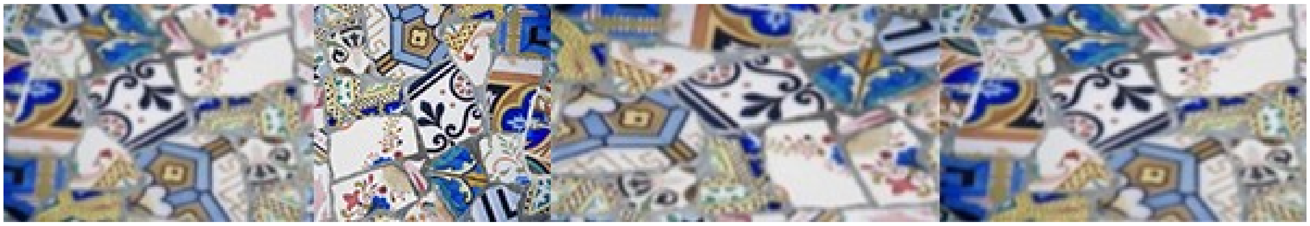
Citation:

Baker Hughes Energy Technologies UK Ltd**.** TS-299-ITAT-2023(DEL)

Our comments.

The propositions applied by the tribunal are on the basis of various decisions referred to in the judgement. section 44BB has been held to be a computation provision and at the same time the settled position is that section 44BB does not override the provisions of section 5, 9 and 90 of the Act. It effectively means that, the reverse of the principle that where computation provision fails charge cannot lie, can arguably be applied. Thus, where the charge does not lie, computation provisions cannot come into play. This is obvious. Unless there is income which is chargeable to tax, there can be no question of its computation.

[1] Sedco Forex International Limited 399 ITR 1(SC)
[2] E-Funds (2018) 13 SCC 294
[3] R & B Falcon Offshore Limited ITA 389(DEL)/2005



MUM ITAT: Section 69 Inapplicable To On-Money Paid By NR From Foreign Sourced Income

Facts:

The assessee, a non-resident, purchased a property developed by Argent Constructions (developer) out of his income sourced in Muscat. During a search at the developer, the developer declared that cash was received from the assessee. Based on the declaration of the developer, assessee's case for AY 2013-14 & AY 2014-15 was reopened u/s 148. During the reassessment proceedings, the developer's statement was recorded in the presence of the AR of the assessee, where in the developer confirmed receipt of cash of Rs.47 lacs on various date. The AO made an addition u/s 69 for the unexplained investment.

Assessee's contention

The AR contended that notice u/s 148 of the Act was without jurisdiction as such notice was issued based on information received from the Investigation Wing and the statement recorded in search proceedings of a third party. Thus, the assessment has been reopened without any cogent material on record.

The assessee was a resident of Muscat. The source of funds for the purchase of property was from his foreign income and he had no taxable source of income in India. In terms of the Article 24 of the DTAA between India and Oman, which provided for taxation of income (not dealt in other articles of DTAA) to be taxable in Oman and thus, the assesses was not taxable in India. Accordingly, the provisions of section 69 could not be invoked. Reliance was placed on the decision of ITO vs. Rajiv Suresh Ghai [198 ITD 348 (Mum ITAT)].

Furthermore, it was contended that the consideration agreed and paid through banking channel was higher than the market value, hence there was no question of payment of cash over and above the agreed price.

The developer, in his statement recorded on 12.12.2017, has stated that on-money of Rs.47 lakhs was received from family members of the assessee.

Revenue's contention

The DR supported the order of the lower authorities and contended that during search at the developer loose papers, files, etc. were seized wherein the developer had admitted to receiving cash from the purchasers of flats (including assessee's flat). The assessee had not discharged the onus to prove that no cash was paid by him despite the opportunity of cross examination.

ITAT observation and ruling

The Hon'ble ITAT noted that the belief of the AO stemmed not only from the investigation report but from the gathering of information from AIR. Thus, the ITAT confirmed the reopening of the assessment.

The ITAT observed that the assessee had purchased the flat from the funds having source outside India (Muscat) and the entire agreed consideration was paid through banking channel. The Revenue had not brought on record any material to substantiate that the assessee had a source of income in India that was utilised for payment of alleged cash. Thus, ITAT held that the source of cash payment, if any, was from outside India.

Under the provisions of section 5(2) of the Act, income of a non-resident person is taxable in India if the source of income is in India or the income is received or deemed to be received in India by or on behalf of NRI or accrues or arise or is deemed to accrue or arise in India during relevant period. Thus, the provisions of section 69 of the Act would trigger if the investment was made from unaccounted money having source in India.

De hors the source-based taxation under the domestic law, the assessee was eligible for treaty benefit in respect of his income earned in Muscat. The ITAT noted that the transaction involved in question was investment in immovable property i.e. the foreign income was invested in India but had not arisen in India. Thus, the transaction was governed by Article 24 of the India Oman DTAA. Article 24 provided for taxation of the income in Oman i.e state of residence. The residuary taxation rights in Article 24 belong to the residence jurisdiction.

The ITAT noted that taxation is at a place where the income is earned and not where income is invested and held that the provisions of section 69, which deals with the explanation *qua* the source of investment, could not be invoked in case of a non-resident not having a source of income in India.

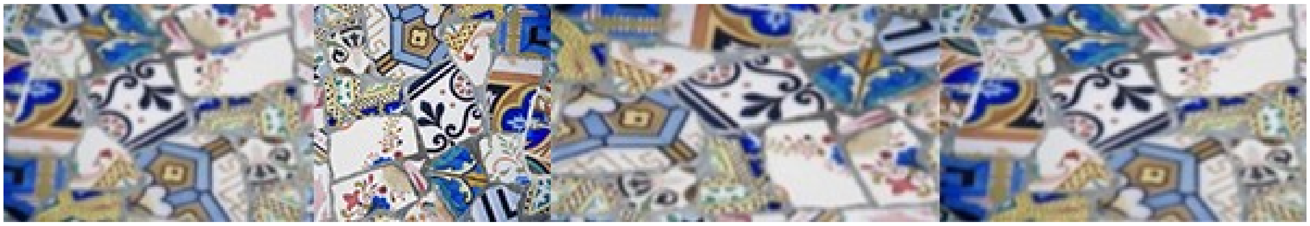
The ITAT relied on the decision of coordinate bench in the case of ITO vs. Rajiv Suresh Ghai [198 ITD 348 (Mum ITAT)].

Citation

Vijaykumar Kanaiyalal Matta [TS-311-ITAT-2023(Mum)]

Our comments

The Hon'ble ITAT proceeded on the basis that the consideration paid by a non-resident in cash (assumed) was from outside India as the non-resident did not have any source of income in India. The ITAT allowed the benefit of the DTAA and based the decision on the tax rights of a contracting state / jurisdiction. This is also supported by the provisions of section 90, which provide for supremacy to the tax treaty in case the provisions of the Act were less beneficial. It is trite that section 90 shall override the deeming fiction in section 69. Apart this, the case of the assessee was that the consideration paid through banking channels was more than the market value of the flat. This could also raise a presumption that there was no case for payment of on money in cash. If however, the market value was more than the monies received through the banking channels then of course the challenge would be for the developer to justify the sale below the market value and in that situation a presumption could be raised against the developer.



KOL ITAT: Enhancement By The CIT(A) On Issues Not Germane To The Assessment Order Not Tenable In Law

Facts of the case:

The assessee had contested certain additions made in the assessment order before the CIT(A). The CIT(A), apart from dealing with the said three issues, enhanced the assessed income by three new issues which were not considered in the assessment proceedings. The assessee had offered income from shipping business as per section 115VA of the Act. The additions made in the assessment order were towards late payment of contribution to PF, provision for leave encashment and provision for bad debt. During the course of appellate proceedings before the CIT(A), the CIT(A) noticed that the assessee had earned income from non-shipping business as well and had allocated certain common expenditure amongst shipping and non-shipping business. The CIT(A) also enquired about the disallowance u/s 14A of the Act as well as deduction claimed u/s80G of the Act.

Assessee contested the jurisdiction of the CIT(A) for enhancing the assessed income on new issues which were not raised during the course of assessment proceedings. CIT(A), however, continued to enhance the income holding that the two issues (other than donation claimed u/s 80G) were raised from the books of accounts submitted by the assessee.

Aggrieved by the order passed by the CIT(A), the assessee filed an appeal before the ITAT challenging the jurisdiction of the CIT(A) enhancing the assessed income of the assessee.

Contentions of the Assessee:

AR submitted that there is no position in law which permits the CIT(A) to enhance income on new issues not dealt with in the assessment proceedings.

AR submitted that such action of the AO was arbitrary and was not in accordance with the provisions of section 251 of the Act. AR contended that by raising the three new issues in the first appellate proceedings, Ld. CIT(A) had brought into picture new source of income which were not the subject matter of the assessment completed by the Ld. AO.

Thus, AR contended that the action of the CIT(A) to enhance the income was not in accordance of the provisions of the Act.

Contentions of the Revenue:

DR submitted that the issues considered for enhancement by the CIT(A) arose from the computation of income wherein certain discrepancies were identified and explanation was sought from the assessee.

Observations and Ruling of the ITAT:

ITAT apprised itself with the provisions of section 251 of the Act. ITAT observed that the power of enhancement of income u/s 251 is restricted to issues arising out of the assessment proceedings or the source of income which is expressly considered by the AO.

ITAT held that since the AO had not applied his mind to the question of taxability or non-taxability of the three issues, ld. CIT(A) had no jurisdiction, in the circumstances of the instant case, to enhance the taxable income of the assessee on these three issues.

CIT(A) cannot travel outside the assessment order with a view to find new sources of income. In the present case, the ITAT observed that the AO had not dealt with the said issues which were considered for the enhancement by the CIT(A).

ITAT also held that the power to contest the assessment order is only with the assessee and if it is not contested by the assessee, the assessment order remains final. The power with the department is only to revise the assessment order u/s263 of the Act or reopening of assessment as per section 147 of the Act.

ITAT referred to various judicial precedents of the SC and held that the exercise of the power by the CIT(A) to enhance the income by raising new issues was not tenable.

Citation:

Apeejay Shipping Ltd. v. ACIT [TS-312-ITAT-2023 (Kol)]

Our Comments:

The ITAT has upheld the settled issue in respect of jurisdiction of the CIT(A) for enhancement of the income assessed by the AO. What is pertinent to note is that issues not arising out of the assessment order cannot be subject to enhancement by the CIT(A). ITAT has highlighted the possibility to consider new issues for assessment through revisionary powers or reopening of assessment u/s 263 or 147 of the Act respectively.

It is a settled position in law that the powers of the CIT(A) are co-terminus with those of the AO in that he can do what the AO can do. Now he has no power to set aside an assessment to the AO. He can of course call for a remand report from the AO in respect issues on which he needs further inquiry. It is equally a settled position that his power of enhancement of income is restricted to the subject matter of assessment or sources of income which have been considered expressly or by implication by the AO. He cannot enhance in respect of sources of income which are neither mentioned in the return of income nor considered by the AO. Routine disallowances not made by the AO but proposed to be made by the CIT(A) cannot amount to the CIT(A) discovering a new source of income. In the peculiar facts of this case the assessment was confined to assessment of income from operating qualifying ships for which a separate code is provided for in section 115VA and hence, disallowance not relating to this source, was held to be not permissible

PUN ITAT: Capital Loss Arising On Transfer Of Shares From One Non Resident Entity Of The Group To Another Related Non Resident Entity Of The Group And Claimed Through Revised Return Filed U/S 139 (5) Can Be Allowed To Be Carried Forward For Set Off

Facts In Brief

The assessee company Bilcare Limited was engaged in the business of manufacture and sale of pharmaceutical packages and providing research-driven packaging solutions and clinical supplies services to leading pharmaceutical companies. For the AY 2016-17, the assessee filed original return of income u/s 139 (1) claiming loss of Rs. 45.98 Crores and subsequently filed revised return of income declaring loss of Rs. 968.30 Crores inter alia claiming loss of Rs. 922 Crores incurred on sale of shares of its wholly owned subsidiary in Singapore on its liquidation to another subsidiary company in Mauritius consequent to obtaining permission of High Court in Singapore to transfer shares for a sale consideration of One Singapore Dollar .

The assessee had not reflected the said sale of shares in the books of account or audited financial statements and it had claimed deduction for long term capital loss arising from such sale in the revised return, which was omitted in the original return.

The AO denied assessee’s claim citing following reasons-

- The revised return of income was not on account of any omission or wrong statement in the original return of income
- The Honourable High Court of Republic Singapore had simply permitted the assessee to sale 77,33,50,000 ordinary shares of BSPL (subsidiary company of assessee in Singapore) without mentioning the consideration for sale of shares. Therefore, the transaction of sale of shares in Singapore company was not by operational of law.

- The assessee company had failed to furnish the information sought by the assessee in order to determine the fair market value of the shares in terms of provisions of Rule 11UA of the Income Tax Rules, 1962.

The assessee company made an application u/s 144(A) of the Act to the learned Joint Commissioner of Income Tax seeking directions for guidance of the AO to enable the AO to complete the assessment. The Joint Commissioner gave following directions :-

(a) The loss on sale of shares of Rs.922 crores claimed in the revised return of income should not be entertained.

(b) However, since there is no claim of capital loss of Rs.922 crores in revised return of income, but made during the course of assessment proceedings, the same may be examined on merits.

The AO took the view that the whole transaction was a dubious premeditated transaction entered into with the intention of claiming capital loss for availing the benefit of carry forward and set off. The AO referred to the decision of Honourable Supreme Court in the case of Mcdowell & Company Ltd. vs. CTO, 154 ITR 148 (SC) and on that basis denied the claim for carry forward and set off of capital loss.

The AO also made some other disallowances in the assessment.

Aggrieved by the order of AO, the assessee went in first appeal before the CIT A.

The CITA considering the chronology of the events and the facts of the case upheld the finding of the Assessing Officer that the long term capital loss arising on sale of shares of Singaporean subsidiary company could not have been claimed through revised return of income. However, the CITA proceeded to hold that since the assessee company had suffered loss, the claim made during the course of assessment proceedings can also be considered placing reliance on the decision of the Honourable Bombay High Court in Pruthvi Brokers & Shareholders 23 taxmann.com 23. The alternative plea taken by the assessee during the course of appeal proceedings that the long term capital loss arising on sale of shares be allowed as business loss was dismissed holding it to be academic. The CITA also disposed the other ground raised in the appeal.

Aggrieved by the order of CITA, Revenue went in second appeal before Honourable Tribunal Pune. The assessee company also filed a Cross Objection challenging the findings of the CIT(A) that the long term capital loss arising on sale of shares cannot be allowed as revenue loss.

Ruling of the Honourable Tribunal

Revenue's contentions

- The revised return of income was not valid in law. CIT A ought not to have applied the ratio of the decision of the Honourable Bombay High Court in the case of CIT vs. M/s Prithvi Brokers & Shareholders, 23 Taxman.com 23 to the facts of the case, as it relates to the claim made for the first time before the learned CIT(A), whereas, the ratio of the decision of the Honourable Supreme Court in the case of Goetze (India) Ltd. vs. 157 Taxman 1 (SC) was squarely applicable to the facts of the case.
- CIT(A) failed to examine the colourful device adopted by the assessee company and the transactions of sale of shares to another wholly owned foreign subsidiary company was not at arm's length price.
- The assessee company has impliedly accepted the findings of the CIT(A) that the revised return of income was not valid in law, as the assessee has chosen not to challenge the said finding before the Tribunal.
- CIT A had failed to take cognizance of provisions of section 139(3) r.w.s. 80 of the Act. Reliance was placed on ratio of the decision of the Honourable Supreme Court in the case of PCIT vs. Wipro Ltd., 446 ITR 1 (SC) drawing attention to para 9 thereof.

Assessee's contentions

- The ratio of decision of the Honourable Supreme Court in the case of Wipro Ltd. (supra) has no application to the facts of the case, as the issue before the Honourable Supreme Court was regarding interpretation of the provisions of sub-section (8) of section 10B of the Act.

- Material on record clearly showed that after meeting the liabilities of creditors of Singapore company there remained nothing to be distributed amongst the shareholders. Therefore, the intrinsic value of shares sold was Nil.
- Rule 11UAA had no application for the year under consideration, for the reason that the provisions of rule 11UAA come into effect w.e.f. 01.04.2018.
- The transaction of sale of shares was not a dubious transaction, as the transaction was real duly substantiated by the documents showing the completeness of transaction of sale of shares
- The ratio of the decision of the Honourable Supreme Court in the case of McDowells & Co. Ltd. (supra) had no application to the facts of the case as in extant case under appeal the transaction of sale of shares was a real transaction and the citizens were free to arrange affairs in order to minimize their tax liability.

Ruling of the Tribunal

Honourable Tribunal inter alia held as follows

- There was no dispute that the original return of income was filed within the due date for filing the return of income u/s 139(1) of the Act.
  Even the revised return of income was filed within the prescribed period of time under the provisions of section 139(5) of the Act. As per the provisions of section 139 (5) a revised return of income can be filed in a situation, where an assessee discovers any omission or any wrong statement made in the original return of income.
  The circumstances, which led the assessee company not to claim the long term capital loss in the original return of income were explained before the Assessing Officer and such explanation was not uncontroverted. Therefore, it could not be said that it was not a bona-fide omission made in the original return of income. The Assessing Officer
  was not justified in not accepting the revised return of income filed by the assessee.

- Once a revised return of income is filed, the natural consequence is that the original return of income is effaced or obliterated for all the purposes, it is not open to the Assessing Officer to advert to the original return of income. This position of law was approved by Honourable Supreme Court in CIT vs. Mahendra Mills/Arun Textile C/Humphreys/ Glassgow Consultants, 243 ITR 56 (SC).
- In the case of Wipro Ltd. (supra) the Honourable Supreme Court was concerned with the interpretation of provisions of subsection (8) of section 10B and made a passing remark that the revised return of income filed by the assessee u/s 139(5) only substituted original return of income u/s 139(1) and cannot be transformed as return u/s 139(3) in order to avail the benefit of carry forward and set-off of any loss under the provisions of section 80 of the Act. The observations made by the Honourable Supreme Court vide para 9 had no application to the facts of the present case, as the assessee company had filed the original return of income showing and thus, the decision of Honourable Supreme Court in Wipro Ltd. (supra) is distinguishable on facts.
- The above discussion clearly brings out that the assessee company had discovered/ omitted to claim a genuine loss arising on sale of shares and, therefore, filed a revised return of income u/s 139(5) within the prescribed time limit claiming the determination and carry forward losses. It was a valid revised return of income filed u/s 139 (5) of the Act. Therefore, the findings of the Assessing Officer the loss within the time prescribed under the provisions of section 139(1) of the Act.

  The findings of the Assessing Officer as well as the learned CIT(A) to the extent that the revised return of income was not valid are reversed.
- The contention of the Revenue that the assessee had impliedly accepted CITA’s finding about the revised return of income not being valid by not challenging it in cross appeal or cross objection could not be accepted as respondent to an appeal can always support the

order of the CIT A on the ground decided against him under the provisions of Rule 27 of the Income Tax (Appellate Tribunal) Rules, 1963.

- It is a settled position of law that in a case where the assessee files return of loss within the prescribed time u/s 139(1) of the Act, there is no bar under the provisions of the Act to claim higher loss during the course of assessment proceedings nor are there any fetters on the Assessing Officer to allow such higher loss.
- The provisions of section 80 of the Act permit an assessee to carry forward loss and seek its set off u/s 72(1) or 72(2) or 74(1) except when the loss has not been determined in pursuance of return of income filed in accordance with the provisions of sub-section (3) of section 139.
- Honourable Delhi High Court in the case of CIT vs. Nalva Investments Ltd. in ITA No. 822/2005, judgment dated 07.08.2020 involving identical facts has held that Assessing Officer was not justified in not determining and allowing carry forward and set off of loss when erroneously claimed lesser amount of loss in the return of income, was corrected during the course of assessment proceedings. The Honourable High Court has held that the conditions prescribed for triggering the provisions of section 80 of the Act were not applicable to such a situation.

  Honourable High Court of Karnataka in CIT vs. Srinivasa Builders 369 ITR 69 (Kar) has held that conditions of section 80 of the Act could not be said to have been violated by the assessee even where assessee had shown positive income in the original return of income filed under the provisions of section 139(1) but in the assessment,

  business loss was determined by the Assessing Officer.

  In the light of above legal position, it could not be said that in the extant case the conditions prescribed u/s 80 were applicable so as to disentitle the assessee to carry forward and set off of the losses against subsequent profits. of law.

- The decision of Bombay High Court in Pruthvi Brokers and Shares Insurance dealt with the issue of allowability fresh claim not made in the original return but during assessment proceedings. The said issue had become academic in the extant case in the light of the revised return filed by the assessee.

- The reason given by the Assessing Officer in denying the claim that the transaction of sale of shares was not reflected in the books of account, could not be countenanced as it is settled position of law that deduction would depend upon the provisions of law relating thereto and not on the treatment given in the books of account. It is also equally settled that the presence and absence of entries in the books of account is not decisive or conclusive on the issue. Useful reference could be made to landmark judgments of Honourable Supreme Court in CIT vs. Parakh & Co. India Ltd. 29 ITR 661 (SC) and Kedarnath Jute Manufacturing Co. Ltd. vs. CIT 82 ITR 363 (SC).
- The material on record clearly showed that the assessee company had really sold the shares of its subsidiary in Singapore to another subsidiary in Mauritius after seeking permission from the High Court of Republic Singapore u/s 259 of the Companies Act.

  The transaction of investments and disinvestment of such shares made by the assessee were duly reported by assessee company to the Reserve Bank of India under the regulations of FEMA and the factum of investments made by the assessee company in the subsidiary was not in dispute.

  In view of the above said facts the impugned transaction could not be termed as dubious. Honourable Supreme Court in Union of India & Anr vs. Azadi Bachao Andolan & Anr 263 ITR 706 (SC), held that the citizen was free to carry on the business within four corners of law and further proceeded to observe that mere tax planning without any motive to evade the tax through colourable device was not frowned upon even in the case of McDowells & Co. Ltd. (supra). Reliance by Assessing Officer on the decision of McDowells & Co. Ltd. (supra) was highly misplaced.

  Honourable Supreme Court in the case of SA Builders Vs. CIT 288 ITR 1 (SC) had agreed with the observations made by the Honourable Delhi High Court in CIT Vs. Dalmia Cement (Bhart) Ltd. 254 ITR 377 (Del) that the Revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the board of directors to take business decisions.

The transaction of sale of shares of was a genuine transaction and the assessee could not be faulted with for arranging its affairs in such a manner so as to minimize its tax liability.

- From the material available on record it was clear that the value of assets of the Singaporean subsidiary company after deducting the amount charged to secured creditors and debenture holders was zero which meant that the intrinsic value of share was Nil. The AO could not disturb the apparent consideration by substituting the agreed consideration by fair market value of the subject asset. The provisions of sec.48 of the Act refer to the term 'full value of consideration' received, accrued as a result of transfer of the capital asset. Honourable Supreme Court in the case of CIT v. George Henderson and Co. Ltd. [1967] 66 ITR 622 held that the term "full value" means the whole price without any deduction whatsoever and it cannot refer to the adequacy or inadequacy of the price bargained for. The legal position that emerged from the decision of the Honourable Supreme Court cited supra was that "full value of consideration" did not mean market value of the capital asset which was the subject matter of the transfer. It was only from assessment year 2018-19, the Legislature had enacted provisions of section 50CA of the Income-tax Act by the Finance Act, 2017 to provide that where the consideration for transfer of shares of a company (other than quoted share) was less than fair market value of such shares determined in accordance with the prescribed manner, fair market value should be deemed to be the full value of consideration for the purposes of computing income under the head “Capital Gains”. The CBDT vide circular No.2/2018 dated 15.02.2018 had clarified that this amendment took effect only from 01.04.2018, accordingly it applied for A.Y. 2018-19.

Honourable Tribunal held that the rejection of claim for determination and carry forward for set off of capital loss on the basis of reasons given by the Assessing Officer was not sustainable in the eyes of law and the grounds raised by the Revenue were dismissed.

Citation:

Bilcare Limited [TS-344-ITAT-2023(PUN)]

Our Comment:

Honourable Tribunal has considered the relevant aspects and passed a reasoned order. However there exists difference of opinion on the issue and reference can be made to the recent contrary decision of Honourable Tribunal Delhi in the case of RRPR Holding Private Limited reported in TS-341-ITAT-2023(DEL) wherein claim for carry forward of long term capital loss of Rs. 206 Cr. arising from sale of shares claimed through a revised return has been rejected by interpreting the interplay of sections 139(1), 139(3), 139(5), 80 and 74. The issue is fraught with controversy and would be set at rest only when the higher judicial forum pronounces the decision.