The Chamber of Tax Consultants

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Brain Trust Questions

Brain Trustees: -

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1. CHARITABLE TRUSTS (SS)

A charitable trust running a school and college has received a specific grant from the Government for payment of salary. The trust has submitted before the AO that this being in nature of income, the 15% basic exemption u/s 11(1)(a) should be allowed. The AO has disallowed 15% deduction by stating that this grant being for specific purpose, 15% deduction cannot be allowed. In AO's view, the grant cannot be treated as income, and the salary paid cannot therefore be an application of income and the benefit of adjusting 15% of salary against other incomecannot be given. In his view, these 'tied up' grants have been held as specific grants and are not in the nature of income in view of the following pronounments:

a. SHUKDEO CHARITY ESTATE VS CIT 149 ITR 470 RAJ.
b. DIRECTORATE OF INCOME TAX VS RAMAKRISHNA SEVA ASHRAMA 258 ITR 201 KAR.
c. NIRMAL AGRICULTURE SOCIETY VS ITP 71 ITR 152 HYD.

Whether action of AO is correct?

2. CAPITAL GAINS – ACCRUAL OF CONSIDERATION (SS)

The Hon'ble Supreme Court in the case of Balbir Singh Maini 398 ITR has applied propositions laid down by earlier Supreme Court judgments in E D Sasoon and Co. and in Excel Industries Ltd. and held that some real income must have arisen on the assumption that there is a transfer of capital asset and this income must have been received or accrued u/s 48 as a result of the transfer of capital asset.

If the transfer of capital asset takes place say in AY 2016-17 but as per terms of agreement consideration will accrue only in AY 2018-19, how is the capital gain taxed? Can the amount accrued and received in AY 2018-19 be taxed in that year in as much as there is no transfer in AY 2018-19 and as stated above transfer was in AY 2016-17?

***3.* TAX NEUTRAL AMALGAMATIONS (RVE)**

Sec. 2(1B)(iii) reads as under: *"shareholders holding not less than three-fourths in value of the shares in the amalgamating company or companies (other than shares already held therein immediately before the amalgamation by, or by a nominee for, the amalgamated company or its subsidiary) become shareholders of the amalgamated company by virtue of the amalgamation."*

3 Companies say A Ltd, B Ltd and C Ltd.are closely held companies. B Ltd. and C Ltd. are getting merged with A Ltd. through one scheme of amalgamation. The shareholding pattern of the aforesaid Companies is given below:

Shareholders of A Ltd	Shareholders of B Ltd	Shareholders of C Ltd
Promoters – 98%	A Ltd – 45%	A Ltd – 45%
B Ltd – 1%	C Ltd – 45%	B Ltd – 45%
C Ltd – 1%	Others – 10%	Others – 10%

On Amalgamation of B Ltd shares held by A Ltd and C Ltd will stand cancelled whereas on amalgamation of C Ltd shares held by A Ltd and B Ltd will stand cancelled. As a result only 10% shareholders of B Ltd. and C Ltd. will be issued shares of A Ltd whereas the section mentions that shareholders holding not less than 3/4th in value in amalgamating companies should become shareholders of amalgamated company.

Whether this will qualify as a tax compliant amalgamation or not?

4. AMALGAMATION: LOSSES (RVE)

As per Sec.72A(2)(a)(ii), for carry forward of Business Loss and Unabsorbed Depreciation under a scheme of amalgamation, *"the amalgamating company must have held continuously as on the date of the amalgamation at least three-fourths of the book value of fixed assets held by it two years prior to the date of amalgamation."*

a) Does the term "*three-fourths of the book value of fixed assets"* pertain to the value of assets or to the identity of assets?

For Example:

Net Block as on April 1, 2016	Rs 2 Lacs comprising of 10 old machines
October 1, 2016	Purchase of 5 machines at Rs.2 Lacs
April 1, 2017	Sells off Old lot of 10 machines at Rs.1 Lac.
Date of Amalgamation	Sep 30, 2017

In such a situation is the condition as described above satisfied?

5. Section 14A (SS)

a) If the company has investment in shares and securities, mutual fund, and has no income "not includible in total income" or such insignificantincome, i.e. Dividend whether disallowance under section 14A will be as per Rule 8D or will it be restricted to income not includible in total income?
b) If investments are strategic in nature and long term, can they still be excluded from the provisions of section 14A?
c) Can assessee plead that no disallowance under section 14A be made for the specific investments on which no income is earned during the year?

6. Section 14A (SS)

Whether disallowance under section 14A gets triggered in a case where the Assessee has profit from a sale of long term shares and has also incurred Loss on Long term Capital Asset (Other then Shares) and the net result is Loss. The A.O. has applied Section 14A r.w.r 8D in making the disallowance on Profit from sale of long term Shares (being exempt) and has allowed the Carry forward of the loss. Is the A.O. correct in doing so?

7. LOSS ON SALE OF LISTED SHARES (RVE)

The A.O. has denied the Set-off of Long term Loss incurred on sale of listed shares against the Profit on sale of long term asset (Other than shares which was taxable) on the ground that Income includes negative income and hence a loss will get the same treatment as an exempt income. Whether the A.O. has correctly denied such a set-off?

8. CAPITAL GAINS ON DEVELOPMENT AGREEMENTS (RVE)

Sec 45(5A) of IT Act, provides that when there is a transfer of capital asset being land or Building or both, the capital gain shall be chargeable to income tax as income of the previous year in which the certificate of completion for the whole or part of the project is issued by the competent authority. When the land owner enters into development agreement with the builder whether the benefit of sec 45(5A) can be availed? The doubt arises because u/s 50C wherein the words are "land or building" are used in a similar manner, Tribunals have held that the development rights are not covered by sec 50C(ref. Voltas Ltd Vs ITO 74 Taxmann.com 99 (MUM). Can one plead that wherever the legislature wanted to cover rights in land and building, they have covered specifically. For e.g.:- Immovable property is defined to include 'Interest in Land'.

Further, as mentioned above in sec 45(5A) word is 'whole or part' certificate of completion is received. If part completion certificate is received, whether proportionate capital gain ought to be taxed?

9. CAPITAL GAINS: Rule 11U (SS)

Applicability of Rule 11 UA to Foreign Companies

Indian Company 1 is transferring 500 equity shares of Indian Company 2 to a Foreign Company. Thus, Indian Company 1 is the transferor company and Foreign Company is the transferee company. This transaction has taken place at INR 500 per share. However, the value of Indian Company 2 as per Rule 11UA comes to INR 700 per share. According to section 56(2)(x), the transferee company would be liable to pay tax on the difference between the FMV as per Rule 11UA and the actual transaction price. In this case, since the transferee company is Foreign Company, would the Foreign Company be liable to pay tax under section 56(2)(x)?

A similar issue arises in case where the NRI transfers Shares of an unlisted Company held long term to the Indian company. Would the NRI be liable to pay tax under section 50CA in such a case?

10. TAXATION OF JOINT VENTURES AS AOP (SS)

Mr. A Owner of Agriculture land, held as capital asset, entered into Joint Venture Agreement with X for development of said land.The Joint Venture Agreement (JV) was registered with Registrar of Assurances.

The terms of joint Ventures were as under

(a) No amount to be credited to the capital account of `A' for the land

(b) Profit to be shared as under:

  (i) A to get 20% of the gross receipt of sale of constructed units

  (ii) The balance Profit to be shared between A and X in the ratio of 1:99

While assessing the income, the AO, (i) treated this JV as an AOP and taxed its income at MMR, (ii) considered 20% of gross receipt as cost of land of the AOP for determining the net profit of AOP. This project is eligible for deduction u/s 80IB(10), the profit determined by the AO is Nil and other income is Rs.1,00,000/-

What is the position in the hands of A:

i) For taxability of Capital Gain on introduction of land in the Joint Venturewhich is at a Nil Value.

ii) For taxability of realization of 20% of the gross sales proceeds being part of his share of profit from the Joint Venture considering the eligibility of deduction U/s 80 IB (10) for the entire Project; and in which year will it be taxable if the sale of units are in different years.

Further, Whether the AO can treat the transfer of Land in Joint Venture as conversion of Capital Asset to stock in trade and bring it to tax the 20% of sale proceeds of constructed units of the project?

11. **LIMITED SCRUNTIY ASSESSMENTS (RVE)**

Assessee had filed return of income for assessment year 2015-16 within due date. The case was selected for scrutiny under CASS and notice u/s 143(2) was served upon the assessee stating title as "Limited Scrutiny" and the sole point was regarding verification of "Interest expenses".

Subsequently, the AO issue notice u/s 142(1) and asks for details like submission of Balance Sheet, Computation of total income, audit report, nature of business and Interest expenses relatable to exempt income. The AO called for details of various expenses debited to Profit & Loss Account by entering the same on the Order Sheet. He made additions by disallowing certain expenses and also taxed certain loans acquired by invoking section 41(1).

Has A.O. acted in accordance with law?

By calling for details of other expenses debited to Profit & Loss Account and asking for details of loans taken, has the AO violated the guidelines provided by CBDT instruction no. 5/2017 dated 7th July 2017?

Can Assessee file writ petition when the AO called for details of expenses and loans acquired vide notings in the order sheet?

Can the department draw parallel from section 292BB and contend that the assessee has waived his right by participating in assessment proceedings without raising any objection?

12. REASSESSMENT (RVE)

Notice u/s 148 dated 28th March 2017 for the A.Y. 2010-11 was issued in the name of Deceased, and received by the Legal heir of the Assessee.Legal heir informed the Assessing Officer about the death of the assessee along with death certificate on 6th April 2017. Assessing Officer did not issue fresh notice u/s 148 in the name ofLegalheir. The Legal heir did not file the return in response to notice u/s 148. Assessing Officer issued notice u/s 142(1) in the name of the Legal heir, calling certain information. Assessing Officer completed Assessment on Legal heir, u/s 144 r.w.s148 of the Act.

Is the notice u/s 148 and the Re-assessment proceeding valid?

Alternatively, what if the A.O. had issued fresh notice u/s 148 in the month of May 2017 in the name of Legal heir's representing the deceased assessee?

1. **CAPITAL GAINS – VALUATION** **(SS)**

For the A.Y. 2015-16, Assessing Officer issued show cause notice to theAssesseefor taxing Capital Gain on transfer of Land. And also referred the case for valuation as on 01/04/1981 to Valuation Officer.

Assesseerequested A.O. to give an opportunity of hearing in case the value adopted in the valuation report is lower than the value considered in the return of Income.Assessing Officer did not grant opportunity after receipt of Valuation Officer's report and completed Assessment u/s 143(3) r.w.s.144 withlower Valuation as on 01/04/1981.

a. Isthe AssessmentValid? If No, what is the remedy available to the Assessee?

b. Alternatively , the A.O. completed the Assessment without the receipt of the D.V.O. report before the last date of limitation Period with a remark that the assessment order be rectified, upon receipt of the DVO report and the assessment was completed by adopting indexed value as on 01/04/1981.
   i. Is such an order/remark valid in law?
   ii. What are the remedies available to the Assessee against such an order or the A.O. as the case may be?

13. **SECTION 263** **(SS)**

Explanation 2 to Sec 263 introduced by the Finance Act 2015 has widened the scope of 263. Is this amendment retrospective? Can it be applied to cases which have already been subjected to an order u/s 263 and the same is under challenge in an appeal?

The amended provisions of said explanation whether will apply to assessment order passed on or after 01.06.2015 or does it apply to any order that is being revised by the CIT on or after 01.06.2015?

14. PENNY STOCK ASSESSMENT (RVE)

Mr. Punni an Individual had purchased the 1000 shares of SRK Ind. Pvt. Ltd. belonging to a Shareholder, Mr. Dhunni @ Rs. 200/- per share in March 2011. Mr. Dhunni had provided the Debit Note for the sale of Shares. The Payment for the Purchase of Shares was made immediately by way of RTGS and the shares were duly Transferred by signing the Transfer deed in the month of April 2011.

SRK Ind. Pvt. Ltd. declared a Bonus of 5: 1 in the month of June 2012. As a result Mr. Punni shareholding increased to 6000 Shares of SRK Ind. Pvt. Ltd.

Thereafter in the month of January 2013 the Company applied for the scheme of merger with one Public Limited Company M/s. Appreciation Ltd. The Share Price of this Co at the time of merger was Rs. 5/- per Share and the Share holder of SRK Ind. Pvt. Limited would get 10 Shares of Appreciation Limited for every one Share held of SRKInd.Pvt. Ltd. The Merger was approved by the High Court of Bombay and as aresult Mr. Punni recd. 60,000 Shares of M/s Appreciation Ltd. in Physical form.

Mr. Punniopened a Separate DematA/C and applied for the Dematerialzaiton of these physical Shares and he sold some shares upon the Credit of same in the Demat Account.

In the meantime, the Share Price of the Appreciation Ltd. appreciated to Rs. 350/- and Mr. Punni sold 25000 shares on 4 different dates in F.Y. 2014-15 @ Avg. price of Rs. 330/- thru a Broker on Bombay Stock Exchange and Claimed the LTCG on the sale of Shares of M/s Appreciation Ltd. as exempt u/s 10(38).

The Payment of the same was credited to his Account.

The A.O. while completing the Assessment has treated the same as Penny Stock, based on the Report of the Investigation Wing, Kolkata, which has not been furnished to the Assessee despite a specific request, but the A.O. has made a mention that the directors of the Appreciation Ltd. have deposed to the Investigation wing, alongwith few of the brokers who operated on the said

shares have stated that the Company is in business of accommodation entries and they have made the transaction on the Instructions of the Directors of the Company as well as the modus Operandi which has been narrated by the SIT formed to unearth the Black Money.

Statement of the Assessee was recorded and the A.O has stated that his answers are Vague without referring to any answers which he could state it to be vague.

Thereby the A.O. has treated the transaction as 'Penny stock' and treated it as Income U/s 68 of the I.T.Act.

a. Is the Assessment made without providing him with Reports of the Investigation Wing of Kolkatta and Report of SIT valid in law?

b. Whether the Addition made by the A.O. is tenable in Law as he made all the details made available to A.O and all the Payments and Receipts are made through the Banking Channels, and shares have been credited and debited in the Demat Account?

c. Can the A.O. make an assessment by invoking the 'Human Probabilities' theory?

15. REASSESSMENT: BOGUS PURCHASES (RVE)

M/s. ABC is a partnership firm carrying its business as traders in Iron and Steel since past 2 decades. On 31st March 2016, they received notice u/s 148 of the Income tax Act, 1961 ("the Act") thereby re-opening assessment for Assessment Year 2011-12. On filing return u/s 148 of the Act, M/s ABC asked for reasons for re-opening the assessment. The reasons from the AO came with standard caption that

"Information was received from Director General of Income Tax (Inv.), Mumbai bearing letter no. XX/2013-14 dated 26/12/2013 regarding Sales tax department's action on hawala operators in issuing bogus bills. The above assessee is one of the beneficiaries who have obtained bogus bills from M/s. XYZ (a proprietary concern) amounting to Rs. 12,52,117/-."

M/s. ABC files a detailed note on modus operandi of its business alongwith purchase bills, bank statements, copy of stock register and corresponding sales invoice.

The AO disallowed the purchases made by M/s. ABC from M/s XYZ on the grounds like transport receipt for goods inward and outward not produced; there is information received from DGIT Mumbai where Sales tax department had taken action against Hawala dealers and that the assessee has transacted

with such party; failure of the Assessee to produce the alleged party before the AO; and that payment of cheque is not conclusive proof.

The AO has made additions of entire amount u/s 69C.

Is such Re-assessment tenable in Law?

What would be the position if 12.5% is disallowed instead of entire purchases?

Whether G.P percentage offered in the return of Income should have been reduced from 12.5% margin?

Whether it is relevant that the VAT rate applicable to these products was only 3%?

17. **80P – CREDIT CO-OP SOCIETY** **(SS)**

A credit co-operative society which is generally engaged in providing credit facilities to its members, but it also extends credit facilities to non-members.

a. Can deduction u/s 80P(2)(a)(i) be claimed on profits arising from extending credit facilities to members as well as non-members?
b. Can the society be denied deduction u/s 80P(2)(a)(i) for extending credit facilities to non-members? Is there a complete bar on extending facilities to non-members or is there some kind of limit on the quantum of credit facilities extended to members vis-à-vis non-members? [Reference is made to the judgment of the Hon'ble Supreme Court in case of Citizen Co-operative Society Ltd. vs. ACIT [[2017] 84 taxmann.com 114 (SC)]. Further, section 80P(2)(c) itself envisages a case where a co-operative society covered by 80P(2)(a) can be engaged in activities other than those specified in the latter section either independently or in addition.
c. If one cannot claim deduction u/s 80P(2)(a)(i) in respect of income arising from extending credit facilities to non-members, can one claim deduction u/s 80P(2)(c) on the income earned from extending credit facilities to non-members?

18. 80P: CO-OPERATIVE HOUSING SOCIETY **(SS)**

A Co-operative Society can claim deduction in respect of interest or dividend derived from its investment with any other co-operative society as per section 80P(2)(d).

a. Does interest earned on investment in co-operative bank be claimed as deduction, considering the provisions of section 80P(4)?

Is it necessary for the interest income or dividend income must be an income arising from its main activity i.e. profit or gains of business or it can be interest arising from investment of surplus funds also? [Reference is made to the judgment in case of PCIT vs. Totgars Co-operative Sale Society [(2017) 395 ITR 611 (Kar). Also if we compare the wording of section 80P(2)(a)/ (b) or (c) vs. 80P(2)(d), the earlier clauses specifically uses the term profits and gains of business which words are not there in the latter clause.

19. **SURVEY ACTION** **(RVE)**

During survey action, declarations are taken against excess stock physically found and against investment found during survey which were either not recorded or were not fully disclosed in books of account. In such case, can A.O apply special rate u/s 115BBE? If yes what precaution should be taken at the time of declaration so that provisions of section 115BBE are not applicable.

20. **PENALTY U/S 270A** **(RVE)**

For new regime of Penalty u/s 270A, whether the old principles as laid down by Judiciary in connection with concealment or furnishing of inaccurate particulars shall be made applicable? Doubts arise as it is purported to be a new concept of Penalty but the memorandum in the Finance Bill said that it is for more clarity and to bring objectivity.

21. PROSECUTION **(SS)**

AO has made an assessment, making addition on account of cash credit as undisclosed income. Appeal is pending before CIT (A). A penalty order u/s 271(1) (c) has not yet been passed. AO has initiated prosecution. Whether the same is valid?

Mr A has not disclosed the capital gains in AY 2009-10. There was no assessment for that year and the same is time barred. As such there cannot be assessment for that year and no penalty u/s 271(1)(c) of the Act can be levied. Whether in such a case prosecution can be made? Or is it if no assessment can be made and no penalty is levied, there cannot be prosecution?

Is Prosecution therefore to be preceded by a penalty for concealment of income?