RECENT DECISIONS – DIRECT TAXES

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SECTION 14A

SOUTH INDIAN BANK LTD. VS. CIT (SC)

- Batch of cases involved Scheduled Banks which earned interest from securities and bonds as well as tax-free dividends.
- Separate accounts were not maintained for the investments made in bonds, securities and shares for enabling disallowances to be limited to actual expenditures.
- Same situation for overheads and other administrative expenses.
- AO made proportionate disallowance of interest attributable to the funds invested to earn tax-free income.
- Appellants had earned substantial tax-free income by way of interest from tax-free bonds and dividend and substantial expenditure is incurred for earning tax-free income.

SOUTH INDIAN BANK LTD. VS. CIT (SC)

- AO had worked out the proportionate disallowance by referring to the average cost of deposit for the relevant year which was confirmed by the CIT (Appeals).
- The ITAT had held that -
  - Bank has indivisible business and investments in tax-free bonds/ shares are in the nature of stock-in-trade.
  - Investments not made out of interest or cost bearing funds alone.
  - Disallowance under S. 14A is not warranted.
- The High Court reversed the decision of the ITAT and the matter was taken up to the Supreme Court.

SOUTH INDIAN BANK LTD. VS. CIT (SC)

- *Whether proportionate disallowance of interest paid by banks is called for under Section 14A for investments made in tax free bonds/ securities which yield tax-free dividend and interest to assessee banks when assessee had sufficient interest-free own funds which were more than the investments made?*
- Contentions of the Assessee
  - Since investments in bonds and shares should be considered to have been made out of interest-free funds which were substantially more than the investment made, the interest paid on deposits cannot be considered as expenditure incurred in relation to tax-free income.
  - As a corollary, no disallowance under Section 14A is warranted.
- Contentions of the Revenue
  - Reasoning of CIT (Appeals) and High Court is correct and disallowance is warranted.

SOUTH INDIAN BANK LTD. VS. CIT (SC)

- Supreme Court held that where mixed funds have been used to make payments, it is the assessee who has such right of appropriation and also the right to assert from what part of the fund a particular investment is made and it may not be permissible for the Revenue to make an estimation of a proportionate figure. The Supreme Court held that Section 14A disallowance was not warranted and referred to
  - Bombay High Court decision in ***CIT Vs. Bombay Dyeing*** wherein it was held that disallowance under Section 80M was not warranted when the interest-free funds available were sufficient to meet the investments.
  - Supreme Court decision in the case of ***CIT Vs. Reliance Industries Ltd. (2019) 410 ITR 466*** wherein it was held that if interest free funds were available and sufficient to meet investments, it will be presumed that investments were made from such interest-free funds.
  - ***Maxopp Investment Ltd. Vs. CIT (2018) 402 ITR 640***
  - ***Godrej and Boyce Manufacturing Company Vs. CIT (2017) 394 ITR 449***

SOUTH INDIAN BANK LTD. VS. CIT (SC)

- Revenue contented that Supreme Court in ***SA Builders vs. CIT (2007) 288 ITR 1*** had ruled in the context of issue of disallowance in relation to funds lent to sister concern out of mixed funds and the question is pending before the Larger Bench.
- Supreme Court observed that while comments are not appropriate when the issue is pending before the Larger Bench, the facts in ***SA Builders*** was different.
- In that case, loans had been lent to sister concerns while in these cases, banks have invested in bonds and securities. The factual scenario is different and distinguishable and the pendency before the Larger Bench has no bearing.

SOUTH INDIAN BANK LTD. VS. CIT (SC)

- Revenue has failed to substantiate their argument that separate accounts have to be maintained. The reliance upon the decision in ***Honda Siel Power Products Ltd. Vs. DCIT (2012) 340 ITR 64*** does not indicate any such obligation. The said case dealt with reopening where full disclosure was not made.
- **There is no statutory provision which obligates the assessee to maintain separate accounts for different types of funds held by it.**
- *It needs to be observed that in taxation regime, there is no room for presumption and nothing can be taken to be implied. The tax an individual or a corporate is required to pay, is a matter or planning for a tax payer and the Government should endeavour to keep it convenient and simple to achieve maximization of compliance. Just as the Government does not wish for avoidance of tax equally it is the responsibility of the regime to design a tax system for which a subject can budget and plan, it proper balance is achieved between these, unnecessary litigation can be avoided without compromising on generation of revenue.*

SECTION 14A – OTHER ASPECTS

- **Partner's share of profits**.
  - Can it be said that profits are exempt in the hands of the partner by applying the decision in ***Godrej?***
  - Profits are not taxed based on the principles of double taxation and a firm has no separate existence from partners.
- **Dividend**
  - Finance Act, 2020 has abolished DDT and withdrawn the exemptions in respect of dividends making 14A irrelevant.
  - The decision is relevant for the past period as the assessee can contend that investments have been made out of own funds.
  - It may also be possible to apply the principle of beneficial allocation of interest against dividend income when investments have been made out of mixed funds.

RE-ASSESSMENT

ASHOK KUMAR AGARWAL VS. UOI 2021-TIOL-1964-HC- ALL-IT

- Writ Petitions filed challenging the validity of reassessment proceedings initiated upon notices issued after 01.04.2021.
- Validity of explanation appended to clause (A) (a) of CBDT Notification No. 20/2021 dated 31.03.2021 and Explanation to clause (A)(b) of CBDT Notification No. 38/2021 dated 27.04.2021 was also questioned.

ASHOK KUMAR AGARWAL VS. UOI 2021-TIOL-1964-HC- ALL-IT

- Contentions of Writ Petitioners
  - Once FA 2021 was enforced, pre-existing Section 148-151 stood repealed and replaced by the new provisions.
  - Substitution of the old provision obliterated from the statue book pre-existing provisions pertaining to re-assessment.
  - **Unamended provision became dead and unenforceable by operation of law**.
  - Since enabling Act sought to enlarge limitation only with respect to pre-existing provisions, it did not resurrect the pre-existing provisions that were already dead.
  - Procedural amendments cannot recreate a non-existing substantive law.
  - Reliance was placed on decision of the Supreme Court in ***Indian Tobacco Association (2005) 187 ELT 162; Gottumukkala Venkata Krishnam Raju Vs. Union of India AIR 2018 SC 4197.***

ASHOK KUMAR AGARWAL VS. UOI 2021-TIOL-1964-HC- ALL-IT

- Enabling Act was only for the purpose of extending limitation under pre-existing provisions as they stood prior to FA 2021 amendment and FA 2021 does not contain any saving clause as may allow an extended life for the pre-existing provisions. Reliance was placed upon the decisions of the Supreme Court in ***Kolhapur Cane Sugar Works Vs. UOI AIR 2000 SC 811***.
- Enabling Act could not have saved pre-existing 147, etc. since on the date of enactment of the Enabling Act, FA 2021 was not born.
- To validate the notification would be legislative overreach by delegated authority.
- Delegation authorised being only for the purpose of enlarging limitation under a valid law could not exercised to resurrect a provision that stood omitted by statute from 01.04.2021.

ASHOK KUMAR AGARWAL VS. UOI 2021-TIOL-1964-HC- ALL-IT

- Chhattisgarh High Court in the case of ***Palak Khatuja Vs. UOI (2021-TIOL-1799-HC-Chattisgarh*)** has not laid down the correct law.
- Parliament was aware of existing statutory laws as well as the Ordinance as well as the enabling Act and still chose to bring in a new scheme without a saving clause. Reliance was placed on ***Syndicate Bank Vs. Prabha D. Naik (AIR 2001 SC 1968)***.
- Enabling Act and FA 2021 operate in different time spaces and there is no conflict or repugnancy.

ASHOK KUMAR AGARWAL VS. UOI 2021-TIOL-1964-HC- ALL-IT

- Contentions of the Revenue
  - The extensions were granted by way of legislative acceptance of the hard realities obtaining from the spread of COVID-19 which had prevented authorities from discharging their statutory obligations.
  - Presumption exists in favour of constitutionality of law and law cannot be struck down on the ground that it is arbitrary or unreasonable. Reliance was placed on ***UOI Vs. Exide Industries (2020) 425 ITR 1.***
  - No ground has been raised to test the validity of the law.
  - Non-obstante provision in enabling Act overrides any period of limitation or disability.
  - Even if there is an ambiguity, mischief rule should be applied and the mischief was the difficult circumstances arising out of COVID-19 which was sought to be remedied through the Enabling Act.
  - Limitation has been extended much prior to the introduction of FA 2021 and only the final push was given by the notification dated 27.04.2021
  - Reliance placed upon ***Ramesh Kymal Vs. Seimens Gamesa Renewable Power Pvt. Ltd. (2021) 3 SCC 224***

ASHOK KUMAR AGARWAL VS. UOI 2021-TIOL-1964-HC- ALL-IT

- The Allahabad High Court allowed all the Writ Petitions and declared that the Ordinance, Enabling Act, Section 2 to 88 of the FA 2021 are enforced w.e.f. 01.04.2021, are not conflicted.
- The Explanation and the impugned notifications must be read as applicable to reassessment proceedings as may have been in existence on 31.03.2021 i.e., before substitution of Section 147, 148, 148A, 149, 151 and 151A.
- **Reassessment notices in all the Writ Petitions are quashed.**
- Open to the assessing authorities to initiate reassessment as per the provisions of the Act as amended by FA 2021.

ASHOK KUMAR AGARWAL VS. UOI 2021-TIOL-1964-HC- ALL-IT

- Reasoning given in the judgment
  - Act of legislative substitution is a composite act. Once a new provision has been put in place of a pre-existing provision, the earlier provision cannot survive except for things done or already undertaken to be done or things expressly saved to be done. In the absence of any express saving clause and since no reassessment proceedings had been initiated prior to the Act of legislative substitution, the second aspect does not require any further examination.
  - From 01.04.2021, by virtue of the plain unexcepted effect of Section 1(2)(a) of FA 2021, Section 147, 148, 149, 151 as they existed up to 31.03.2021 stood substituted along with the new provision without any saving clause.

ASHOK KUMAR AGARWAL VS. UOI 2021-TIOL-1964-HC- ALL-IT

- Enabling Act which was pre-existing had been enforced prior to Finance Act, 2021.
- In the enabling Act and FA 2021, there is absence, both of any express provision in itself or to delegate the function to save the applicability of the provisions of Section 147, 148, 149 or 151 as they existed up to 31.03.2021.
- Enabling Act only protected certain proceedings that may have become time-barred on 20.03.2021 up to 30.06.2021.
- Allowing the delegatee to indefinitely extend such limitation would be to allow the validity of an enacted law i.e., FA 2021 to be defeated by a purely colourable exercise of power by the delegate of the Parliament.
- Mischief Rule has no application when plain legislative action exists.

ASHOK KUMAR AGARWAL VS. UOI 2021-TIOL-1964-HC- ALL-IT

- Insofar as the Supreme Court decision in ***Ramesh Kymal*** is concerned, the same is distinguishable because the earlier provisions were not substituted. Further, the Parliamentary intervention provided for delegated power to exercise relaxation through 10A.
- The High Court did not agree with the view of the Chhattisgarh High Court on the ground that a delegated legislation cannot overreach any Act of the principal legislature.
- Practicality of life de hors statutory provisions may never be a good guiding principle to interpret any taxation law.

KEY TAKE AWAYS

- **Parliament aware of existing law.**
  - It is difficult to accept the argument that RERA is a special enactment which deals with real estate development project and must therefore be given precedence over the IBC which is only a general enactment. At the time of introduction of the explanation to Section 5(8)(f) of the IBC, Parliament was aware of RERA and applied some of the definition provisions to the Code. - ***Pioneer Urban Land and Infrastructure Ltd. Vs. Uol (2019) 108 taxmann.com 147 (SC)***

KEY TAKEAWAYS

- **Absence of a Savings Clause**
  - The position is well known that at common law, the normal effect of repealing a statute or deleting a provision is to obliterate it from the statute book as completely as if it had never been passed, and the statute must be considered as a law that never existed. To this rule, an exception is engrafted by the provisions of Section 6(1). If a provision of a statute is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop where the omission finds them, and if final relief has not been granted before the omission goes into effect, it cannot be granted afterwards. Savings of the nature contained in Section 6 or in special Acts may modify the position. Thus the operation of repeal or deletion as to the future and the past largely depends on the savings applicable. In a case where a particular provision in a statute is omitted and in its place another provision dealing with the same contingency is introduced without a saving clause in favour of pending proceedings then it can be reasonably inferred that the intention of the legislature is that the pending proceeding shall not continue but a fresh proceeding for the same purpose may be initiated under the new provision - ***Kolhapur Cane Sugar Works (SC)***

SECTION 50C and 54EC

POONAM HARESH BUDHRANI Vs. CIT (A) – TS-988-ITAT-2021 (Mum.)

- Issues before Tribunal
  - Whether adoption of stamp duty value as per Section 50C was correct?
  - Whether rejection of exemption claim under Section 54EC was correct?

POONAM HARESH BUDHRANI Vs. CIT (A)

- Section 50C
  - Assessee sold a residential property for a consideration of Rs. 58.5 lakhs.
  - Market value as per stamp duty authority was Rs.61.16 lakhs.
  - Assessee adopted actual sale consideration.
  - Show Cause Notice referring to Section 50C and assessment completed by adopting the stamp duty value.
  - During first appeal, it was contended that the difference was only 4.55% of the sale consideration and Reliance was placed on decision of the Jaipur Bench of the ITAT which had ruled that if difference is less than 10% then actual consideration can be adopted.

POONAM HARESH BUDHRANI Vs. CIT (A)

- Mumbai Bench of the ITAT held that
  - Difference in consideration adopted by the stamp valuation authority and the assessee is less than 5%; there is an amendment which has been brought in Section 50C od the Act by way of third proviso w.e.f. 01.04.2019 wherein tolerance band of 10% has been specified.
  - Amendment in third proviso has been held to be retrospective in operation by the Co-ordinate Bench of Mumbai Tribunal in the case of ***Maria Fernandes Cheryl Vs. ITO 123 taxmann.com 252*** which held that the said proviso even though not stated to be prospective must be construed as curative in nature and hence to be given retrospective effect.
  - The Tribunal directed the ld. AO to consider only Rs. 58.5 lakhs as consideration.

POONAM HARESH BUDHRANI Vs. CIT (A)

- **Section 54Ec**
  - The assessee intended to invest in NHAI capital gain bonds for Rs. 50 lakhs and claim exemption under Section 54EC.
  - A cheque dated 25.04.2013 for Rs. 50 lakhs was handed over to the sub-broker who in turn handed over the documents over along with the cheque dated 24.03.2013 to M/s. Karvy Stock Broking Ltd., who had acknowledged the receipt of application together with the cheque by way of affixing its stamp in the application form for investment in NHAI Bonds.
  - M/s. Karvy Stock Broking had retained the cheque with it and had handed over the same to NHAI to 06.11.2013 and the cheque for Rs. 50 lakhs was ultimately encashed on 07.11.2013.
  - Investment was considered to have been made beyond the period of 6 months.
  - Revenue stated that the last date for making the investment in NHAI capital gains had expired on 25.11.2013 and since the investment was made on 07.11.2013 (being the date of encashment of the cheque), the assessee was not eligible for exemption under Section 54EC of the Act.

POONAM HARESH BUDHRANI Vs. CIT (A)

- ITAT held that
  - Assessee cannot be penalized for the delay caused by M/s. Karvy Stock Broking Ltd. to hand over the cheque to NHAI, which in any case, is not in the control of the assessee.
  - The assessee had duly invested in NHAI bonds within a period of 6 months from the date of sale.
  - Assessee had pre-closed his Fixed Deposits held in Corporation Bank and Abhyudaya Bank on 11.10.2013 itself which clearly proves the intention of the assessee to make the investment in NHAI bonds well before the due date prescribed in the statute.
  - Primary fact of date of handing over the cheque together with the application form is duly supported by an affidavit filed by the sub-broker who had categorically affirmed that he had collected the application form together with the cheque from the assessee on 24.10.2013 and had indeed handed over the same to the authorized agent on 24.10.2013 itself.

POONAM HARESH BUDHRANI Vs. CIT (A)

- ITAT held that
  - The law is very well settled that in the event of an affidavit not tested by the Department in the manner known to law, then the contents of the said affidavit is to be construed as true and correct - Reliance placed on ***Mehta Parikh & Co. Vs. CIT 30 ITR 181 (SC)***
  - The assessee is entitled for claim of exemption under Section 54EC of the Act in respect of investment made by her in NHAI capital gain bonds within a period of six months from the date of transfer.

KEY TAKE AWAYS

- Role of an affidavit
  - Affidavit filed cannot be rejected outright without cross examination - ***Mehta Parikh & Co. Vs. CIT 30 ITR 181 (SC)***
  - Affidavit on fact should ordinarily be countered by another affidavit if one were to challenge the facts – ***Hemesh Family Trust Vs. CIT (2007) 295 ITR 514 (Guj.)***
  - Where an alleged borrower had denied such borrowal but later retracted the statement with evidence suggesting that the advance was made by the assessee, the AO is not justified in going by the first statement contradicted by an Affidavit with deponent who had died subsequently. Re-assessment not valid. ***Indian Express Newspapers (Bombay) Pvt. Ltd. Vs. UoI (2008) 300 ITR 351 (Bom.)***
  - When Affidavit is filed stating that no hearing notice was served, burden is on the Revenue to prove service. ***CIT Vs. Silver Streak Trading Pvt. Ltd. (2010) 326 ITR 418 (Del.)***

KEY TAKE AWAYS

- **Curative amendments can have retrospective effect.**
  - ITAT applied the decision in ***Maria Fernandes*** which had relied upon ***Rajivkumar Agarwal Vs. ACIT (2014) 45 taxmann.com 555*** pertaining to insertion of proviso to Section 40(a)(i) and ***CIT Vs. Ansal Landmark Township (P) Ltd. (2015) 61 taxmann.com 45*** pertaining to second proviso to Section 40(a)(i)(a)
  - In the context of Section 43B, the Supreme Court held that the nature and object of a proviso should be taken into account while deciding the question of whether the proviso was prospective or retrospective. Where a proviso was designed to eliminate unintended and prejudicial consequences which would cause hardship to a party, such a proviso should be seen to be remedial and one that mitigated the prejudice caused from inception - ***Allied Motors (P) Ltd.*** **v.** ***Commissioner of Income Tax*** **[1997 (3) SCC 472]**

SECTION 68 – SHARE APPLICATION MONEY

DCIT VS. LEENA POWER TECH ENGINEERS PVT. LTD. – ITAT 1313/MUM/20-DT.21.09.2021

- Assessment was reopened and the assessee was asked to "prove identity, capacity and genuineness (of its share application money) even if confirmations are filed and the persons are assessed to tax".
- Notice was issued to Rohini Vyapar Pvt. Ltd. under Section 133(6).
- Amounts received from RVPL was proposed to be taxed under Section 68.

DCIT VS. LEENA POWER TECH ENGINEERS PVT. LTD. – ITAT 1313/MUM/20-DT.21.09.2021

- Contention of assessee during assessment
  - Questionnaire was issued in 2013 seeking details of the share premium received, subscriber information, etc. and all data was provided.
  - The subscribers had also given reply to the notices issued under Section 133(6) along with all other details.
  - Assessment order did not contain any discussions on share application money.
  - Reasons for reopening is said to be based on information from credible sources about large value cash being deposited in ICICI bank account followed by immediate transfer through other bank and details were provided by the assessing officer.

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- No failure to disclose fully and truly all material fact
- Reopening is time barred.
- Share application money received through banking channels
- Reliance placed on Delhi High Court decision in the case of ***Sabh Infrastructure*** in the context of detailed guidelines for reopening of assessment.

- The Assessing Officer confirmed the addition by relying upon various decisions and treated the entire share capital subscription as unexplained credit under Section 68.
- On appeal, the CIT (A) allowed the appeal.

DCIT VS. LEENA POWER TECH ENGINEERS PVT. LTD. – ITAT 1313/MUM/20-DT.21.09.2021

- Reasons given by CIT(A).
  - Documentary evidence had been furnished for identify of share subscriber.
  - Assessment under Section 143(3) had been completed for the subscriber and there is no disallowance on account of equity share capital. Balance sheet shows that the subscribing companies had sufficient funds.
  - These companies had capacity to lend funds to the appellant.
  - Financial statements available in public domain.
  - Application money received through banking channel.
  - No evidence to demonstrate that transaction was accommodation entry.

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- Reasons given by CIT(A).
  - No nexus is established that funds have been circulated or cash was paid by appellant to the subscribing company to obtain cheques for share application money.
  - Share application money actually received and shares allotted.
  - Appellant had discharged primary owners to prove the identify and credentials of the subscribing companies and the genuineness of the share application money.
  - AO has not carried out any investigation or enquiry to verify the facts or information given by the investigation wing.
  - Connection between the investigation report and the appellant not established.

DCIT VS. LEENA POWER TECH ENGINEERS PVT. LTD. – ITAT 1313/MUM/20-DT.21.09.2021

- Reasons given by CIT(A).
  - AO has observed in the order that the nexus between cash deposit and appellant company is not possible due to limited resources and time barring scrutiny.
  - None of the subscribing companies or the other entities who had invested in these companies have deposited cash.
  - Decisions of Supreme Court in ***Lovely Exports; Bombay High Court in Paradise Inland Shipping; Orchid Industries; Creative World Tele Films*** relied upon to delete the addition.
  - Reopening cannot be based on change of opinion.

DCIT VS. LEENA POWER TECH ENGINEERS PVT. LTD. – ITAT 1313/MUM/20-DT.21.09.2021

- ITAT decision
  - Burden is on the assessee to prove the nature and source thereof to the satisfaction of the AO.
  - There must be three ingredients namely proof regarding identify; credit worthiness; and genuineness of the transaction as a whole. Reference made to decisions of the Delhi High Court in ***CIT Vs. Youth Construction Pvt. Ltd. (2013) 367 ITR 197***; Calcutta High Court in the case of ***CIT Vs. Union Commercial and Industrial Co. Pvt. Ltd. (1991) 187 ITR 596*** and ***CIT Vs. Precision Finance Pvt. Ltd. (1994) 208 ITR 465.***
  - Genuineness of the transaction as a whole is a very important and critical factor.

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- ITAT decision
  - Science has not invented any instrument to test the reliability of the evidence placed before a Court or Tribunal. Courts or Tribunals have to judge the evidence before them by applying the test of human probabilities – ***CIT Vs. Durga Prasad More (1971) 82 ITR 540 (SC)***
  - As a final tax finding authority, Tribunal cannot be superficial in its assessment of the genuineness of the transaction.
  - Phenomenon of shell entities being subjected to deep scrutiny by tax and enforcement officials is rather recent and till recently little was known outside the underbelly of the financial world about *modus operandi* of shell entities.

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- ITAT decision
  - Genuineness of transaction cannot be decided on the basis of inferences drawn from judicial precedents in cases where genuineness came up for examination in a very limited perspective and in times when shell entities were virtually non-existent.
  - Gujarat High Court in ***Pawankumar M Sanghvi Vs. ITO (2018) 90 taxmann.com 386 (Guj.)*** had observed that Tribunal had minutely examined the position of lenders, circumstances of the loan and then concluded that the transaction was not genuine.
  - The Supreme Court in ***PCIT Vs. NRA Iron and Steel Pvt. Ltd. (2019) 412 ITR 161 (SC)*** observed that *"The practice of conversion of un-accounted money through the cloak of Share Capital/Premium must be subjected to careful scrutiny. This would be particularly so in the case of private placement of shares, where a higher onus is required to be placed on the assessee since the information is within the personal knowledge of the assessee. The assessee is under a legal obligation to prove the receipt of share capital/premium to the satisfaction of the AO, failure of which, would justify addition of the said amount to the income of the assessee".*

DCIT VS. LEENA POWER TECH ENGINEERS PVT. LTD. – ITAT 1313/MUM/20-DT.21.09.2021

- ITAT decision
  - Legal existence of share applicant not in doubt
  - It is difficult to believe that the Company handling investments in excess of Rs.10 crores and making aggressive investments of buying shares for 3.78 crores at a huge premium in a private company without any management control would operate in a very modest manner. (expenses in the financial statement were found to be negligible)
  - RVPL thus primarily acted as a conduit company raising Rs.10 crores at high premium and siphoning Rs.9.92 crores to other companies and has no independent activities on his own.
  - RVPL does not have any revenues except bank interest (*comments about the directors report about the performance of the company being satisfactory*).
  - No whisper about persons behind RVPL.
  - No management participation in the companies where investments are made.

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- ITAT decision
  - Buying shares at a huge premium without share in management and control is extremely unusual.
  - Huge premium for a shares in a company which has no other activity defies logic and such transaction do not take place in the real life world.
  - Net cashflow is less than 0.4% of the profit + depreciation but the DCF value has taken net cashflow as 1.67 crores which is overstated when compared to actual financial statements.
  - Free cashflow should be arrived by reducing capital expenditure from cashflow operating activities and this exercise has not been carried out in the DCF valuation report.
  - Premium valuation in the report is incorrect and fallacious.
  - Valuation report does not inspire any faith.
  - Explanation for share premium does not meet our approval.

DCIT VS. LEENA POWER TECH ENGINEERS PVT. LTD. – ITAT 1313/MUM/20-DT.21.09.2021

- ITAT decision
  - The other company does not have any income and without business it has invested at a huge premium and also issue shares at a huge premium.
  - Transactions are circular transaction.
  - Transaction is not a bonafide transaction.
  - Argument that Government has not notified the companies as shell companies is irrelevant since the two companies investing in the assessee company fit the description of semblance of genuine business but lack of genuineness in actual operation.
  - Since genuineness in doubt, decision of the Bombay High Court in ***Gagan Deep Infrastructure*** on the prospective effect of the proviso to Section 68 has no application.
  - ***Orchid Industries*** not applicable since analysis of balance sheet shows lack of genuineness.

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- ITAT decision
  - ***Paradise Island*** not applicable as the genuineness of the transaction is an issue before the Tribunal and not a case of the investors not being in existence.
  - Higher onus is on the assessee in the case of ***Private Placement of Shares***.
  - Tribunal has the power to do a through analysis of the material on record.
  - Assessment was reopened based on information from credible sources that RVPL had received funds from other companies through multiple layers of intervening companies have its origin from certain cash deposits in ICICI Bank branches and the assessee company was a beneficiary of such multiple layer routing of monies through complex web of shell companies. **This information is certainly a good basis for reopening the assessment and taking a relook at the whole thing.**

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- ITAT decision
  - Assessing Officer has a detailed investigation report which could only have been prepared by the investigation wing; extracts have been reproduced in the reasons recorded for reopening.
  - At the stage of reopening it is not necessary to prove escapement of income to the hilt – ***ACIT Vs. Rajesh Jhaveri Stockbrokers (2007) 291 ITR 500***.
  - Rule 27 does not permit no ground being raised before us.
  - Order of the CIT(A) is set aside and the order of the AO is restored.
  - Burden is on the assessee to prove the nature and source of credit and assessee cannot state that the onus is on the AO to demonstrate the malafide of the subscription and that the assessee had introduced unaccounted money.
  - Reference is made once again to ***Durgaprasad*** decision.

KEY QUESTIONS

- When the ITAT decision recognizes that there is no dispute on the identity of the subscriber and the assessee and subscriber have led evidence for source, can the ITAT look at valuation?
  - Section 68 deals with unexplained cash credit while Section 56(2)(viib) deals with consideration received for issue of shares that exceeds FMV.
  - Therefore, if source cannot be explained Section 68 should apply but if source is explained then value can be examined under Section 56(2)(viib).
  - When premium is received in excess of face value it would be treated as income from other sources under Section 56(2)(viib) and cannot be controlled by provisions of Section 68 of the Act – ***Sunrise Academy .. Vs. ITO (2018) 409 ITR 109 (Ker.)***

KEY QUESTIONS

- Investigation report
  - Whether there was independent application of mind by the AO?
  - Where impugned proceedings have proceeded on the basis of the reports of the enforcement wing without the assessing officer independently doing the assessment, the proceedings are not valid - ***Chemplast Sanmar Ltd. Vs. AC (Mad.)***
- Rule 27
  - Turning to rule 27 which permits the respondent before the Tribunal to support the order of the Appellate Assistant Commissioner on any of the grounds decided against him, it seems to be clear that this is a right conferred upon him. The Tribunal has no discretion to deprive the respondent of the benefit of this rule. It is an enabling provision which the respondent can avail himself of in order to retain the benefit which has accrued to him from the order appealed against. - ***CIT vs. Sundaram & Co. Pvt. Ltd. (1964) 52 ITR 763 (Mad)***
  - *For supporting the decree passed by the trial court, it is not necessary for a respondent in the appeal, to file a memorandum of cross-objections challenging a particular finding that is rendered by the trial court against him when the ultimate decree itself is in his favour. A memorandum of cross-objections is needed only if the respondent claims any relief which had been negatived to him by the trial court and in addition to what he has already been given by the decree under challenge.* - **S. Nazeer Ahmed v. State Bank of Mysore AIR 2007 SCW 766 .**

KEY QUESTIONS

- Whether reassessment is time-barred?
  - Bombay High Court in the case of ***Rubix Trading Pvt. Ltd. Vs. ITO (2019) 421 ITR 330*** has held that when the assessing officer had asked the assessee to explain why the interest income of certain amount was not offered to tax and the assessee also produced an explanation, it is indisputable that the entire question of taxing assessee's interest income was minutely scrutinized by the assessing officer during original assessment proceedings. In the absence of any new material, the reopening of the assessment would be based on mere change of opinion.
  - Any lack of comprehension on the part of the Assessing officer in understanding the details placed before him cannot confer jurisdiction for reopening the assessment, long after the period of four years had expired. ***Fenner (India) Ltd. Vs. DCIT (2000) 241 ITR 672***
- Is there is a sufficient nexus between the alleged bank accounts and the subscription?
- Are more operations required for an investment company?

JURISDICTIONAL DEFECT IN NOTICE

HIMALAYA DRUG CO. VS. DCIT [TS-992-HC-2021 (KAR)]

- Key question of law
  - Whether notices issued under Section 153C by DCIT Bangalore on 11.05.2009 for AY 2003-2004 to 2008-2009 are without jurisdiction and hence invalid thereby rendering all the subsequent proceedings void ab initio?
- Commissioner Bangalore vide order dated 20.07.2009 issued under Section 127(2) had transferred the case from DCIT Circle 6(1) to DCIT Circle 1(1) w.e.f. 20.07.2009.
- Notice under Section 153C were issued by DCIT Circle 1(1) on 11.05.2009 prior to conferring jurisdiction.
- In the assessment order of the search party it was stated that consequent to search under Section 132, the case was centralized to DCIT 1(1) from ITO Ward 3(2) vide Commissioner's order dated 20.10.2010.

HIMALAYA DRUG CO. VS. DCIT [TS-992-HC-2021 (KAR)]

- The Karnataka High Court held that
  - Notice under Section 153C have been clearly issued prior to transfer of case and jurisdiction.
  - Order passed without jurisdiction is invalid.
  - Supreme Court in the case of ***PCIT Vs. Maruti Suzuki India (2019) 416 ITR 613*** has held that assessment order passed against a non-existent company is a substantive illegality and not a procedural violation of a nature referred to in Section 292B.
  - The Bombay High Court in the ***CIT Vs. Lalitkumar Bardia (2018) 404 ITR 63*** has held that it is assessing officer alone who has to serve notice under Section 158BC. Where such notice was not issued by the AO having jurisdiction, all subsequent proceedings are without authority of law.

HIMALAYA DRUG CO. VS. DCIT [TS-992-HC-2021 (KAR)]

- Notice issued without jurisdiction is not a procedural violation of the nature referred to in Section 292B and 292BB.
- Section 124(3)(c) was inserted by FA, 2016 w.e.f. 01.06.2016 and this provision cannot be treated as declaratory / statutory or curative in nature. ***CIT Vs. Vatika Township Pvt. Ltd. (2014) 367 ITR 466 (SC)*** applied.

KEY TAKE AWAYS

- Notice stage
  - "**sublato fundamento cadit opus**" meaning thereby that if foundation is removed, the structure falls.
  - Lack of jurisdiction
  - Maintainability issues
  - Objection and time limit
  - Jurisdictional defects may not get protection under Section 292B / 292BB.

THANK YOU

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