VAISH ASSOCIATES ADVOCATES
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WEBINAR ON RECENT JUDGMENTS ON DIRECT TAXES

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Addl. CIT

vs.

Shri Jatinder Mehra

(BMA No. 01/Del/2020)

ITAT Delhi

Facts

- Post search proceedings in name of R Group information regarding the assessee trust was received.

- The AO relying on the above information issued notice u/s 10(1) arraying assessee to be the beneficial owner of foreign account where trust money was credited.

- Assessee submitted that the ultimate beneficiary of this trust was his son and grandson and he was only a nominal settlor of trust. Further, when the trust deed was revoked this money was transferred to the said account.

- However, ignoring the above submissions AO passed an assessment order considering the assessee as the beneficial owner of the foreign account and held that the foreign account is a Undisclosed Foreign Asset under section 2(11) of the BMA.

- The assessee preferred an appeal before the CIT(A), who in turn had deleted additions on the ground that the account belonged to a non resident company and not Assessee. The Revenue, however, carried the matter to ITAT on the ground that the assessee is beneficial owner of the account since his name is appearing in the account opening form of bank account.

Assessee's Submissions

The assessee submitted as under:

- His name was mentioned as beneficial owner in account opening form out of gratitude and respect shown by his son;
- Moreover, none of the above document relied bear any of the signature of the Assessee;
- The source of funds in the overseas bank account is on account of transactions with Trust where Assessee was only nominal settler;
- The account in question belongs to Watergate Advisors Ltd, a non resident company incorporated outside India. Moreover the control and management of company is outside India where Assessee's son is the director and sole shareholder of the Co.
- Assessee relied on the Mumbai bench ruling in Kamal Galani wherein the issue is on similar facts and decided in favour of Assessee.
- Assessee Relied on the SC ruling in Estate of HMM Vikramsinhji of Gondal [CA no. 2312 of 2007] and submitted that taxation in the hands of beneficial owner would arise either on account of contribution of assets/funds or on receipt of any distribution or benefit from such trust.
- Further stated that the issue of retroactive application of the BMA was pending before the SC, and hence the money deposited in the overseas bank account in FY 2011-12/ 2012-13 could not be brought to tax.

Revenue's Argument

- From the information received, Assessee is a beneficial owner of the Account in question as reflected in the account opening form.

- In terms of section 2(11) of BMA, the credit in account should be considered as Undisclosed Foreign Income and Assets under the Black Money Act 2015.

- If the Assessee was merely nominal settler of the trust then his name would not have been shown as beneficial owner for the overseas bank account.

- If the intention was to confer all the benefits to Son, the name of the beneficial owner in the bank account should have been of son and not of Assessee.

Findings of ITAT

- ITAT while referring to the definition of "*undisclosed asset located outside India"* under section 2(11) of the BMA observed that in the stated the facts of the case only first condition viz. the asset is located outside India is satisfied. However, the second condition is not satisfied since the asset is held in the name of Watergate Advisors Ltd and not the Assessee.
- ITAT in order to explain the capacity of beneficial owner, the meaning was discussed at length by placing reliance on various Acts and Dictionaries, since the BMA do not define the meaning of Beneficial owner .

- ITAT held that "it is apparent that assessee does not own any share capital in case of Watergate advisors Limited as well as it also does not controls the above company as he does not have any shareholding or management rights in that company"

- ITAT held that mere mention of name in the account opening form of an overseas bank account does not establish beneficial ownership; and rejected the appeal of revenue.

Findings of CIT(A) confirmed by ITAT

- It is not disputed that account belonged to and was owned by Watergate advisors Ltd i.e. a company incorporated outside India.

- The sole shareholder and director of company was Assessee's son a non-resident under IT Act.

- Son is involved in the management and control of the said company. Thus, even if management and control was partly in India and partly outside India, the said company does not qualify as an Indian resident as per provisions of Section 6(3) of the IT Act as applicable for A.Y. 2016 – 17.

- Further the documents submitted [Certificate of incumbency, memorandum of Family Arrangements, confirmation from Business relations, affidavit executed by Shri Rajneesh Mehra] proved that the assessee was not the beneficial owner of the said foreign account**.**

Yashovardhan Birla

vs.

CIT(A)

(BMA. No 01/Mum/2021)

(A.Y. 2016-2017)

ITAT Mumbai

Facts

- Notice under section 10(1) alleging the assessee to be a beneficial owner of various foreign assets [Bank accounts and beneficiary of foreign discretionary trusts] was issued on 22.11.2017.

- At the first instance the assessee challenged the jurisdictional validity of notice issued u/s 10(1) contenting that the proceedings are pre-mature in a way that the assessee has time to file income tax returns for the relevant assessment year till 31.03.2018 by way of an appeal before the CIT(A) . However, the CIT(A) did not dispose of the said appeal.

- In the meantime the AO continued with the BM Assessment proceedings.

- The assessee assailed the inaction of the CIT(A) by way of Writ Petition before the Hon'ble Bombay Court. The Hon'ble Court ordered the CIT(A) to decide on the jurisdictional challenge of the said notice within 4 weeks. However, **no stay was granted on the completion of the assessment proceedings in the meantime**.

- Thereafter the AO passed final assessment order holding the assessee to be the beneficial owner of certain foreign assets and making additions thereof as Undisclosed foreign assets. The CIT(A) who was directed by the Hon'ble Bombay High Court to pass the order w.r.t the Jurisdictional challenge did not adjudicate upon the same, however, proceeded with incorporating the findings of the AO in the appellate order.
- Against the said order passed by the CIT(A) the assessee preferred an appeal before ITAT

Assessee's Submission

- The Assessee made the following submissions:

a. The notice u/s 10 (1) were premature since the time limit for filing the ITR was available;

b. The purported assets were under the disclosure before the ITSC and accordingly there cannot be two simultaneous assessment proceedings qua the same assets;

c. The Assessee was in the earlier years held not liable for wealth-tax in respect of funds lying in the off-shore accounts and also that Assessee is only named beneficiary not the sole beneficiary;

d. The assets to the extent assessed under Income Tax Act has to be reduced from income to be assessed under BMA, if any;

e. The beneficial ownership was acquired by way of inheritance by all the descendants;

f. The income of the offshore discretionary trust was not sourced from India;

g. No income has been affected in favour of beneficiaries and same can't be brought to tax in the hands of the assessee [Refer: Estate of HMM Vikramsinhji of Gondal (CA no. 2312 of 2007)]

Revenue's Argument

- The Revenue contended as under:
  a. Since the assessment orders passed under IT proceedings stand quashed by the High Court there is assessment qua the foreign assets;
  b. On one hand the Assessee is settling the undisclosed foreign assets with ITSC and on the other hand claiming that he is not Beneficial Owner, this in itself is self contradictory;
  c. Since the income [w.r.t foreign assets] has not been taxed under IT Act, there is no immunity under the provisions of section 5(1)(ii) available to the assessee;
  d. The scope and ambit of the scope of proceedings under BMA is much wider and is different that the nature of proceedings under the Wealth Tax Act;
  e. The ITAT order w.r.t to the wealth tax proceedings was not in existence when notice u/s 10(1) was issued; ergo it did not hold any value in the present proceedings.

Final Conclusion

- ITAT Held Black Money proceedings to be jurisdictionally defective observing as under:

a. The CIT(A) instead of deciding the jurisdictional challenge by examining all the original materials produced only relied upon the assessment order passed by the AO in BM assessment proceedings;

b. The order passed by CIT(A) as unsustainable and violative of the principles of natural justice because no opportunity of being heard was afforded to the Assessee;

c. The ITAT order under Wealth Tax Act has not been reversed by the High Court and therefore CIT(A) was wrong to hold that said order was not in existence when the notice u/s 10(1) was issued;

d. The Revenue cannot shift stands under different proceedings that involve same facts;

e. The assets made out of income assessed under income tax shall be excluded from the purview of undisclosed asset in Black Money Act.

f. Further there cannot be a simultaneous proceedings under IT Act and BMA on the same asset/income.

g. Taxation as beneficial owner would arise either on account of contribution of assets or funds or on receipt of any distribution or benefit from such trust,

h. Considering the same, holds that the ownership of the assets cannot be thrust upon the Assessee. [Refer: Estate of HMM Vikramsinhji of Gondal (CA no. 2312 of 2007)]

Madras High Court

K.Nagarajan, I.A.S

vs.

The Adjudication Authority and others

[W.P.No.22037 of 2017 and W.M.P.No.23086 of 2017]

Facts

- A search warrant was issued by the Investigation wing of IT Department in the name of B. Ayyappan the Managing Director of M/s.Kathir Kaman Jewellers (P) Ltd.

- A search was also conducted in the residential premises of Mrs.R. Sabitharani [Petitioner's spouse], wherein the Petitioner also stays with his spouse. During the course of search certain gold was found/seized and in order to protect its interest Prohibitory orders were passed by the IT department

- Though the said prohibitory orders were lifted, the IO passed the provisional attachment order under Section 24 of the Benami Act, 2016, arraying the petitioner as a beneficial owner of the property. In terms of the said order the transaction was entered into on 28.10.2016.

- Further the SCN notice under section 26 of the Benami Act, 2016 were also issued.

- Petitioner challenging the provisional attachment order and the show cause notice filed this writ petition .

Argument of Petitioner

- The Petitioner challenged the provisional attachment order on the following grounds:

  (a) The order is illegal and violative of the principles of natural justice for implicating the Petitioner as the beneficial owner of the property in question without issuing any notice or giving any opportunity of being heard;

  (b) the amendments to Benami Act came into force w.e.f Nov 1, 2016 and thus, would not apply to alleged transaction entered into on Oct 28, 2016 which would render the impugned order jurisdictionally defective; Thus, the very initiation itself is in violation of the provisions of the Act;

  (c) Also, the proceedings under the Benami Act are required to be an independent proceedings and an adverse finding of the IO against the Petitioner based on statement of one B.Ayyappan recorded u/s 131 in IT proceedings are unsustainable;

Argument of Revenue

- The Revenue in response to the Petition contended as under:

  (a) The provisions of Benami Act, 2016 are applicable retrospectively, except for section 3,5 and 8; [Refer: Tulsiram and Ors. vs. Assistant CIT reported in [MANU/CG/0099/2020]]

  (b) Immediately after the provisional attachment order, SCN u/s 26(1) was issued scrupulously following the procedures under the provisions of the Act andaccordingly no principles of natural justice are violated; [Refer: Dinesh Chand Surana Vs DCIT reported in [MANU/TN/3340/2018]]

;

Final Conclusion

- High court on examining the nature of impugned proceedings held that :-
  - Though the petitioner has relied on Sub-Section (3) to Section 3, *stating that whoever enters into any benami transaction on and after the date of commencement of the Benami Transactions (Prohibition) Amendment Act, 2016, shall, notwithstanding anything contained in Sub-Section (2), be punishable in accordance with the provisions contained in Chapter VII*,
  - Section 1(3) clarifies that the other remaining provisions of the Act shall be deemed to have come into force on the 19.05.1988.
  - In the present case, investigations and search were conducted prior to the amendment Act. The alleged benami transactions were also occurred prior to the amendment. But, the provisional attachment under Section 24 was made after the amendment, which is certainly permissible under Section 1(3) of the Act
  - In the present case, it is not in dispute that the impugned order dated 12.05.2017, is an order of provisional attachment passed under Section 24(4)(a)(i) of the Benami Transactions (Prohibition) Amendment Act, 2016 and the second amendment order dated 26.05.2016 is the notice to show-cause under Section 26(1) of the Act and thus the commencement is legal.

- HC takes note of the legal provisions and holds that the Act is unambiguous on provisional attachment of the property and it is only the commencement of proceedings under the Act where after the Petitioner has to respond to the SCN by submitting their explanations/objections along with the documents and evidences and thereafter, the authorities are bound to adjudicate the matter in the manner provided and take appropriate decision and disposed of the writ upholding the provisional attachment order.

Yorkn Tech Pvt. Ltd.

vs.

DCIT

(ITA. No. 635/DEL/2021)

A.Y. 2016-17

ITAT Delhi

Facts

- Assessee is a subsidiary of Uphill Farms Pvt. Ltd. (Uphill) engaged the business of construction and development of real estate projects in India.
- Assessee acquired a real estate business as a going concern from its holding company, by way of slump sale.
- The Assessing Officer referred the matter to the TPO for determination of ALP in respect of 'business transfer agreement' being a specific domestic transaction as per the provision of Section 92BA r.w.s. 92C.
- TPO rejected the slump sale valuation adopted by Assessee and the proposed adjustment was included by AO in the draft assessment order .
- Thereafter, Assessee filed objections before the Hon'ble DRP stating that clause (i) of section 92BA of the Act has been omitted by Finance Act 2017 and is not applicable in the impugned AY.
- Thereafter, Hon'ble DRP restricted the adjustment and deleted various other adjustments in favour of Assessee.
- Aggreived by adjustment made under clause (i) of Section 92BA, Assessee preferred this appeal before ITAT.

Submissions

- It was submitted that clause (i) of Section 92BA have been omitted by the statute therefore, it is deemed that the said clause was never part of the Act.
- Further, contented that action of revenue under clause (i) of section 92BA was invalid and bad in law as was made after the omission of clause (i) of Section 92BA.
- Such an omission was made without an express saving clause or provision, stating whether the pending proceedings shall continue, it is deemed that the said clause has been deleted since its inception in light of Section 6 and 6A of General Clauses Act.
- To conclude the main contention of assessee is that if a provision of clause (i) of section 92BA was unconditionally omitted all actions must stop where the omission finds them.

On the other hand, ld. CIT-DR submitted that

- The provision of clause (i) of Section 92BA was there in the statute for A.Y. 2016-17 when transaction was entered.
- The omission of the provision is prospective w.e.f 01.04.2017 i.e. A.Y. 2017-18 and not retrospective to include A.Y. 2016-17.

Final Conclusion

- ITAT referred to the provisions of section 6 of general clauses Act and came to a conclusion that 'omission" wound amount to 'repeal' as per General Clauses Act. [Refer: Fibre Boards Pvt. Ltd. vs. CIT: (2015) 376 ITR 596 (SC)]

- ITAT Bench on the issue observed that Clause (i) of Section 92BA has been omitted from 01.04.2017 without any re-enactment with modification or any Saving Clause in any other sections of the Act.

- Further held that in absence of any saving clause it is to be interpreted that Clause (i) of Section 92BA did not come into operation at all, especially when proceeding are initiated after such omission.

- Further, ITAT held that no Transfer Pricing Adjustment can be made on a domestic transaction which has been referred to the Assessing Officer after the omission of the said clause by the Finance Act, 2017 even though transaction has undertaken in the Assessment Year 2016-17.

Karnataka High Court

Nandi Steels Ltd

vs.

ACIT

(ITA. No 103/2012)

(A.Y. 2003-2004)

Facts

- Assessee company is carrying on the business of manufacture of iron and steel and had claimed set off of the brought forward business losses against the income declared under the head 'income from of capital gains' under section 72 .

- The AO denied the set off of brought forward losses against capital gain holding it to be contrary to provisions of law.

- The assesse preferred an appeal(s) before the CIT(A) and ITAT, wherein the appeals were dismissed and the disallowance stood confirmed

- On appeal before High Court, the following question of law have been raised:-
  - (i) Whether the Tribunal was justified in law in not allowing the set off of carry forward business loss of ₹ 39,99,652/- against capital gain arising on sale of business asset used for the purpose of business on the facts and circumstances of the case?

  - (ii) Whether the Tribunal was justified in law in not holding that the income arising out of sale of business assets has the character of business income, and consequently the income though assessed as capital gain is entitled to set off against the carry forward business loss on the facts and circumstances of the case?

Assessee's Submission

❖ The assessee made the following submissions:

(a) it is entitled to set off of brought forward loss against the income which has the attributes of business income even though under any other head of income other than the head 'income from profits and gains from business'.

(a) Proviso to Section 72(1)(i) was **omitted** with effect from 01.04.2000 and their was no requirement to carry on business for the purpose of set off of brought forward business loss.

❖ Decision in the case of **CIT VS Express Newspapers Ltd: 53 ITR 250 (SC)** is not applicable to the facts of the case since it discusses whether capital gains can be taxed in the hands of the successor company not applicable to facts of the case.

Arguments by Revenue

- The Revenue had put forth the following submissions:

  (a) In order to consider the sale as business income, the asset must be stock in trade and not fixed asset.

  (b) The assets were considered as capital asset in balance sheet and the consideration has been rightly treated under the head of capital gains.

  (c) Section 72 of the act is not applicable to the present case as this only permits set off of business loss against the profits and gains of business or profession not any other head.

  (d)Moreover, section 72 mandates that carried forward business loss can only be set off against the profit from business carried on for that Assessment Year.

- Emphasis was laid on the words 'under the head' and 'if any' employed by the legislature and it was contented that unabsorbed carried forward losses can be set off only against the income assessable under the head profits and gains.

Final Conclusion

- Proviso to Section 72(1)(i) was **omitted** by the Finance Act, 1999 w.e.f. 01.04.2000. Therefore, for the Assessment Year in question i.e., 2003-04, the assessee was not required to have carried on the business for the purposes of set off of brought forward business losses.

- Section 72(1) employs the expression computation 'under the head profits and gains or profession', whereas, section 72(1)(i) does not use the expression 'under the head'. Thus, the legislature has consciously left it open that any income from business though classified under any other head can still be entitled to the benefit of set off.

- SC in the case of **Cocanada Radhaswami Bank Ltd. [57 ITR 306 (SC)]** held that business income can be broken up as income under various heads and still doesn't cease to be the income of business on account of mere classification under different head; rather purpose is to be seen.

- In that view of the matter it was held that the Assessee is entitled to **set off brought forward loss against income which has the attributes of business income even though under a head other than profits and gains from business**.

Kerala High Court

APPOLO TYRES LTD

vs.

DCIT(ITA. No 216/2013)
(A.Y. 2005-2006)

Facts

- The assessee claimed set-off of long terms loss arising from sale of shares/ mutual funds unit on which STT was paid against the LTCG arising from sale of a land under section 70(3).

- The AO rejected the claim of set-off of loss holding as under:

  (i) since the gains are exempt under section 10, the same cannot to be considered for claiming set-off;

  (ii) The AO also held that section 70(3) is only applicable for computing income under section 48 to 55 of the Act.

- The ITAT and the CIT (A) concurred with the view taken by the AO.

- **<u>On appeal before High court, the following substantial questions of law were admitted</u>**:
  - Whether on the facts and in the circumstances of the case the Tribunal is justified in law in disallowing the deduction of Rs.2,76,00,000/- being advances paid to Continental Group of Companies for supply of machinery and written off during the year, holding that the amount is of the nature of capital expenditure?
  - Whether on the facts and in the circumstances of the case, the Tribunal is justified in law in disallowing the setting off of long term capital loss on sale of shares and units of mutual funds against long term capital gain on sale of land?

Assessee's Submission

- That the assessee is entitled to set off the loss from long term capital asset covered u/s 10(38) booked against the income earned on the sale of a long term capital asset .

- Assessee contended –
  - The criteria for attracting Section 10(38) is that income arising from the transfer of a long term capital asset, being an equity share in a company or a unit of an equity oriented fund, is chargeable to STT. In the case on hand, the twin requirements are attracted, however, instead of earning income, the transaction resulted in a loss to the Assessee. The loss is from a long term asset, and, hence, could be set off in terms of Section 70(3) of the Act

  - Provisions of section 70(3) do not prohibit the assessee from availing the loss otherwise incurred by the Assessee in respect of the sale of a long term capital asset that has been subjected to STT.

  - In support of his argument, Assessee relied on the judgments reported in Royal Calcutta Truf Club v. CIT [(1982)144 ITR 100 (Ker.)] ; CIT v. Karamchand Premchand Ltd [(1960) 40 ITR 106 (SC)] ; CIT v. Harprasad & Co. [(1975) 99 ITR 118 (SC)] and Kishorebhai Virani v. ACIT.

Revenue's Argument

- The AO disallowed the set-off claimed by the Assessee under Sec 70 (3) of the Act.
  - The reasoning of AO is that the income which is exempt under section 10 should be removed from the purview of income before computation of the total income of an Assessee.
  - Further since the income includes loss as well. The same should also be excluded while computing the total income.
  - Section 70(3) arises applies only upon computation of income as per the provisions of Sections 48 to 55 which is not the facts of the present case.

- Arguments by AR of department
  - The first argument is that the Assessee is mixing up heterogeneous heads as homogeneous heads and claiming the set-off.
  - The inclusion of an income as well as loss under Section 10(38) otherwise excluded from purview of total income, would completely change the meaning of Section 70(3) of the Act dealing only with computation of income and loss made under section 48 to 55.

Final Conclusion

- The question of law framed deals with the claim of the Assessee to set off the loss suffered by the Assessee from the sale of long term capital assets i.e., shares against the income earned from the sale of a long term capital asset. While discussing the above high court discussed the following -
  - Chapter III of the Act deals with incomes that do not form part of total income. Sections 10 to 13 are various incomes that are treated as not forming part of the income of the Assessee.
  - Chapter IV deals with the computation of total income. Section 14 deals with heads of income. Sections 45 to 55 deal with computation of capital gains wherein Sections 48 to 55 deal with the computation of long term capital gains by the Assessee.
  - Chapter VI deals with aggregation of income and set-off or carry forward of loss.

Final Conclusion

- The principle laid down by the Supreme Court in Harprasad & Co. case is that the income is inclusive of profit and loss i.e., both positive and negative effects of the transaction. Hence, it is legal and correct not to introduce the entry of sale of shares under section 10(38) in the computation of income under Sections 48 to 55.
- For claiming set-off under Section 70(3), the first requirement is computation made under Sections 48 to 55 in respect of any Long term capital asset is loss. Therefore, to merit an adjustment under Section 70(3), the assessee is required to first establish that the loss arrived at by the assessee is on the computation under Sections 48 to 55, in respect of a long term capital asset.
- The language of Section 70(3) is clear and unambiguous and the Parliament intended homogeneous entries to adjust the loss or profit against one another and not introduce heterogeneous elements or entries
- The effort of the assessee includes an excluded claim, i.e, a heterogeneous claim under Section 70(3) of the Act, by claiming that the homogeneity of long term capital gain is satisfied by the assessee. Thus the application of Section 70(3) is incorrect and illegal.

Karnataka High Court

Karnataka State Co-Operative Apex Bank Ltd.
vs.
DCIT(ITA. No 392/2016)
(A.Y. 2007-2008)

Facts

- The assessee was carrying on banking business and for the A.Y. 2007-08, original return of Income was processed u/s 143(1) without being scrutinized u/s 143(3).

- Thereafter notice under section 148 was issued and in response to which a return of income reducing the total income on account of additional claim for loss on sale of securities was filed.

- The AO in the reassessment order passed disallowed the additional loss claimed in the reassessment proceedings [not claimed in the original proceedings].

- The CIT(A) and ITAT upheld the view of the AO.

- On appeal before High Court, the following questions of law were raised-
  - (1) Whether the Tribunal is right in applying the ratio of the decision of the Hon'ble Supreme Court in CIT v. Sun Engineering (P.) Ltd. 198 ITR 297 (SC) and holding that concluded issue in the original proceeding cannot be re-agitated in reassessment proceedings even though the case of the appellant is distinguishable inasmuch as there was no original assessment proceedings on the facts and circumstances of the case?
  - (2) Whether the Tribunal was justified in law in not appreciating that the notice u/s 148 of the Act was issued to "assess" the income and thus all contentions in law remained open for the appellant to agitate by filling a return in response to the notice u/s 148 of the Act on the facts and circumstances of the case?
  - 3) Whether the Tribunal is justified in law in holding that the appellant is not entitled to make additional claim of loss incurred of Rs. 8,28,65,052/- in the reassessment proceedings under section 147 of the Act on the facts and circumstances of the case?
  - 4) Whether the Tribunal is right in not holding that the appellant is entitled to the additional claim of actual loss incurred of Rs. 8,28,65,052/- on account of sale of government securities on the facts and circumstances of the case?

Assessee's Submission

The assessee in support of making an additional claim in the return filed in response to the notice under section 148 of the Act submitted as under:

- There was no scrutiny assessment was made under section 143(3) and only intimation was issued u/s 143(1) for the year under consideration;

- The intimation under section 143(1) of the Income Tax Act is not an order of assessment. [Refer: Amendment to section 143(1) w.e.f. 01.04.1998 and ACIT vs. Rajesh Jhaveri: 291 ITR 500].

- In that view of the matter, in absence of there being an original assessment proceedings, an additional claim was not assessed by the AO which could have reached finality.

- That apart earlier assessment order gets effaced on commencement of reassessment proceedings.

Arguments by Revenue

- The Revenue objecting to the additional claim filed by the assessee submitted as under:

a. Proceedings under section 148 has limited scope related to escaped income and don't extend to revising, reopening or reconsidering the whole assessment [CIT vs. Sun Engineering (P.) Ltd. 198 ITR 297 (SC)];

b. Any omission or wrong statement has to be rectified by filing revised return under section 139(5) and in case the time prescribed for revision expires then the only remedy to rectify such defect that is available to the assessee is to seek condonation of delay under section 119;

c. The re-assessment proceedings are for the benefit of the revenue and not for the assessee. Being so no fresh claims can be made by the assessee in a proceeding under section 148;

d. There is no scope to re-agitate questions which had been decided in the original assessment proceedings

Final Conclusion

- High court distinguished with Supreme Court decision relied by revenue in case of Sun Engineering Works Ltd.[198 ITR 297] holding-

  - Decision relates to assessment years before amendment in Section 143(1).
  - Decision was not ceased with the controversy of assessment under section 147 being taken up for the first time and, therefore, ratio emanating therefrom cannot be applied.

- That an intimation u/s 143(1) of the Act cannot be treated as an order of assessment.

- Relying on the decision of Supreme Court in the case of ITO vs. K.L. Srihari (HUF) [250 ITR 193] held that where a fresh assessment is taken up under section 147, the earlier assessment order stands effaced by the subsequent order under section 147.

- The assessee is, therefore, entitled to raise fresh claims in such proceedings and the AO was required to consider the proceeding de-novo and to consider the claim of the assessee.

Karnataka High Court

Wipro Limited
vs
JCIT, (Bangalore) and Ors.
(W.P. NO.20040/2019)

Facts

- Wipro Limited was engaged in the business of manufacture of computer software & providing IT enabled services, for AY 2008-09, declared an income of Rs.588.08 Cr. but was assessed at Rs.2389.89 Cr. in terms of DRP order, inclusive of TP adjustment of Rs.10.54 Cr.
- On an appeal made by both Assessee and the Revenue with the ITAT, order was passed u/s 254 partly favouring the Assessee and partly issues were remitted to TPO for re-computation of the Transfer Pricing Adjustment.
- Consequently the order, resulted in a refund inclusive of interest u/s 244A since the tax paid by the Assessee was more than the tax payable
- Later, the files of the Petitioner were transferred to another AO before whom rectification application was filed u/s 154 that resulted in enhancement of refund and also the interest u/s 244A(1A).

Refund	Tax refund	Interest	Total
Stage 1	789.90	267.55	1057.45
Stage 2	982.57	397.56	1380.13

- However, the Assessing Officer denied additional interest of Rs.58.65 Cr. calculated at 3% p.a. envisaged u/s 244A(1A) for the period of Feb 28, 2017 i.e. date of ITAT order to May 4, 2019 i.e. date on which refund was finally granted, i.e., 17 months.
- Petitioner, thus, preferred a writ petition challenging the action of AO

Argument of Petitioner

- Petitioner submitted that the amendment made by Finance Act, 2016 contemplates two scenarios: (a) Section 153(3)-making of fresh assessment order pursuant to appellate order that have been set aside or cancelled the assessment and (b) Section 153(5)- giving effect to appellate orders other than those covered by fresh assessment orders;
- In that view of the matter the Petitioner pointed that the amended provisions only provide for grant of additional interest if the cases falls under section 153(5);
- Further the orders under section 244A(1A) can be classified into two categories viz.
  - (a) where a fresh assessment/reassessment needs to be made, &
  - (b) where only effect is to be given to the appellate orders without any requirement of conducting any fresh assessment.
- The direction given to TPO by ITAT for adjustment of refund amount would fall under the category (b).
- The transfer pricing adjustment would account for a refund of a paltry sum of Rs.3.88 Cr. as compared to refund of Rs.978 Cr. and it would be offending to sense of fairness & proportionality if such a huge refund is held back just on the pretext of deciding a small TP issue.
- Also, submitted that the TP adjustment is not determinative of the refund amount since the tax amount is based on book profit.
- Petitioner contended that interest u/s 244A(1A) was intended to bring parity in the converse situation where the Revenue levies interest on delayed payment of taxes as provided u/s 234B

Revenue's Argument

- Revenue submitted that in terms of section 244A(1A) the assessee is entitled to an additional interest only in cases where there is no requirement of fresh assessment or re-assessment in terms of appellate orders but since an assessment or reassessment cannot be done in a piecemeal or in a truncated way, the total income of an Assessee can be determined only after the fresh assessment or reassessment is accomplished.
- Revenue further submitted that S.240 that contemplates refund only after the accomplishment of the exercise mandated under the appellate order, i.e, either assessment is set aside or cancelled with a direction to undertake a fresh assessment/re-assessment. Stated that the question of granting interest arises only after ascertainment of amount to be refunded which happens only after the fresh assessment/re-assessment is done in terms of the ITAT order.
- Pointed that the time limit of three months prescribed u/s 153(5) for passing 'giving effect to' orders is applicable only in cases where no fresh assessment or reassessment is contemplated under the appellate orders and since in the instant case, the matter was remitted to TPO for fresh assessment/re-assessment, Assessee's case does not fit into Sec. 244A(1A).
- Revenue pointed out the expression "wholly or partly" employed u/s 153(5) and Sec. 244A(1A) to mean a fresh assessment/re-assessment to be made "wholly or partly" and interpreted that the said expression does not qualify "the order to give effect to the order on appeal" and thus, the mater remitted to TPO and to the AO for a de novo consideration though in certain aspects, the Assessee is not entitled to additional interest u/s 244A(1A) until the matter is decided.
- Revenue observed that the ITAT passed the order following Assessee's earlier order for AYs 2003-04 & 2004-05, according to which TP adjustment was proposed to undertake a fresh exercise in terms of directions given in the earlier order; this exercise warrants a judicious approach since the matter merits re-examination of the issue in the light of the orders of the Tribunal, makes it fall under the second Proviso to Sec. 153(5) which gives a time limit of 9 months to the AO.

Discussion and Observations by High Court

- In order to clarify meaning of "assessment“ and difference between "assessment" & "assessment order, Court reproduced "**Sir Rajendranath Mukerjee v. CIT, (1934) 2 ITR 71 (PC),** it has been held under the erstwhile Income Tax Act, 1922 that the word ‘assessment’ is not confined to the definite act of making an order of assessment

- Discussed **CIT v. Purshottamdas T. Patel [1994] 209 ITR 52 (Guj)** where it was held that,” *the passing of an assessment order is only an integral part of the process of assessment and therefore, the word ‘assessment’ cannot be confined to the act of making an order of assessment; there is a certain legal difference between the terms ‘assessment’ & ‘assessment order’; it can be stated that the use of the word ‘assessment’ would mean the whole process of determination of income and the same should not be restricted to a mere passing of an assessment order*.”

- While discussing about limitation period under the 1961 Act, the court reproduced **C. Ramaiah Reddy 339 ITR 210 Kar, which** observed that if proceedings are not initiated within the time prescribed, the remedy is lost and the Assessee would acquire an indefatigable right; such a right accruing by the lapse of time cannot be at the mercy of the officials, who do not discharge their duties within the prescribed period or a reasonable time; in the matter of limitation, question of prejudice does not arise.

- Legislative intent forthcoming from the Notes on Clauses to the Finance Bill, 2016 That, “*Interest u/s 244A(1A) would not accrue in cases of fresh assessment or reassessment. The use of words* ***‘wholly or partly’*** *would indicate that the bar of interest accrual is confined only to that part of the assessment that are occasioned by remittance/remand and would not extend to other concluded issues that give rise to refund u/s 153(5); interest u/s 244A(1A) has to be granted in respect of refund arising on such issues that are concluded and that the pendency of consideration on remitted issues does not interdict the statutory accrual of interest; an argument to the contrary cannot be countenanced without straining the text & context of the provision.”*

Final Conclusion

- Hon'ble High Court on careful analysis of ITAT order observed that appeal is allowed only for **"statistical purposes"** which means that it is a case where the ITAT has held some issues definitively, and on some other, it had remitted the matter to the AO/TPO for a limited consideration afresh. Clarified that ITAT has not directed assessment or reassessment at all, but it only asked the TPO to follow its directions in the earlier year.
- Where issues are set aside, the AO was supposed to adhere to the provisions of Sec. 153(5) based on the principles laid down by the ITAT .Whereas Sec. 153(3) uses the term" fresh assessment" in pursuance of the orders passed setting aside or cancelling an assessment; therefore, this term "fresh assessment", though not defined, contemplates a new assessment consequent to the higher authorities cancelling or setting aside the assessment; Section 153(5), talks of giving effect to an order passed by the higher authorities, wholly or partly, otherwise than by making a fresh assessment or reassessment.
- HC thus, held that in respect of issues which are set aside, where there is a definitive holding, section 153(5) would apply and the AO ought to have passed an assessment order u/s 153(5) following the principles already laid down by the superior forum.
- HC accepted Assessee's submission that if refund was granted immediately, the claim for additional interest in terms of section 244A(1A) would not have arisen. Further, since the tax paid by the Assessee was more than the tax payable on the book profit it can be safely stated that no part of the refund payable i.e. Rs. 1380 crore arose because of the reduction in the Transfer Pricing Adjustment merely amounting to Rs. 25 Lakhs. Thus, the contention of the Revenue militates against the rule of proportionality and the fairness standards.
- HC rejected Revenue's contention that any order giving effect to the order of the ITAT will result in re-determination of the Assessee's total income and therefore will constitute a fresh assessment as it would lead to an absurd conclusion that every OGE has to be considered as a fresh assessment or reassessment and therefore would be outside the purview of Sec. 153(5) and consequently any delay in granting actual refund would also be outside the ambit of Sec.244A(1A), defeating the very object for which this provision has been brought on the statute book.

THANK YOU

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