Recent Judgments – May 2015

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1. India International Centre Vs ADIT(E) ITA No. 3124/Del/2014 Dt 11.05.2015

Mere surplus from any activity which has been undertaken to achieve the dominant object does not imply that the same is being carried on with a profit motive. Assessing Officer cannot apply Section 2(15) if the predominant activities of the Institution were not to earn income

Overview of the case:

- The AO completed the assessment u/s 143(3) after examining the books of accounts at Nil income
- Subsequently, the DIT(E) examined the records and concluded that:
    - major activities of the assessee revolved around accommodation and catering facilities and these activities were not on no-profit/loss basis, since there was continuous surplus being reflected in the account for many previous years
    - the second objective as per memorandum of association viz. "to undertake, organize and facilitate study courses, conferences, seminars, lectures and research in matters relating to different cultural patterns of the world", was not charitable in itself but becomes charitable only when it is read with first objective viz. "to promote understanding and amity between the different communities of the world by undertaking or promoting the study of their past and present cultures, by disseminating or exchanging knowledge thereof,

and by providing such other facilities as would lead to their universal appreciation"

- since the trust itself was applying the principle of mutuality in respect of admission fee, subscription, income from hostel rooms, food and beverage, sale and expenses thereof, it could be concluded that nature of the trust was to serve its members to their benefits
- examination of the bye laws of the society show that they did not fulfill the criteria to come under the principle of mutuality

- Accordingly, the DIT(E) held that the order of the AO was erroneous and prejudicial to the interests of revenue and issued notice u/s 263
- The assessee contended that:
  - the 263 notice was bad in law and that it was not a case of "no enquiry" by the AO on the applicability of provisions of Section 2(15) with its latest amendment
  - the DIT(E) erred in holding that provisions of Sections 11, 12, 13 and Section 10(23C)(iv) of the Income Tax Act are not applicable to the facts of the appellant in spite of the fact that registration u/s 12A, 80G and 10(23C)(iv) remain intact
  - the DIT(E) erred in holding the activities represented trade and business irrespective of the fact that "dominant object" of the appellant remains charitable not driven by "profit motive"
  - the DIT(E) erred in holding that all the activities of the assessee had to be seen in totality and the assessee cannot be allowed to compartmentalize its activities and income arising there from under charitable activities and mutual activities
- The Tribunal considered all the arguments of both sides and held that:
  - the predominant activities of the centre was not to earn income but to provide facilities for disseminating or exchanging knowledge as per

the object of the society

- merely because incidental income was earned by assessee society for achieving its dominant object from providing hostel and catering activities, it cannot be said that the assessee was doing trade or business as contemplated under proviso to section 2(15)
- the centre had to necessarily charge for the hostel, catering and use of such facilities from members/ participants since it had to recover cost and at the same time have enough funds to carry out the charitable activities, especially in the absence of funding from government or any other outside bodies
- even while charging the members, there was no commercial motive in fixing the rates; they were nowhere near the commercial rates and were generally fixed to recover the cost and cost of activities to run the centre. Therefore, it is apparent that the dominant object of the assessee is definitely for the well being of public at large
- the DIT(E) herself has observed that the first category does fulfill the charitable purpose/ criteria and it is only the second category i.e. giving of hostel, catering etc. that the assessee's activities are caught within the mischief of second proviso to section 2(15)
- the primary object of insertion of proviso to section 2(15) was to curb the practice of earning income by way of carrying on of trade or commerce and claiming the same as exempt in the garb of pursuing the alleged charitable object of general public utility
- this proviso never meant to deny the exemption to those institutions, where the predominant object is undeniably a charitable object and in order to achieve the same incidental activities, essential in the given circumstances, are carried on
- this case is squarely covered by the Hon'ble Delhi High court

judgment in ***India Trade Promotion Organization Vs. Director General of Income Tax (Exemptions) & Others*** [WP(C) no. 1872/2013 dated 22-1-2015] 2015-TIOL-227-HC-DEL-IT

- according order passed by the DIT(E) u/s 263 of the Act is quashed and the assessment order passed by the AO is restored

2. Rang International Vs ITO ITA No.2543/Ahd/2011 Dt 15.05.2015

Where a notice is not complied with but the assessee subsequently attends the proceedings, penalty u/s 271(1)(b) cannot be levied. The statutory provision for levy of penalty is not for mere technical non-compliance but for actual or habitual defaulters.

Overview of the case:

- During the course of assessment proceedings, the AO issued two notices u/s 142(1), which were not complied with
- The AO therefore levied penalty u/s 271(1)(b)
- The assessee went on appeal and the CIT(A) considered the submissions of the assessee and dismissed the appeal
- On further appeal, the Tribunal relied on ***Swarnaben M. Khanna Vs. DCIT*** (2010) 37 SOT (25) and held that:
  - the assessment proceedings were initiated subsequently and the requisite details were filed as and when called for
  - neither the A.O. nor the Ld. C.I.T.(A) has made out a case for sustaining the penalties
  - the AO is therefore directed to delete the penalty

3. Ferrous Infrastructure Pvt Ltd Vs DCIT 2015-TIOL-1382-HC-DEL-IT

Dt 21.05.2015

AO should record his reasons before issuing notice u/s 148, Objections to the notice should be disposed off by a speaking order

Overview of the case:

- Assessee, an infrastructure company, filed a writ petition challenging the 148 notice dt 30.08.2012 and subsequent reassessment order dt 30.03.2014 for the following reasons:
  - the purported reasons for initiating reassessment proceedings had been recorded after the issuance of notice u/s 148 (on 18.09.2012)
  - the objections furnished by the petitioners to the Section 148 notice had not been disposed of by a separate speaking order prior to the re-assessment order
- Revenue filed a counter affidavit and stated that the date had been inadvertently mentioned as a later date, though it was issued and served on the assessee much before that
- The High Court observed that:
  - notice date : 30.08.2012
  - reasons recorded : 19.09.2012 (was manually changed to 18.09.2012 – so it cannot be said that the date was an inadvertent mistake)
  - Sec. 148(2) clearly says that the AO shall, before issuing notice, record his reasons for doing so
  - Moreover, the AO has to pass a speaking order disposing off the objections before proceeding with the assessment
  - In this case, no speaking order was passed and the objections were

dealt with, if at all, in the re-assessment order itself.

- Therefore, the petitioner succeeds on both grounds – the 148 notice is quashed and the order dt 30.03.2014 is invalid.
- Cases referred:
  - GKN Driveshafts (India) Ltd Vs ITO 2002-TIOL-634-SC-IT

4. ITO Vs. Minopharm Laboratories Ltd 2015-TIOL-591-ITAT-HYD Dt 22.05.2015

Sec. 269SS not applicable to mere book adjustments

Overview of the case:

- Assessee is a company engaged in the business of pharmaceutical formulations.
- AO found out that the assessee had accepted deposits and repaid the same in cash, thereby violating the provisions of Sec. 269SS and 269T.
- AO levied penalty on the assessee.
- CIT(A) allowed the appeal and remanded the matter to the file of the AO
- During the course of the remand proceedings, the AO found that the assessee received the cash from its Managing Director (MD) and therefore, levied penalty u/s 271D.
- On appeal, the CIT(A) allowed the assessee's appeal.
- The Revenue is now on appeal before the Tribunal.
- The Tribunal held that:
  - the MD had issued his personal cheque to meet the urgent business needs of the assessee company, directly to/in favour of the persons to whom the assessee company owes money
  - no cash entries were passed in the MD's ledger

- the transaction between the assessee company and the MD is reflected only through journal entries
- Sec. 269SS is not applicable to mere book adjustments, so penalty is not attracted
- Cases referred:
  - Gururaj Mini Roller Flour Mills Vs ACIT 118 DTR (AP) 218
  - ITO Vs Integrated Technology Ltd 31 CCH 369
  - CIT Vs Preeti Fuels and Flames P. Ltd. 330 ITR 129

5. ACIT Vs Hazira Port Pvt Ltd 2015-TIOL-607-ITAT-AHM Dt 22.05.2015

Admission of additional evidence before the ITAT: Instead of admitting the additional evidences, the ITAT thought it would be appropriate if the orders of the authorities below are set aside and matter was restored back to the file of the Assessing Officer

Overview of the case:

- Assessee, a private port, made payments in regard to landing fees, shipping fees, waterfront fees, waterfront royalty etc to the Government of Gujarat
- During the assessment proceedings, the AO found that the assessee had deducted tax u/s 194J instead of 194I and hence, held the assessee to be an assessee in default and levied tax u/s 201(1)
- On appeal, the CIT(A) deleted the levy of tax and subsequently, the Dept filed an appeal before the Tribunal
- The counsel for the assessee made an application for admission of additional evidence before the Tribunal, and stated that the payments being State charges liable to be paid to the Government of Gujarat, no tax was required to be deducted and hence, the question as to whether the tax was required to be deducted u/s 194J or 194I is irrelevant

- The Dept on the other hand, objected to the admission of additional evidences and stated that this issue was never raised before the Assessing Officer
- The Tribunal therefore set aside the orders of the authorities below and restored the matter back to the file of the Assessing Officer with a direction to the assessee to produce all the evidences and explanation before the Assessing Officer.

6. DCIT Vs Bhagyanagar India Ltd 2015-TIOL-688-ITAT-HYD dt 27.05.2015

Debatable issues beyond the scope of rectification u/s 154. The order passed by the AO to give effect to an order of the Tribunal is limited to the scope of the Tribunal order

Overview of the case:

- Assessee is a limited company engaged in the manufacture and sale of copper products, telephone cables as well as generation of wind power
- 143(3) assessment was completed vide order dated 29.12.2010
- The order was subsequently examined by the CIT and on such examination, he was of the opinion that the order passed by the AO had errors (with regard to depreciation, contribution to PF/ESI and treatment of income arising out of development agreement) and had to be rectified
- The CIT issued a notice and subsequently, passed an order u/s 263 directing the AO to assess the income arising out of development agreement with Vansh Builders as business income in the hands of the assessee, as against capital gains. He did not revise the assessment order on the issues of excess depreciation and belated payment of contribution towards P.F. and ESI
- Order under section 143(3) read with section 263 was passed by the AO on 14.06.2012 bringing to tax the said income in the hands of the assessee as

business income

- Meanwhile, the appeal filed by the assessee against the 263 order came to be disposed off by the Tribunal vide order dated 06.11.2012 whereby it was held that the income arising to the assessee out of development agreement with Vansh Builders was chargeable to tax as income from capital gains and not as business income
- While giving effect to the order of the Tribunal dated 06.11.2012, the AO made a mistake of adding the STCG twice
- The assessee therefore moved an application under section 154 seeking rectification of the said mistake
- While passing the rectification order, the AO also made rectification on account of excess depreciation and belated contribution to PF/ESI
- The assessee filed an appeal against this 154 order and the CIT(A) held that the issues raised by the AO in the 154 order were all debatable issues and the same were therefore beyond the scope of rectification permissible under section 154
- On appeal by the Dept, the Tribunal held that:
    - all the issues raised by the AO in his order under section 154 were certainly debatable and hence, beyond the scope of rectification permissible under section 154
    - the order passed by the AO giving effect to the order of the Tribunal did not involve these issues as the scope of the said order was limited
    - the order of the CIT(A) is therefore upheld and the Revenue's appeal dismissed

7. Gauri Pati Udyog Vs ITO 2015-TIOL-1414-HC-ALL-IT, Dt 29.05.2015

Opinion to be formed by the AO regarding the complexity of the assessee's accounts before directing the assessee to get it audited/passing an order u/s

142(2A). Recourse to the said provision cannot be had by the Assessing Officer merely to shift his responsibility of scrutinizing the accounts of an assessee and pass on the buck to the special auditor.

Overview of the case:

- Assessee concern contended that the direction for special audit had been made without examining the books of accounts of the assessee, which was in violation of principles of natural justice
- The High Court relied on the Supreme Court judgment in ***Sahara India (Firm) Vs CIT*** 300 ITR 403 where it has been held that:
    - before dubbing the accounts to be complex or difficult to understand, there has to be a genuine and honest attempt on the part of the AO to understand accounts maintained by the assessee; appreciate the entries made therein and in the event of any doubt, seek explanation from the assessee
    - the opinion to be formed by the AO should be based on objective criteria and not on subjective satisfaction
    - recourse to the said provision cannot be had by the AO merely to shift his responsibility of scrutinizing the accounts of an assessee and pass on the buck to the special auditor
- In this case, before issuance of order of re-assessment under Section 142 (2A), the ITO had issued notices to the assessee but in none of them the opinion formed by the Assessing Officer for special audit of petitioner's accounts in regard to the nature and complexity of the accounts and the interest of revenue had been disclosed
- Therefore, the order passed by the ITO is invalid

8. CIT Vs GRUP ISM P. Ltd ITA 325/2014 Dt 29.05.2015

Scope of the terms 'technical service' and 'consultancy service'; applicability of

Art 14 of India UAE DTAA. A liaisoning agent rendering service for the assessee, receiving its remuneration from each client that it successfully solicits for the assessee, such services cannot be said to be included within the meaning of 'consultancy services', as that would amount to unduly expanding the scope of the term 'consultancy'.

Overview of the case:

- The assessee did not deduct tax on payments made to non residents CGS International, UAE and Marble Arts & Crafts LLC, UAE and hence, the amount was sought to be disallowed u/s 40(a)(i)
- Marble Arts acted as an agent of the assessee for the purposes of the latter's dealings with the Works Department, Abu Dhabi, which included coordinating with the authorities in the said department and handling invoices for the assessee
- CGS International acted as a liaisoning agent for the assessee and received its remuneration from each client that it successfully solicited for the assessee
- The CIT(A) held that:
    - the payment made by the assessee to the two UAE entities would not come within the purview of 'technical services' as defined in Explanation 2 to Section 9(1)(vii) of the Act and consequently, the provisions of Section 9(1)(vii) were not attracted in the assessee's case
    - Article 14 of the DTAA with UAE, dated 18.11.1993, is applicable in the facts of the case and that the AO could not have denied the applicability of the said on the sole premise that the two UAE entities are companies.
    - accordingly, since the remittances to such non-resident entities are liable to be taxed in the UAE, no TDS was required to be deducted
- The Tribunal upheld the CIT(A)'s order and dismissed the Revenue's appeal

- On further appeal, the Delhi High Court has held that:
  - the services performed by the above two non resident entities cannot be said to be included within the meaning of 'consultancy services', as that would amount to unduly expanding the scope of the term 'consultancy'
  - consequently, the remittances made by the assessee would not come within the scope of the phrase 'fees for technical services' as employed in Section 9(1)(vii) of the Act
  - since the income of CGS International and Marble Arts & Crafts can only be classified under Article 14 or Article 22 of the DTAA – both of which provide that the income shall be taxable in the State of residence (UAE) – the issue as to whether the services provided by the two UAE entities fall within the scope of 'professional services' under Article 14 is irrelevant to the outcome of this case
  - therefore, the assessee was held to be not obligated to deduct tax on the remittances made to CGS International and Marble Arts & Crafts and the Revenue's appeal was dismissed

9. Smt Nirmala Devi Chordia Vs CIT 2015-TIOL-723-ITAT-JAIPUR Dt 29.05.2015

263 notice: difference between lack of enquiry and perception about the level of enquiry. Jurisdiction u/s 263 cannot be invoked for making roving enquiries or to go into the process of assessment again and again merely on the basis that more enquiry ought to have been conducted to find something.

Overview of the case:

- Assessee, an individual, is regularly assessed to tax and filed the return of income for the relevant assessment year
- The AO got information that the assessee had invested Rs. 68.00 lakhs in

NABARD Bonds

- The AO issued notice u/s 148 by recording the reasons that the assessee had not filed the return of income and that the NABARD investment of Rs. 68.00 lakhs was to be verified
- The assessee filed an objection pointing out that return was filed by the assessee and notice u/s 148 was thus invalid being issued on wrong recording of reasons
- However, to remain on safe side, the assessee requested to consider her original return as filed in response to notice u/s 148 of the Act
- Consequently, the AO considered the original return filed along with profit and loss account, balance sheet, capital account, details of shares sold by the assessee and computation of income with detailed annexure of disclosure about long term capital gains and passed an order accepting the LTCG claim of the assessee
- The CIT issued a notice u/s 263 alleging that no evidence of sale/ transfer of shares was filed by the assessee and the sale was accepted by the AO without proper enquiries and investigation as to the credit-worthiness of the purchaser of the shares. Moreover, no documentary evidence to prove date of acquisition so as to hold a view that the gains were long term capital gains. Therefore, the order was held to be prejudicial to the interests of the Revenue and the assessment was set aside to the file of the AO
- On appeal, the Tribunal held that:
    - the assessee had already filed the return of income. Despite that she has been wrongly accused of not filing the same; this subjected the assessee to the rigor of avoidable 148 proceedings
    - the record and submissions filed during the course of assessment proceedings did not in any manner indicate that proper enquiries and verification were not conducted

- the order of the AO though short yet crisp and clear in arriving at proper findings reflecting reasonable discharge of assessment which cannot be held as erroneous
- Section 263 proceedings cannot be invoked where reasonable inquiries are conducted with application of mind; there is conspicuous difference between the cases of lack of enquiry and perception about the level of enquiry
- in this case it emerges that ld. CIT carried a different perception about the manner of enquiry which ought to have been conducted by the AO
- this is not sufficient to hold the assessment order as erroneous and thereby prejudicial to the interest of revenue.

10. Typhoon Financial Services Pvt Ltd Vs ITO 2015-TIOL-754-ITAT-AHM Dt 29.05.2015

Loss on sale of shares by a NBFC not to be treated as a speculation loss

Overview of the case:

- The assessee is a non banking finance company
- During the assessment proceedings, the AO treated the loss on the sale of shares as speculation loss, to be carried forward and adjusted against future speculation profit only
- On appeal, the ld. CIT(A) considered the submissions of the assessee and dismissed the appeal
- On further appeal, the Tribunal held that:
  - the explanation to section 73 makes it evident that a company whose gross total income consists mainly of income which is chargeable

under the heads 'Interest on securities', 'Income from house property', 'Capital gains' and 'Income from other sources', or a company the principal business of which is the business of 'banking' or 'the granting of loans and advances', are excluded from the deeming provision created by the Explanation

- in the instant case, the R.B.I. has granted to the assessee a Certificate of Registration u/s. 45-IA of the Reserve Bank of India Act, 1934 to commence/carry on the business of non-banking financial institution subject to certain conditions; the assessee is engaged in the business of financing and substantial income has been derived from interest
- therefore, the impugned order is set aside and the Assessing Officer is directed not to treat the loss as speculation loss