CHARTERED ACCOUNTANTS STUDY CIRCLE

MEETING – 14.12.2017 – RECENT DECISIONS

CA Mythili Raghunathan

S.No.	Case details	Particulars of the decision
1	Paradigm Geophysical Pty Ltd. v DCIT – Delhi High Court - WP(C) 6052/2017, decision rendered on 25.11.17 Assessment year 2012-13	A non-resident Australian company engaged in designing and providing software enabled solutions to the oil and gas industry and AMC in relation to these solutions. Return for AY 2012-13 applied Section 44BB, whereas the assessment order applied Section 44DA. No objections were filed before the DRP and the assessment was completed on 11.5.2015. No appeal was filed. Assessee then filed a revision petition u/s 264 on 1.2.2016 on the ground that 44BB was wrongly denied and 44DA was incorrectly applied. CIT declined to interfere with the order primarily on the ground that for other assessment years, i.e. AY 2011-12 and AY 2013-14, appeals had been filed on the same issue. He therefore held that the assessee was choosing a back door entry for filing an appeal which could not be allowed. The High Court held that this was not a valid ground for not exercising jurisdiction u/s 264. Negative restriction u/s 264(4) were not present. Merely since appeal had been filed for other years, it cannot be said that Section 264 could not be resorted to for this year. Case remanded to the Commissioner to decide the revision petition afresh and in accordance with law.
2	Sharavathy Conductors Pvt Ltd. v CCIT – Karnataka High Court [2017] 87 taxmann.com 244 (Kar), decision rendered on 24.10.2017 Relevant assessment year 1997-98	Assessee filed return of income claiming deduction u/s 80-IA. Later it filed a revised return claiming further deduction u/s 80-HHC and made a claim for refund. But this return was filed beyond the period allowed u/s 139(5). Petition for condonation of delay u/s 119(2)(b) was made to the CBDT. CCIT (under delegated powers) rejected the petition and held - Refund arose not on account of TDS or taxes paid, but on account of additional deduction claimed u/s 80-HHC. Return can be revised if there is a bonafide mistake or inadvertent error. Whether 80-HHC can be claimed after claiming 80-IA is a debatable issue which is pending before the larger bench of the Supreme Court (in ACIT v Micro Labs Ltd.) (and is therefore not a bonafide mistake or inadvertent error. . HC held that condonation was a discretionary matter which cannot be interfered with where there is a fair exercise of discretion. The matter of deduction was highly debatable. Order of the Chief Commissioner was in accordance with CBDT guidelines in Circular 9/15 dtd.9.6.15. The assessee's writ petition was dismissed.
3	ITO v Arvind Kumar Jain HUF	Assessee filed return for Rs.19,249/-. AO received information from Dy Director of Income Tax that assessee had sold shares of Ramkrishna Fincap Ltd. through M/s Basant Periwal and Co, who was under DRI probing evasion by firms for market and price manipulation through deals in the

	ITA 4862/Mum/2014 0-Mumbai ITAT Order pronounced on 18.09.2017 Assessment year 2005-06	particular scrip, assessee had bought shares at Rs.3.12 in 2003 and sold them at 165.83 in 2005, these scrips were penny stock and gain was only accommodation entry, and SEBI had passed orders in respect of the deals in the shares by the specified broker. The AO initiated action u/s 148 and taxed the long term capital gains u/s 68. CIT(A) held reopening valid (based on Rajat Export Import India Pvt Ltd. [2012] 341 ITR 135 (Del), but allowed the appeal of the assessee on merits since the bank pass book, the demat account had the relevant entries, contract notes and STT statements were available. Therefore there was no material to show the sale was bogus. Reliance was placed on Jharkhand High Court decision in the case of CIT vs. Arun Kumar Agarwal (HUF) (2012) 26 taxmann.com 113 (Jharkhand) Tribunal held in favour of assessee even though there was only one transaction of sale in the shares of the said company, the broker was in Kolkata and the assessee in Mumbai, the broker was tainted, all other security transactions of the assessee were through brokers in Mumbai, the company did not have net worth to justify increase in price. It was held that where assessee's transactions were bona fide, merely because the broker was tainted, it would not make the assessee's transactions bogus. Reliance placed on Co-ordinate bench decision in ITO vs. M/s Indravadan Jain HUF (ITA No. 4861/Mum/2014) CIT v Shyam R Pawar [2015] 54 taxmann.com 108 (Bom HC) – (Dmat account and contract note showed details of share transaction, and AO had not proved said transactions to be bogus.)
4	CIT v Smt. Pooja Agarwal ITA no. 385 of 2011 (Rajasthan High Court), decision rendered on 11.09.2017 Assessment year	Though assessee denied share transactions during survey, on finding evidences subsequently the assessee had done transactions in shares through brokers, had a demat account and had paid account payee cheques through an undisclosed bank account, it was held that since the transactions were genuine and it had not been proved that they were accommodation entries, the income was to be assessed under Short Term Capital gains and not as undisclosed income.
5	Director of Income Tax v SRMB Dairy Farming Pvt Ltd. [2017] 100 CCH 0098 ISCC Decision rendered on 23.11.2017	Beneficial circular has to be applied retrospectively while oppressive circular to be applied prospectively. Instruction No.3 of 2011 dated 9.2.2011 providing for appeals not to be filed before High Court(s) where tax impact was less than Rs.10 lakh is applicable to pending litigation also In CIT v Surya Herbal Ltd. [2013] 350 ITR 300 (SC) (three member bench) the Supreme Court gave liberty is given to the Department to move the High Court pointing out that the Circular dated 9th February, 2011, (regarding monetary limit of appeals by the Department) should not be applied ipso facto, particularly, when the matter has a cascading effect Earlier, Delhi High court dismissed the revenue appeal on the ground that the amount involved is less than ₹ 10 Lakhs vide its order dated 21-2-2011 The Supreme Court in SMRB case held that the above decision had not been brought to the attention of the court in CIT v Suman Dhamija and CIT v

		Gemini Distilleries, and that the decision of the three member bench should be applied regarding retrospective applicability of circulars, but with the caveats mentioned in that decision, viz. where a common principle was involved in subsequent matters or a large number of matters, when the circular would not be applied ipso facto.
6	CIT v M/s Gad Fashion ITA 575 / 2008 / Rajasthan, Decision rendered on 10.11.2017	Before the High Court the Revenue had taken the stand that Section 260A entitles the Revenue to appeal against any order if there is a substantial question of law and that a circular cannot restrict that entitlement. Question was referred to a larger Bench. The High Court concluded CBDT circular is binding on the department, but if order of CIT(A) or ITAT is contrary to decision of Supreme Court on the relevant issue, appeal can be filed by department in those cases, in order to maintain sanctity of Article 141 of the Constitution.
7	Dayawanti (through legal heir Sunita Gupta) v CIT Petition for special leave to appeal no. 20559 of 2017 Supreme Court Decision rendered on 03.10.2017	Supreme Court has stayed the operation of the order of the Delhi High Court Earlier the decision of the Mumbai Special Bench in AllCargo Global Logistics Ltd. v DCIT was followed which held that assessment / reassessment in a search case shall be made only if incriminating material is found. This decision has since been confirmed by the Bombay High Court in [2015] 374 ITR 645 (Bom) In the light of stay of the decision, the Allcargo decision would prevail until the Supreme Court decision is rendered
8	Ambience Hospitality Pvt. Ltd. v Deputy Commissioner Of Income Tax : (2017) 100 CCH 0100 Del HC Decision rendered on: 23.11.2017 Relevant assessment year 2007-08	Assessee claimed depreciation on the entire value of 'property' comprising land and building. Mistake was discovered during audit of the next year, i.e in September 2008. However no revised return was filed and AO was also not informed. In the course of assessment proceedings, AO raised query on details of fixed assets on 23.11.2009 and reply was filed on 8.12.2009 bringing the wrong deduction to his notice. Penalty was levied which was deleted by the CIT(A), reinstated by the ITAT and confirmed by the High Court. Thereafter complaint was filed before Addl Chief Metropolitan Magistrate and the company was found guilty of offence u/s 276C (wilful attempt to evade tax) and 277 (false statement in verification) On appeal, the High Court held that mistake cannot be said to be a mere clerical error when there is no sincere effort put in by the assessee after detection of the alleged mistake. First auditors and then directors ought to have found the mistake before affixing their signatures. It cannot be held to be mere accounting mistake. The prosecution was confirmed and fine of Rs.30000 was levied.

9	ADIT v e-funds Solution Inc Civil appeal no. 6082 of 2015 (Supreme Court) with bunch of cases Decision rendered on 24.10.2017	Indian subsidiary of a foreign company providing back office support does not constitute a PE in India
10	CIT v Madhur Housing and Development Company (bunch of cases) Supreme Court Civil appeal no. 3961 of 2013, decision rendered on 05.10.2017	The Supreme Court agreed with the decision of the Delhi High Court in CIT v Ankitech Pvt Ltd. [2011] 242 CTR 129 (Del) rendered on 11.5.2011 from which this appeal has arisen. The Delhi High Court had held as follows: Under second limb of Section 2(22)(e), deemed dividend is taxable in the hands of the shareholder and not the recipient of the loan / advance. Deeming is in respect of the dividend and was not intended to be extended to the meaning of shareholder. Circular 495 dated 22.9.1997 is not relevant. Loan/Advance given in the normal course of business are not covered u/s 2(22)(e) Shareholding of an individual cannot be combined with the shareholding held as karta of HUF for the purpose of determining extent of shareholding in any entity. Assessee should be both registered and beneficial shareholder Other references: ACIT v Bhaumik Colour (P) Ltd. 118 ITD 1 (Mum)(SB) affirmed by Bombay High Court in CIT v Universal Medicare P Ltd. 190 Taxman 144 (Bom) CIT v Hotel Hilltop 217 CTR (Raj) 527 CIT v CP Sarathy Mudaliar [1972] 83 ITR 170 (SC)
11	DCIT v Bank of India ITA NO. 3082/Mum/2015 Mumbai Bench of ITAT Assessment year 2009-10 Decision rendered on 08.11.2017	Amendment in Income tax Act does not amend the provisions of the tax treaties. Assessee derived income from house property in Kenya. As per DTAA between India and Kenya, the income 'may be taxed' in the country in which the property is located. Revenue invoked Circular 91/2008 to say that the income could not be excluded from total income but was chargeable to tax in India also. ITAT held that changes in domestic law could not modify the treaties if the same are not rectified by both signatories and therefore the income was chargeable to tax in Kenya in accordance with the DTAA

12	Tata HAL Technologies Ltd. v DCIT – ITA 1592/Bang/2016 Bangalore Bench of ITAT Decision rendered on 23.11.2017 Assessment year 2012-13	Assessee purchased software and capitalised the same. AO treated the payment as royalty relying on Karnataka High Court decision in CIT v Samsung Electronics Co. Ltd.[2012] 345 ITR 494, and since the assessee did not deduct tax on the payment, AO invoked provisions of Section 40(a)(ia) and disallowed the claim of depreciation. Tribunal held depreciation is a deduction and not an expenditure, there is no outgoing expenditure. Therefore no disallowance u/s 40(a)(ia) could be made. Tribunal relied on its own decision in assessee's case for earlier assessment year 2011-12, and the following decisions, and allowed appeal in favour of assessee: • DCIT v Tally Solutions Pvt Ltd. ITA 1463/Bang/2013 • SKOL Breweries Ltd. v ACIT [2013] 142 ITD 49 (Mum-Trib) • Kawasaki Micro Electronics – India Branch v DCIT [2015] 155 ITD 0402 (Bang) (Section 195 rws 40(a)(i))
13	DCIT v Ace Multi Axes Systems Ltd. Supreme Court Civil appeal no. 20854 of 2017 Assessment year 2005-06 Decision rendered on 05.12.2017	Deduction u/s 80-IB is allowed for small scale undertakings for a consecutive period of 10 years. The CIT(A) and ITAT held that where the assessee ceases to be a small scale undertaking in any of the 10 years, the deduction u/s 80-IB will be disallowed. The High Court held that if during the 10 year period, the undertaking stabilises and improves, thereby going out of the meaning of small scale undertaking, it should not be barred from claiming benefit for 10 years starting from the initial assessment year. On Revenue's appeal, the Supreme Court held that the scheme of the section does not envisage continuation of benefit irrespective of the eligibility in the particular year. If the undertaking ceases to be a small scale undertaking or earn profits, it cannot claim the deduction. Each assessment year is a different assessment year. Construing the benefit liberally does not mean ignoring the conditions for exemption. If SSI nature is not retained, deduction u/s 80-IB cannot be allowed even if it had been allowed in the initial assessment year.
14	DCIT v Brindavan Threads PvtLtd. ITA 2219/Bang/2016 Assessment year 2008-09 Decision rendered on 29.11.2017	Assessee's return was accepted u/s 143(3), both under normal provisions and book profit u/s 115JB. Search operations were conducted and subsequently while framing order u/s 143(3) r.w.s. 153A, it was noticed that the assessee had claimed 100% depreciation on windmills in its books of account. AO modified the 115JB book profit. Appeal was filed by assessee before CIT(A) who accepted the stand of the assessee that book profit could not be disturbed other than the as provided under the section. Assessee filed appeal before ITAT on the ground that no addition could be made in the absence of incriminating material. Revenue appealed against deletion of addition u/s 115JB.

		ITAT held that Assessing Officer cannot disturb the Profit and Loss account even if depreciation has been apparently claimed wrongly, if the statutory auditors have accepted the same. Only adjustments permitted under the Section can be made and not otherwise. The ground raised by the assessee was dismissed as infructuous. Cases relied on for the proposition that book profit could not be disturbed: Apollo Tyres Ltd. v CIT [2002] 255 ITR 373 (SC) Sri Hariram Hotels Pvt Ltd. v CIT ITA No. 53/2009 dated 16.12.2015)
15	PCIT v ST Micro Electronics Pvt Ltd. [2017] 87 taxmann.com 262 (Del) Relevant assessment year 2007-08	A blind application of precedent, cannot per se be a ground for excluding or including comparables unless factual and functional analysis are carried out Assessee engaged in software development services and furnished details of 55 comparables. TPO accepted 10 and added some more, totalling to 26. TP adjustment of Rs.3.99 crores was made. The DRP confirmed the order of the AO and TPO. The matter was agitated before the tribunal. Case of Hewlett Packard (India) Globalsoft (P) Ltd. v DCIT [2015] 63 taxmann.com 136 (Bang. - Trib.) had just then been decided by the Tribunal. Assessee submitted that comparables taken up in the case of Hewlett Packard (supra) were fit for the assessee's case since the functional profiles were identical. The Tribunal verified the functional profiles of the comparables and held that they could be considered in the case of the appellant. It was not a case of blindly following a precedent in that sense. Revenue's contention that the ITAT should have called for fresh determination was not accepted.
16	PCIT v Baisetty Revathi ITA 684 of 2016 High Court for the State of Telangana and AP Assessment year 2010-11 Decision rendered on 13.07.2017	Show cause notice issued u/s 271(1)(c) must clearly mention whether the offence of the assessee is concealment of income or furnishing of inaccurate particulars of income so that the assessee is put on notice of the default. Lack of clarity on the part of the Assessing Officer would make the penal proceedings invalid in law.
17	PCIT v Delhi Airport Metro Express Pvt Ltd.- ITA 705/2017 - Delhi HC Decision rendered on 5.9.2017	Proceedings u/s 263 are sustainable where there is lack of enquiry by AO, and not inadequate enquiry. CIT cannot hold the AO's order to be erroneous merely because he did not carry on the enquiry in the manner that the CIT would have wanted it to. If the AO has made enquiry, albeit inadequate, order cannot be held to be erroneous if the AO has taken one of the possible views. It was similarly held by the Delhi Bench of the ITAT in the case of

	Assessment year 2011-12	Amira Pure Foods Pvt Ltd. v PCIT in ITA no. 3205 / Del / 2017, decision rendered on 29.11.2017
18	CIT v Shreedhar Sewa Trust ITA 33/2017 Allahabad High Court Decision rendered on 7.9.2017	Registration u/s 12AA could not be refused on the ground that the trust has not yet commenced the charitable or religious activity. At the stage of registration only the genuineness of the objects should be tested and not the activities, which have not yet commenced. Reliance was placed on the decision in CIT v R.S.Bajaj Society [2014] 222 Taxman 111 (All); Hardayal Educational and Charitable Trust v CIT ITA 107 of 2012, Allahabad High Court, decision rendered on 15.3.2013
19	Pr CIT v Paradise Inland Shipping Pvt Ltd. – High Court of Bombay at Goa ITA No. 66 of 2016	Assessment was completed u/s 143(3) r.w.s. 147, wherein share capital received during the year was treated as undisclosed income. The High Court held that the assessee had furnished the names of the companies who invested, their PAN, voluminous documents including incorporation documents, Memorandum of Association, assessment orders for preceding three years, etc. The Revenue which alleged that the investing companies were not even in existence had not established the same by any material on record. Therefore it had not discharged the burden cast on it. Voluminous documents furnished could not be discarded merely on the statements of two persons. At this stage (before the High Court), the Assessing Officer could not ask for remand for re-examining the two persons. The High Court found no infirmity in the findings of the lower appellate authorities.
20	Google India Pvt Ltd. v Addl CIT ITA 1511 to 1518/Bang/2013 AYs 2007-08 to 2012-13 Decision rendered on 23.10.2017	Payment made by Google India Pvt Ltd. to Google Ireland Ltd. under the distribution agreement over the period 01.04.2006 to 31.3.2012 without deduction of tax. Revenue contended that payment was in the nature of royalty and tax should have been withheld. Therefore 201 proceedings initiated. Bench held the payments were for secret process and therefore in the nature of royalty and confirmed the action of the Revenue. Bar of limitation would not apply since at the time of initiation of action, Section 201(3) was on statute books. Same time limit as applicable to residents can be taken to apply to non-residents, though not specifically mentioned in the Act. DTAA does not determine method of accounting. Receipt basis of taxability cannot be accepted. Revenue's stand confirmed.