

Important judgements and Updates

Update No 70/ 2021

Venus Infrastructure & Developers (P) Ltd In favour of Assessee

ITA No.1582/AHD/2019 Ahmedabad ITAT

Issues discussed and addressed:

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| Issue No 1 | Colourable Device | Choosing a tax effective option out of the two legally permissible options is not the same as employing a colourable device. |
| Issue No 2 | Opinion of CA | The Chartered Accountant being the expert of his field, his advice cannot be faulted by the AO without bringing any cogent material on record. Therefore, the opinion of the chartered accountant should be admitted. |

Facts of the case with respect to issue No 1:

Assessee-Company engaged in the business of construction and development of real estate sold shares of one ARGHPL and incurred a long term capital loss of Rs.6.52 Cr. in AY 2012-13. Revenue found that ARGHPL owned only one immovable property as asset and held that Assessee used colourable device by resorting to sale of shares resulting in long term capital loss, instead of sale of property, which would have resulted in short term capital gains and made addition of Rs.5.55 Cr which was confirmed by CIT(A).

Held by the Authorities with respect to Issue No 1:

Every Act which results in tax deduction, exemption of tax or not attracting tax authorized by law cannot be treated as a device of tax avoidance and the real question to be asked is whether the act of the assessee falls in the category of a colourable device, a dubious method or subterfuge which the judicial process may not accord approval. The Assessee had two options, one to sell the land, which was the only asset and second to transfer the overall control by selling off the shares and remarks that Assessee chose one of the two legally permissible options which it deemed to be the most tax effective or viable. The Assessee treated the shareholdings as investment in shares and not in land, and was also subjected to disallowances under Section 14A for the expenses incurred to earn dividend from such investment and thus holds principle of consistency should be followed and the Revenue could not change its stand as per its will.

Judgments Relied upon by the Authorities with respect to Issue No 1:

- a. Banyan Berry [TS-5770-HC-1995(GUJARAT)-O]

Facts of the case with respect to issue No 1:

The deduction claimed by the assessee under section 80-IB (10) of the Act for ₹ 32,13,73,570/ was denied by the AO for 2 reasons. Firstly, the assessee failed to file the income tax return within the due date as provided under section 139(1) of the Act. Therefore there was the contravention of the provisions of section 80AC of

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the Act. Secondly, the residential project of the assessee namely 'Venus Parkland' was not completed within the due date as provided under section 80-IB(10) of the Act.

Held by the Authorities with respect to Issue No 2:

There is no dispute to the fact that the assessee was to file the return of income on or before 30 November 2012 in the event if it was to file TP report in form 3CEB for having international transactions with its associated enterprise. Admittedly, the assessee has filed form 3CEB for having international transactions with the AE. These transactions include the guarantee furnished by the AE as well as the brokerage agreement with the AE. This fact of filing the form 3CEB report has not been controverted by the AO. The chartered accountant being the expert of his field, his advice cannot be faulted by the AO without bringing any cogent material on record. Therefore, the opinion of the chartered accountant should be admitted.

Likewise, the assessee has also furnished the opinion of the expert consultant which was not doubted by the AO. In these opinions, it was advised to comply the transfer pricing provisions for having international transactions as discussed above.

Further assessee has paid all tax due in the form of advance tax and self-assessment tax before 30th September 2012. Its books of account got audited under Companies Act. The Tax Audit report under section 44AB of the Act and audit in form 10CCB for claiming deduction under section 80- IB were obtained before 30th September 2012 except getting TP report in form 3CEB. Thus there was not any reason preventing the assessee to file return of income on or before 30th September 2012. Hence on the ground of delayed filing of return, the claim of deduction can not be denied.

There was dispute for the jurisdiction over issuance of BU permission between AMC and AUDA from April 2012. Therefore, the permission for remaining units was delayed. the learned CIT(A) has given flawless finding that after resolution of dispute of jurisdiction over issuance of BU permission, the AMC has issued such permission for remaining units to the assessee and certified that the project was completed before due date i.e. 31st March 2012. Therefore in view of the above finding, there remains no ambiguity with respect to completion of project within the prescribed time limit.

Judgments Relied upon by the Authorities with respect to Issue No 2:

- a. Mangal Textile Mills Private Ltd vs. Union of India reported in 2002 taxmann.com 1665

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Waterline Hotels Pvt. Ltd ITA No.1689/Bang/2016 Bangalore ITAT In favour of Assessee

Issues discussed and addressed:

Issue No 1 Section 32 Accepted accountancy rule for determining cost of fixed assets is to include of expenditure necessary to bring such assets into existence and to put them in working condition.

Facts of the case with respect to issue No 1:

Assessee-Company, for commencing the hospitality business, incurred an expenditure of Rs.88.48 lakhs in AY 2012-13 essential for starting its business viz., rent, salaries and administrative expenses, and capitalised the same to building as per the principles enshrined in AS-10 and also under ICDS-V, though notified from a subsequent date. Revenue disallowed Rs.8.84 lakhs of depreciation which was also confirmed by the CIT(A) on the grounds that the expenditure incurred did not increase the value of assets, and thus, could not be capitalised.

Held by the Authorities with respect to Issue No 1:

Depreciation is allowable on actual cost of the asset, which should be construed in ordinary commercial manner and notes that examples provided in AS-10 includes site preparation, delivery and handling cost, professional fees for architects and engineers, preliminary project expenditure, indirect expenditure relating to construction and other indirect expenditure not related to construction have been included in the cost of the asset. ITAT held that "the expenses are required to be capitalised and that the allocation has been made by the assessee on a reasonable basis in the ratio of cost of the asset to the total cost. Section 43(1) of the Act defines "actual cost" to mean actual cost of the asset to the assessee, reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by any other person or authority".

Judgments Relied upon by the Authorities with respect to Issue No 1:

- a. Challapalli Sugars Limited Vs. CIT (1975) 98 ITR 167 (Supreme Court)
- b. CIT Vs. Food Specialities Limited, (1982)136 ITR 203 (Delhi),
- c. CIT Vs. Lucas-TVS Limited (No.2), (1977)110 ITR 346

Hussain Mohideen Ibrahim Sha ITA No. 449/Chny/2017 Chennai ITAT In favour of Assessee

Issues discussed and addressed:

Issue No Section 71 Income declared in survey is to be taxed and it has to fall under one of the heads of income, i.e., business income and, therefore, is available for set-off against the business loss.

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Facts of the case with respect to issue No 1:

A survey under section 133A was conducted in business premises of assessee. Consequent to survey, an amount of Rs. 75,00,000 was offered as business income. Further, a revised return was filed declaring loss after adjusting the loss originally returned in original return of income. AO invoked provisions of section 115BBE read with section 69C and made addition of Rs. 75,00,000 due to non-availability of bills or evidences to support the purchases. Accordingly, the expenses relating to purchases were disallowed by invoking provisions of section 115BBE read with section 69C. Assessee submitted that the expenditure of purchase once shown by it in its regular business accounts, the source was obviously explained. Once source was explained, provisions of section 69C could not be invoked. It was further submitted that the provisions of section 115BBE were brought on the statute book w.e.f. 1-4-2017 and the relevant assessment year involved was 2008-09, therefore, the said provisions would not apply in the assessee s case.

Held by the Authorities with respect to Issue No 1:

Provisions of section 115BBE had been brought into the statute book w.e.f. 1-4-2017 by the Finance Act, 2016 and a beneficial circular had been issued by CBDT vide Circular No. 11 of 2019, dated 19-6-2019, wherein the CBDT clarified the applicability of circular. Even such position had been explained in the explanatory notes to the provisions of the Finance Act, 2016 by CBDT vide F. No. 370142/20/2016-TPL, Circular No. 3/2017 dated 20-1-2017, wherein it had been clarified that the amendment in section 115BBE would take effect from 1-4-2017 and would accordingly be applied for assessment year 2017-18 and subsequent assessment years.

Further, it is settled that income declared in survey is to be taxed and it has to fall under one of the head of income, i.e., business income and therefore, is available for set-off against the business loss. In instant case, during survey, an income was surrendered and added in the income of assessee and consequent business loss was claimed, therefore, such income would be available for set-off against the business loss. Further, it is also settled that the AO cannot deny benefit of section 71, and the AO has to consider the undisclosed income under section 69, but once the loss is determined, the same should be set-off against the income determined under any other head of income. Furthermore, the provisions of section 115BBE would not apply in instant case, as the same were prospective and not retrospective in nature.

Judgments Relied upon by the Authorities with respect to Issue No 1:

- a. CIT v. Shilpa Dyeing & Printing Mills (P) Ltd., (2013) 39 taxmann.com 3 (Gujarat)