

Important judgements and Updates

Update No 72/ 2021

Mohammed Meeran Shahul Hameed Honourable Supreme Court of India Against Assessee

Issues discussed and addressed:

Issue No 1 Revision u/s 263 For determining the period of limitation date on which order is passed is relevant. Date of dispatch or date of receipt are not relevant.

Facts of the case with respect to issue No 1:

The short question of law which is posed for consideration was whether the High Court was right in holding that the relevant date for the purpose of considering the period of limitation under Section 263(2) of the IT Act would be the date on which the order passed under Section 263 by the learned Commissioner is received by the assessee?

Held by the Authorities with respect to Issue No 1:

On a fair reading of sub-section (2) of Section 263 it can be seen that as mandated by sub-section (2) of Section 263 no order under Section 263 of the Act shall be “made” after the expiry of two years from the end of the financial year in which the order sought to be revised was passed. The word used is “made” and not the order “received” by the assessee. Even the word “dispatch” is not mentioned in Section 263 (2). Therefore, once it is established that the order under Section 263 was made/passed within the period of two years from the end of the financial year in which the order sought to be revised was passed, such an order cannot be said to be beyond the period of limitation prescribed under Section 263 (2) of the Act. Thus receipt of the order has no relevance for the purpose of counting the period of limitation u/s 263.

The cardinal principle of law is that the provision of the statute/act is to be read as it is and nothing is to be added or taken away from the provision of the statute.

Adrus Estate and Properties LLP ITA No. 544 (PUN) of 2018 Pune ITAT In favour of Assessee

Issues discussed and addressed:

Issue No 1 PGBP vs CG It is settled position that the treatment given in the books of account gives an indication as to the intention of the assessee to hold asset as an investment or stock-in trade.

Facts of the case with respect to issue No 1:

In the return of income, the respondent/assessee has offered the profit on the sale of the said land under the head of "Capital Gains".The Assessing Officer by observing that the respondent/assessee company was formed only for the purpose of dealing in the land and the source of acquisition of property of land was out of borrowed funds had called upon the respondent/assessee to show cause as to why the profits on the sale

Important judgements and Updates

Update No 72/ 2021

should not be assessed under the head "Income from Business".The gist of the explanation offered by the respondent/assessee is that the land was reflected as Investment in the Balance-Sheet and never forming part of stock-in-trade and no development activities on the said land were carried on and not engaged in the continuous and regular purchase and sale of land except this solitary transaction. The land was purchased out of own funds and not out of borrowed funds. Thus it was contended before the Assessing Officer that the transaction of sale of land does not fall under the category of an "Adventure in nature of trade".

Considering the above explanation of the respondent/assessee company, the Assessing Officer concluded that the land was purchased out of the proceeds received on allotment of 8% redeemable non-cumulative preference shares each to M/s. Cyzachem Pvt. Ltd. According to the Assessing Officer 8% redeemable non-cumulative preference shares are only in the nature of borrowed funds and taking into consideration the fact that the land was converted into non-agricultural land by the respondent/assessee after the sale to MCA and the fact that respondent/assessee has also generated huge profits establishes that motive is only to sell the property for profit, therefore the transaction is in the nature of adventure in trade and brought tax the profit arising out of the sale as "Income from business".

Held by the Authorities with respect to Issue No 1:

In view of the decision of Hon'ble Karnataka High Court in the case of Kirloskar Electric Co. Ltd. v. CIT [1997] 228 ITR 674 (Kar.), it can be held that the proceeds on allotment of 8% redeemable non-cumulative preference shares does not come under "borrowed funds".

The Hon'ble Madras High Court in the case of *CIT v. Kasturi Estate (P.) Ltd.* [1966] 62 ITR 578 has categorically held that realization of investments or conversion of land into money would not amount to adventure in nature of trade. The mere fact that the respondent/assessee generated huge profit *ipso facto* not enough to infer that the transaction is in the nature of adventure in trade.

In any event, it is settled position of law that assessee is entitled to maintain two different portfolios *i.e.*, Stock-in-trade as well as Investment. This position is also accepted by the CBDT in the context of taxing the profits in respect of sale transaction and shares and securities *vide* CBDT Circular No. 4 of 2007 dated 4-5-2007.

It is settled position of law that to determine whether a particular transaction is an adventure in the nature of trade or investment, the test to be applied is intention of the party at the time of acquisition of the property as held by the Hon'ble Supreme Court in the case of *G. Venkataswami Naidu & Co. v. CIT* [1959] 35 ITR 594 "It is therefore, clear that if an asset is purchased by way of investment, the transaction does not

Important judgements and Updates

Update No 72/ 2021

become an adventure in the nature of trade merely because at the date when the asset was acquired, there was intention to resell it, if an enhanced price could be earned. But, it is equally clear, and that is now settled by the decision of the Hon'ble Supreme Court in *G. Venkataswamy Naidu and Co. case (supra)* that if the purchase of the asset was made solely and exclusively with an intention to resell it at a profit, it would be a strong factor indicating that the transaction is an adventure in the nature of trade." This position was subsequently followed by the Hon'ble Supreme Court in the case of *CIT v. Sulej Cotton Mills Supply Agency Ltd.* [1975] 100 ITR 706 and *Dalmia Cements Ltd. v. CIT* [1976] 105 ITR 633 (SC).

It is an undisputed fact that the land was recorded in the books of account as part of investment. It is settled position that the treatment given in the books of account gives an indication as to the intention of the assessee to hold asset as an investment or stock-in trade. In the present case, the fact that the said land was shown as part of investment in the books of accounts coupled with the fact that the land was sold after a gap of six years would *prima facie* go to show that the intention on the part of the respondent/assessee is to hold the said land as "investment". It is settled position of law that the onus lies upon the Department for bringing the relevant material on record to prove that the transaction is an adventure in nature of trade.