advances with ledger copies during the remand proceedings. Two of the customers had also appeared before the Assessing Officer and their statements were recorded. There was sufficient information that advances were received towards sale of flat. Further, loans and advances were required to be received by prescribed means other than cash under section 269SS only from June 1, 2015 while the assessment related to the assessment year 2010-11. The explanation regarding cash receipts were not found to be incorrect. The receipts were not strictly the proceeds of the business. The claim that ledger account of the assessee as well as the promoters were produced is not denied. The amounts were necessary for running the business, so that they were supplied by the promoters and, hence, such receipts cannot be strictly construed as loans and advances coming within the ambit of section 269SS, so as to attract penalty under section 271D ; consequently, penalty under section 271D was not leviable for any of the above reasons and, therefore, deleted by the Tribunal in *Space N Place Promoters P. Ltd.* v. *Jt. CIT* [2019] 71 ITR (Trib)(S.N.) 95 (Chennai).

Kotu Sarat Kumar's *case*

The following issues were decided in a common judgment in *Kotu Sarat Kumar* v. *Dy. CIT* [2019] 71 ITR (Trib) 147 (Vizag).

(i) *Disallowance under section 14A* : Where there is no exempt income, the question of disallowance under section 14A cannot arise as was decided following *P. Venkateswara Rao* v. *Asst. CIT* (I. T. A. No. 429/Vizag/2018 dated November 30, 2018).

(ii) *Interest on borrowed capital* : Where the assessee, running a hotel, had borrowed funds from a co-operative bank making investments for acquiring new hotels, while he had interest income from unsecured loans, so that he offered only the net interest amount as income under Other Sources. The Income-tax Officer disallowed the claim of interest on borrowings on the inference that the borrowing for business had been diverted for earning interest, but it was held that there could be no disallowance as the borrowed funds were used only for the assessee's investments following *S. A. Builders Ltd.* v. *CIT (Appeals)* [2007] 288 ITR 1 (SC).

(iii) *Post-search block assessment* : An addition was made for extra unaccounted receipt on sale of a property for which the assessee's friend received Rs. 35.10 lakhs as belonging to the assessee and Rs. 74.10 lakhs for his mother out of which Rs. 39 lakhs was to be paid unofficially as inferred on the basis of a writing on loose sheets recovered during search identified to be in the handwriting of the assessee's friend. The amount of Rs. 35.10 lakhs added in his case was confirmed in first appeal, but deleted

by the Tribunal since the handwriting in the loose sheets of the writer, though identified, was not that of the assessee or any of his family members. When no statement of writer was recorded nor any enquiry was made from the purchaser, the addition was deleted following *Paramjit Singh* v. *ITO* [2010] 323 ITR 588 (P&H).

(iv) *Unaccounted cash* : An amount of Rs. 5,37,775 in cash found in the assessee's residence during search was added by the Assessing Officer and confirmed in first appeal. The assessee claimed that it represented the book balance by supporting it through a cash flow statement and wealth-tax return, which was accepted in the wealth-tax assessments, so that no defect having been found in cash flow statement, the addition was held unwarranted.

(v) *Unaccounted jewellery* : Where gold jewellery to the extent of 1064.6 gms, diamond jewellery to the extent of 27 carats and silver of 11,525 gams were found during search said to belong to the assessee's wife and mother, but unproved, 50 per cent. of the same was treated as unexplained, while in first appeal, the normal holding at 500 gms for a married lady, 250 gms, for each of the two unmarried daughters and 100 gms for male members with 50 per cent. of silverware accepted as normal holding were accepted, so that the difference alone was added. The Commissioner (Appeals) allowed a relief of 1,000 gms of gold in gold jewellery accepting the explanation that they were inherited by wife and mother and such explanation could not to be rejected merely because the jewellery was not admitted in the wealth-tax returns in their own names, though wealth-tax returns filed after search was accepted without making any addition. The addition made by the Assessing Officer was partially reduced retaining liability to the extent of 1,000 gms and 50 per cent. of silverware, but this addition was also totally deleted in the light of accepted wealth tax return.

SEL Manufacturing Co. Ltd.'s *case*

The following issues were decided in *SEL Manufacturing Co. Ltd.* v. *Dy. CIT* [2019] 71 ITR (Trib) 343 (Chand) as under :

(i) *Jurisdiction for reassessment* : The assessee questioned jurisdiction under section 153A on the ground that no incriminating materials have been found in relation to share application money or Global Depository Receipts (GDRs) which are the subject matters of the proposed reassessment. The objections against validity of notice was not accepted either by the Assessing Officer or Commissioner (Appeals). But the Tribunal found that no incriminating materials were found in respect of share application money or Global Depository Receipts, so that no addition could be made by invoking section 153A, when the original assessment has been

© Company Law Institute of India Pvt. Ltd.

completed. It was so decided by the Tribunal following *CIT* v. *Murli Agro Products Ltd.* [2014] 49 taxmann.com 172 (Bom), *CIT* v. *Continental Warehousing Corporation (Nhava Sheva) Ltd.* [2015] 374 ITR 645 (Bom), *CIT* v. *Kabul Chawla* [2016] 380 ITR 573 (Delhi) and *Pr. CIT* v. *Meera Gutgutia, Prop. M/s. Ferns "N" Petals* [2017] 395 ITR 526 (Delhi).

(ii) *Reference to competent authority* : Where the Assessing Officer had made a reference to the competent authority on a complaint of market manipulations in respect of Global Depository Receipts received by the assessee from transactions outside India, which gave the benefit of extended time for the assessee till response from the competent authority is received. The Assessing Officer did not, however, communicate to the assessee of his reference and in fact, there was nothing in the records to support the averment in the assessment order about any such reference. However, it was found by the Commissioner (Appeals) that a reference had been made and the extended time for response was available to the assessee on this matter, so that in view of this categorical finding, the Tribunal did not find merit in the argument that the response was time-barred, apart from the fact the inference of market manipulation was only a matter of suspicion.

(iii) *Allegation of market manipulation not proved* : Three assessments for three different years were made under section 153A on account of the Global Depository Receipts, the proceeds of which were added as unexplained credit under section 68 because the assessee was unable to prove the identity, genuineness and creditworthiness of the investors or the financial trail of the investments, so that the entire amount claimed to have been received towards proceeds of Global Depository Receipts were treated as income and upheld in first appeal. The Tribunal finding was that the additions were made solely on suspicion and that there was nothing to suggest that the receipts were the assessee's own funds, which were introduced by the assessee in the guise of receipt from Global Depository Receipts and that the search on the assessee's premises did not reveal any evidence to support the departmental inference made on suspicion, when the Global Depository Receipts were on account of public issue listed in a stock exchange with no relationship between the assessee and the investors, who have subscribed to them in the equity market. The expectation that the assessee should produce the foreign subscribers in the absence of which an adverse inference is drawn, was not justified, so that the addition cannot be upheld since the allegation of market manipulation is unsupported and has no relevancy on the issue of creditworthiness of the investors.

© Company Law Institute of India Pvt. Ltd.

(iv) *Principles of natural justice* : Apart from the fact that Assessing Officer had violated the principles of natural justice in not having put his suspicion to enable the assessee to controvert or rebut the inferences of the Assessing Officer especially in the context of the answer to the Assessing Officer's reference to the Foreign Tax Division being still awaited at the time the assessment was made and the assessee being asked to file voluminous details and evidence at the fag end of limitation period. Taking all these facts into consideration, the assessment was found to be bad in law for being in violation of the principles of natural justice.

(v) *Disallowance under section 14A* : The assessee had surrendered Rs. 80 crores in all for the three years covering substantial disallowances under section 14A disclosed in the return filed under section 153A. The additions in this regard after income additionally admitted in the returns, which were confirmed in first appeal, would necessitate restriction of the addition, so that disallowance under section 14A does not exceed the amount admitted by the assessee in absence of any incriminating materials found. The addition in excess of what is admitted by the assessee by way of disallowance under section 14A was found to require deletion.

(vi) *Set-off of past losses* : Since the appeal against disallowance of set-off of past losses made by the Assessing Officer had not been adjudicated in first appeal, it was remanded by the Tribunal to the Commissioner (Appeals) for a fresh decision after hearing the assessee.

(vii) *Unaccounted sales* : For the addition of gross profit at 25 per cent. as against 10 per cent. disclosed by the assessee in respect of unaccounted turnover from its business, the Tribunal found the entire unaccounted turnover could not have been brought to tax since there were corresponding purchases for which deduction had to be allowed, so that estimate of gross profit was justified, but not 25 per cent. as made by the Assessing Officer, but only at 10 per cent. as was adopted by the Assessing Officer himself in respect of another amount of unaccounted sales inferred from stock shortage found during search.

(viii) *Section 43B* : As regards the addition made to the extent of about Rs. 80 lakhs under section 43B, it was found that this item was not adjudicated upon, so that this was restored to the Assessing Officer for a decision afresh after considering the submission of proofs offered by the assessee.

(ix) *Other items* : Where an addition of notional interest at 12 per cent. on amounts advanced to the extent of Rs. 80 lakhs to one N and R was deleted in first appeal on the inference of own funds available to the assessee to justify the interest-free advances, the deletion in first appeal

© Company Law Institute of India Pvt. Ltd.

was upheld by the Tribunal following *Asst. CIT* v. *Janak Global Resources Pvt. Ltd.* (I. T. A. No. 470/Chd/2018 dated October 16, 2018) and *CIT* v. *Reliance Industries Ltd.* [2019] 410 ITR 466 (SC).

(x) *Contributions to PF and ESI* : The disallowance of delayed payment of contributions to employers' provident fund and the employees' State insurance covered under section 36(1)(v) was held to be rightly allowed in first appeal as held by the Tribunal, since the payments have been deposited before the due date for filing return, so as to require deduction following the decision of the Supreme Court in *CIT* v. *Alom Extrusions Ltd.* [2009] 319 ITR 306 (SC) and *CIT* v. *Lakhani India Ltd.* [2010] 188 Taxman 132 (P&H).

M3M India Holdings' case

The Tribunal, in *M3M India Holdings* v. v. *Dy. CIT* [2019] 71 ITR (Trib) 451 (Delhi), decided the following issues in respect of a post-search block assessment.

(1) A valid search is a pre-condition for a block assessment under sections 153A to 153C. Where the assessee questioned the very search on the basis of which jurisdiction was assumed under section 153A, it was found that the very fact that there had been a warrant of authorization under section 132 in pursuance of which a panchnama was drawn in respect of a search conducted in the premises of the assessee, proves the search and consequently the jurisdiction for post-search assessment under sections 153A and 153B.

(2) Requirement of issue of notice under section 143(2) before proceeding with an assessment was relied upon by the assessee to question the validity of assessment without such notice. However, the Tribunal found that the counsel for the assessee was heard by the Assessing Officer for the assessment, so that notice under section 143(2) should have been issued. But even such notice is not required where the assessee had been heard before the assessment as was held in this case following *Ashok Chaddha* v. *ITO* [2011] 337 ITR 399 (Delhi). The correctness of the decision in *Ashok Chaddha's* case (supra) has been doubted in the comment on this case under "Landmark Cases" in Income Tax Reports [2011] 337 ITR (Journal) 79 in the light of the mandatory requirement of notice under section 143(2) before an assessment.

(3) Where prior approval required under section 153D for post-search cases was communicated by the Additional Commissioner on January 31, 2014 and the assessment order was passed on the same day, the validity of the order was questioned on the ground that the assessee had filed a reply

© Company Law Institute of India Pvt. Ltd.

to the show cause only on January 29, 2014 running to 500 pages, so that a draft order thereafter followed by approval before January 31, could not have happened on proper application of mind on the part of the Assessing Officer and the Additional Commissioner. This argument was accepted on the finding that the entire exercise of approval under section 153D has happened in a mechanical manner and not on expected lines on proper application of mind on the part of approving authorities to the matters considered in draft assessment order following *Smt. Indira Bansal* v. *Asst. CIT* [2018] 192 TTJ 968 (Jodhpur).

(4) Where it was seen that the assessee sold his shares to one L for a consideration of Rs. 526 crores by an agreement which was modified by an additional agreement reducing the consideration to Rs. 520 crores, the difference of Rs. 6 crores was treated as unaccounted income, but it was found that novation, recession and alteration of contract are all known under the contract law, so as to substitute the original agreement, so that the assumption that the amount of Rs. 6 crores representing the difference in consideration should have necessarily been received as unaccounted sale consideration, does not necessarily follow without any evidence for such an inference as was also decided in this case.

(5) Where the convertible debentures held by A were purchased from five parties without any premium and the sellers required informal approval of transfer of the debentures to them along with a no-objection certificate for transfer in the context of the requirement of 80 per cent. consent of the shareholders for the transfer. On assurance of such approval, the sale consideration was paid through banking channels, when transfer in the debenture register was sought, it was refused on alleged non-compliance relating to the terms for such transfer and that the debenture certificates that were handed over were only copies without common seal of the company, so that the Assessing Officer inferred that the entire transaction was non-genuine and sham and, therefore, the claim of short-term capital loss of Rs. 155.75 crores was not allowed. But the Tribunal found that the transactions were supported by documentary evidence, which had not been challenged. It could not be disbelieved merely because the transactions are between group companies. Preponderance of probability favoured inference of genuineness of the loss, so that the disallowance was deleted on the finding that the original debenture certificates had been handed over to the buyers, so that inability of seller to produce the buyers by itself does not justify any adverse inference as regards genuineness.

© Company Law Institute of India Pvt. Ltd.

Wealth-tax

What is an asset?

The Wealth-tax Act levies wealth-tax on value of assets held by the assessee, the asset itself being defined under section 2(ea) of the Wealth-tax Act, which inter alia covers urban land, subject to exception, inter alia, of agricultural land used for agricultural purposes. The Assessing Officer in the assessee's case did not accept the claim of non-liability in respect of land claimed to have been used for agricultural purposes, relying on the *Explanation* to section 2(ea)(v) of the Act, to aver it does not include unused agricultural land held for industrial purpose for two years from date of acquisition or is held as stock-in-trade for 10 years from such date, so as to be taxable. It is true that the land should not only be classified as agricultural land, but also used for agricultural purposes to avoid wealth-tax. But the assessee was given certificate for such use in the form of Gardwari certificate from the Revenue authorities, showing that the assessee had grown paddy and wheat in these lands during the period for which certificate was issued, which was sufficient to discharge the burden of proof that it was used for agricultural purposes. It was under these circumstances, the assessee's claim was found acceptable in *Nector Organics Ltd.* v. *Dy. CIT* [2019] 71 ITR (Trib) 226 (Chand) following *ITO* v. *Gomantak Eximis Ltd.* [2018] 53 CCH 106 (Del-Trib).

End of Volume 71

© Company Law Institute of India Pvt. Ltd.