LANDMARK CASES

S. Rajaratnam[1]

Income

Deemed dividend

Where the assessee was part owner to the extent of 50 per cent. in equity shares with other directors in the two companies as co-owners, deemed dividend under section 2(22)(e) was inferred in respect of loans or advances availed of by them from these companies, which had substantial accumulated reserves, so as to justify the inference of deemed dividend as they were substantial shareholders holding 50 per cent. of shareholding. On a similar issue for an earlier year, the matter had been remanded by the Tribunal to the Assessing Officer, so that the decision for this year in the case of assessment on both these directors on deemed dividend was questioned in assessment for the assessment year 2006-07 in the absence of finality over the matter remanded on the same issue for the years prior to the assessment year 2006-07 for deciding the issue for the assessment year 2011-12, which issue had been earlier remanded in a group of two cases in *V. Ramesh* v. *Asst. CIT* [2020] 420 ITR 10 (Mad). Incidentally, the High Court pointed out, where there is any concession made by the authorised representative of the assessee as in this case to follow a final decision for another year, it should be taken in writing, so that unnecessary appeals could be avoided. Mere recording of the concession without such consent in writing was a practice, which had to be advisedly discarded.

Transfer Pricing

Determination of arm's length price

Where the assessee engaged in the business of providing data collection, web services, information research and related support services to its associated enterprises, the Assessing Officer adopted the transfer pricing rules in a draft order and sent it to Dispute Resolution Panel, which had directed recomputation as per its advice, so that the Assessing Officer followed its recommendation. The addition so computed, was confirmed in first appeal, but was partly allowed by the Tribunal by excluding three comparables accepted at lower level after elaborately analyzing the records and appreciating the factual matrix, because they were functionally different. In view

1. Retd. Member, I. T. A. T.

of this exclusion, the arm's length price had undergone some change, so that the Department had filed an appeal against the Tribunal order before the High Court, which dismissed the Departmental appeal on the ground, that no substantial question of law arose out of the Tribunal order based entirely on facts after elaborate discussion as to the justification for the exclusion of the three comparables by the Tribunal, so that the Departmental appeal was dismissed in *Pr. CIT* v. *Corporate Executive Board India P. Ltd.* [2020] 420 ITR 52 (P&H).

Where the Assessing Officer referred to determination of arm's length price under section 92CA to the Transfer Pricing Officer, who enhanced the computation of the Assessing Officer by requiring an upward adjustment against which the assessee approached the Dispute Resolution Panel (DRP), which upheld such upward adjustment as worked out by the Transfer Pricing Officer. But the Tribunal found that such upward adjustment was not justified after elaborately going through the facts of the case and the reasoning of the DRP finding that the estimate made by it was not supported by any documentary evidence and that the comparables chosen were not of those with functional similarity, there being no supporting documents for the working and that the Tribunal order in the assessee's own case for an earlier year had not been taken into consideration for guidance nor a decision of a Co-ordinate Bench of the Tribunal, which had fully supported the claim of the assessee, that the Tribunal in this case dismissed the appeal taking into consideration the voluminous documentary evidence on record in the form of e-mail correspondence indicating the rendition of services and reproducing the decision of the Co-ordinate Bench. The view, whether the service rendered in this case were required or not, can only be that of the assessee to whom such matters are best left to his commercial wisdom. The two issues, whether services were rendered and if so, whether the amount paid for it was reasonable, were both found to be in favour of the assessee as concluded after discussion in detail by the Tribunal, so that the Departmental appeal was dismissed by the High Court in *Pr. CIT* v. *Tudor India P. Ltd.* [2020] 420 ITR 399 (Guj).

The dispute that had incidentally arisen in this case was whether the issue was one, which could legitimately be the subject matter of appeal before the High Court as one involving a substantial question of law. What could be accepted as a matter involving substantial question of law had been reproduced in this case from the decision in *Sir Chunilal V. Mehta and Sons Ltd.* v. *Century Spinning and Manufacturing Co. Ltd.* [1962] AIR 1962 SC 1314 in the following words :

"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether if directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial question of law."

Business expenditure

Deduction under section 35D

Section 35D permits deduction of preliminary expenses on the basis of amortization of such expenditure during the ten years beginning with the previous year in which the business is commenced. In a case, where a payment relating to a mining lease, this being a preliminary expense, was sought to be covered for deduction under section 35D, the payment, however, was construed as capital expenditure which is not deductible and was, therefore, disallowed by the Assessing Officer and upheld in first appeal. But the Tribunal held that the payment was in the nature of deferred revenue expenditure which could be amortised for a period of eight years. However, the Tribunal decision to this effect was found to be erroneous by the High Court in *CIT* v. *Zuari Industries Ltd.* [2020] 420 ITR 323 (Bom), as the amount could not be amortised for a period of eight years. The High Court incidentally pointed out that not all mining leases can be treated in the same way. What is required is the adoption of an empirical test. Where it is for mining operation for mining minerals, it would be a revenue expenditure as was pointed out in *R. B. Seth Moolchand Suganchand* v. *CIT* [1972] 86 ITR 647 (SC). This decision leads to the proposition of law that in the case of mining lease, the empirical test is whether the lease relates to minerals which had already been obtained and lying in the surface, in which case it would be revenue expenditure. But where the mineral has to be brought to the surface before use, it cannot be regarded as a direct payment for acquiring stock-in-trade, so that it has necessarily to be construed as on capital account.

Another issue decided in this case related to the deductibility of interest on borrowed capital, which was found to be for setting up a plant for assessee's business, so as to permit deduction under section 36(1)(iii) following *Deputy CIT* v. *Core Health Care Ltd.* [2008] 298 ITR 194 (SC).

Capital gains

Section 50C

Section 50C is applicable prima facie wherever the stamp value is larger than the accounted consideration, but stamp value is not final as it is still open to the assessee to prove the accounted consideration. It can be so done by pointing out that the guideline value has no application to the assessee's case, which may be done with the help of an approved valuer, if the assessee is able to discharge the onus on him, inter alia, showing that the purchaser has not accounted for any extra consideration for the purchase. In a case, where the Assessing Officer had originally accepted the sale value, but the matter came up before him again because of revisional order by the Commissioner under section 263 for application of section 50C, it was found by the High Court, in *Gayatri Enterprise* v. *ITO* [2020] 420 ITR 15 (Guj), that the price received on sale of the land is a pure question of fact and where the guideline value is applied notwithstanding the assessee's protest, the onus lies on the Department to prove any extra consideration paid by the assessee, who was a purchaser in this case, because section 50C prima facie applies to the seller and not to the purchaser. If an addition were to be based upon guideline value or any other matter, the onus is solely on the Department. It is on this law, where reliance was solely placed on section 50C and not on any other fact, that the addition was held to be not justified in a long judgement running to 34 printed pages referring to 40 precedents, on an issue, which is a simple one of addition solely based on section 50C, which is applicable only in the case of seller, but had been wrongly applied to a purchaser without any justification whatsoever, so that the burden of proof was placed on the Revenue in such cases had not been discharged.

It was observed that though a lot had been argued by both sides on section 50C, what is important for application of section 50C is the knowledge that it is a special provision meant only for transfer of immovable property, where admitted consideration is lower than the guideline value in an actual transfer. But where application of section 50C is questioned, reference of the Departmental Valuation Officer is mandatory. Section 50C inserted by the Finance Act, 2002 is effective from April 1, 2003, so as to be applicable from assessment year 2003-04. It is not meant to be applied in a case of genuine transaction following *K. P. Varghese* v. *ITO* [1981] 131 ITR 597 (SC), unless there is evidence of extra consideration as is ordinarily necessary. But this proof of extra consideration being a Herculean task, the deeming provision under section 50C was introduced, but even so the application of section 50C involves the following 15 basic ingredients listed in the decision as under :

"(i) There should be a transfer of capital asset, being land or building or both ;

(ii) There should be a transfer of such capital asset by way of registration with the stamp duty authorities ;

(iii) Stamp duty is sought to be imposed by the Stamp Valuation Authorities at certain value of the capital asset which is different than the sale consideration shown in the documents of transfer sought to be registered ;

(iv) Where valuation done by the Stamp Valuation Authorities for levying stamp duty is less than the sale consideration shown by the assessee in the sale deed, section 50C cannot be invoked ;

(v) Where valuation done by the Stamp Valuation Authorities for levying stamp duty is more than the sale consideration shown by the transferor in the sale deed then such higher valuation will be considered as full value of consideration and, accordingly, such full value of consideration being valuation done by the Stamp Valuation Authorities will be substituted for apparent consideration ;

(vi) The capital gains under section 48 shall be computed accordingly on the basis of such higher full value of consideration and not on the basis of apparent consideration shown in the sale deed ;

(vii) If the assessee, being transferor, claims before the Assessing Officer that fair market value of the property under transfer is less than the valuation done by the Stamp Valuation Authorities then the Assessing Officer may refer the property to the Valuation Officer for determining its fair market value as on the date of the transfer ;

(viii) Such reference would be made in accordance with section 55A ;

(ix) On receipt of the valuation report from the Valuation Officer, the Assessing Officer has to compare the fair market value as determined by the Valuation Officer with the valuation done by the Stamp Valuation Authorities under the Stamp Duty Act and with the apparent sale consideration shown by the assessee in the sale deed ;

(x) Where valuation done by the Valuation Officer is more than the valuation done by the Stamp Valuation Authorities (SVA) then valuation done by the SVA would be taken as full value of consideration and capital gains will be calculated accordingly ;

(xi) If valuation done by the Valuation Officer is less than the valuation done by the Stamp Valuation Authorities then valuation done by the Valuation Officer would be adopted as full value of consideration as against the apparent consideration shown by the assessee or the valuation done by the Stamp Valuation Authority and capital gains be calculated accordingly ;

(xii) If valuation done by the Valuation Officer is less than the valuation done by the Stamp Valuation Authority as well as sale consideration shown by the assessee in the sale deed then apparent consideration shown in the sale deed would alone be accepted as full value of consideration and capital gains be calculated accordingly, i.e., as shown by the assessee ;

(xiii) With effect from October 1, 2009, applicable for assessment year 2010-11 the Finance (No. 2) Act, 2009 has enabled the Assessing Officer to find out Stamp Duty Value assessable by the Stamp Valuation Authority in cases where agreements to sale were executed, consideration changed hands and possession of the property was handed over to the buyer but without getting the transfer registered with the Stamp Valuation Authority. In such situation the stamp duty valuation assessable would also be treated as full value of consideration ;

(xiv) Use of the word "shall" in section 50C makes it mandatory for the Assessing Officer to adopt the valuation done by the Stamp Valuation Authority in place of apparent consideration, if necessary conditions under section 50C are satisfied. The Assessing Officer has no discretion."

Incentive deductions

Section 80-IB

The assessee had claimed relief under section 80-IB in respect of an industrial undertaking for its manufacturing business started on March 26, 2002, so as to be eligible for relief. The Finance Act, 2002, by an amendment to section 80-IB(4) extended the date of commencement for manufacture up to March 31, 2004, where the assessee had begun manufacture on February 1, 2003. But even so, there was no evidence brought on record to show that the assessee had at least started trial production within the permissible time; there was no material to satisfy the condition that the assessee had started manufacture in assessment year 2002-03 within the meaning of section 80-IB(14)(c) of the Act, so that the Tribunal upheld the Departmental inference that the assessee was not entitled to relief under section 80-IB. It was this decision, which was endorsed by the High Court dismissing the assessee's appeal as there was no contemporaneous evidence for the assessee's claim and the Tribunal order was not shown to be vitiated by perversity or absurdity as held in *Teracom Ltd.* v. *Asst. CIT* [2020] 420 ITR 1 (Bom).

Assessment

Notice in the name of deceased is not valid

The law that a notice in the name of a dead person cannot be valid and that the mere fact that the notice was not addressed to the legal representative cannot be treated as a curable defect within the meaning of section 292B, is well-settled. Even the fact that legal representative participated during the hearing does not make good the defect in the original notice, so that the mere participation, which was also extremely limited for the purpose of intimation, that the assessee was no more alive, does not render the notice valid. There is a jurisdictional defect and not procedural irregularity in issue of such a notice in the name of the deceased, following the settled law on the subject in a number of cases, which were also cited and discussed in this case in *Urmilaben Anirudhhasinhji Jadeja* v. *ITO* [2020] 420 ITR 226 (Guj).

Notice in the name of a deceased, even where it has been complied with by the assessee's wife presenting all the facts of the case, continues to be invalid, so that it was set aside and the assessment in pursuance of such notice was annulled in *Rupa Shyamsundar Dhumatkar* v. *Asst. CIT* [2020] 420 ITR 256 (Bom) following *Alamelu Veerappan* v. *ITO* [2018] 12 ITR-OL 95 (Mad) and *Chandreshbhai Jayantibhai Patel* v. *ITO* [2019] 413 ITR 276 (Guj).

Return

Time limit for revised return

The law provides for acceptance of a revised return filed within time under section 139(4). A return filed beyond the time limit could also, however, be accepted, where the revised return was pursuant to a scheme of amalgamation in the context of the scheme itself providing for filing revised return on approval of the scheme. Since no objection was raised by the Revenue before the scheme was approved, revised return filed beyond the due date, but under the scheme of amalgamation, is valid and is required to be accepted, as was held by the Supreme Court in *Dalmia Power Ltd.* v. *Asst. CIT* [2020] 420 ITR 339 (SC) affirming the decision of the High Court by a single judge *Dalmia Power Ltd.* v. *Asst. CIT* [2019] 418 ITR 221 (Mad) and reversing the decision of the Division Bench in *Asst. CIT* v. *Dalmia Power Ltd.* [2019] 418 ITR 242 (Mad).

Reassessment

Not valid

In a case, where the assessee had undertaken a contract for construction of bridges for Public Works Department (Roads) Division, the income of which was exempt under section 80-IA and such exemption was accepted in a scrutiny assessment, the assessment was, all the same, sought to be reopened under section 147 on the inference that the assessee had not proved that it was in the business of providing infrastructural facilities, while its regular business was outdoor advertisement. However, on a writ petition filed by the assessee against the notice under section 148, it was found that the reasoning in recorded reasons was that the assessee has not brought any tangible material for the right to relief under section 80-IA. It was found by the High Court that the assessee had responded to all the notices and supplied the required information confirmed by the Executive Engineer of Public Works Department. A reliable answer given by a Government functionary could not be rejected without any tangible material having a live link with formation of belief of escapement of any income. It was clearly a case of proposed reassessment on mere change of opinion, so that there could be no jurisdiction for reassessment in such cases as decided in *Selvel Transit Advertising Pvt. Ltd.* v. *CIT* [2020] 420 ITR 100 (Cal) accepting the argument of the assessee that there is no jurisdiction following the decision of the Supreme Court in *CIT* v. *Kelvinator of India Ltd.* [2010] 320 ITR 561 (SC).

An addition in a regular assessment deleted in appeal cannot again be repeated by recourse to jurisdiction under section 147 as in such a case, even where it falls within the four-year limit, it does not only satisfies the usual condition of satisfaction on the part of the Assessing Officer as regards escaped income, but also the requirement to prove failure on the part of the assessee to fully and truly disclose all material facts. Where material facts were all disclosed and assessment itself made under section 143(3) having become the subject matter of appeal under block assessment under section 158BC, there could not have been any reason for reassessment, so that jurisdiction for reassessment was found to be lacking in *Audhut Timblo* v. *Asst. CIT* [2020] 420 ITR 62 (Bom) as it was a case, where all the material facts had been disclosed, so that there was no jurisdiction in the light of settled law as pointed out in *GKN Sinter Metals Ltd.* v. *Ms. Ramapriya Raghavan, Asst. CIT* [2015] 371 ITR 225 (Bom) and *Asian Paints Ltd.* v. *Deputy CIT* [2009] 308 ITR 195 (Bom).

Service of notice under section 148 was issued on the Power of Attorney holder for two assessees, who were sisters in a matter of dispute relating to an immovable property in the State of Goa. The dispute in the court as to the ownership of the property in a civil suit was settled by a consent decree. As a result of such decree, the assessee obtained Rs. 5.5 crores in the financial year 1999-2000. To bring this amount to capital gains tax, reassessment notice under section 148 was issued. The notice was accompanied by reasons for reopening proposing to treat the power of attorney as the agent of the assessee under section 163 of the Act. But the Assessing Officer followed up this notice with another communication, wherein he clarified that the notice may be read as having been served on the power-of-attorney holder on whom the amount of Rs. 5.5 crores was brought to tax. Jurisdiction in respect of the assessment on the power-of-attorney holder was upheld by the Tribunal and the High Court in *P. P. Mahatme, Power of Attorney Holder* v. *Asst. CIT* [2020] 420 ITR 71 (Bom), as no substantial question of law arose from the order pointing out that the Assessing Officer had also issued a clarification that the notice was issued to power-of-attorney holder solely in his capacity as agent of the non-residents. Since the notice was within a period of six years, jurisdiction was held justified. When jurisdiction was held justified by all the three authorities, namely, Assessing Officer, Commissioner (Appeals) and the Tribunal, the decision, it was found, had to be upheld by the High Court. In holding so, it rejected the argument to construe the consent decree as one of family arrangement not giving rise to any liability, but such an argument was found unacceptable in that it was not a family arrangement or family settlement. Since the question of liability to tax on capital gains was never a matter of any family arrangement or family settlement and since the consideration received could not, therefore, be characterised as money received on family arrangement and family settlement as decided by the Tribunal, the High Court upheld the order of the Tribunal, pointing out that it does not give rise to any question of law and much less a substantial question of law, so as to justify its interference. It was in this view that the appeal by the power-of-attorney holder was dismissed by the High Court.

Central Board of Direct Taxes (CBDT)

Circulars or instructions issued by the Central Board of Direct Taxes are binding on the officers of the Department, but not the courts. Such Circulars cannot have primacy over the jurisdictional High Court, where the instructions are found to be contrary to the law as found by it, though they are binding on the officers. It is not open to an assessee to contend that the Circular will prevail over the decision of the High Court or the Supreme Court. The instructions or Circulars of the Board are its opinions. But where such opinion runs counter to the law laid down by the High Court, it will no longer prevail. It was this law, which was followed by the High Court in a group of cases relating to a special deduction under section 80P in *Kuthannur Service Co-operative Bank Ltd.* v. *ITO* [2020] 420 ITR 358 (Ker), where deduction under section 80P(2) was denied to a co-operative bank in the view that it was not a primary agricultural credit society. In first appeal, it was held that deduction was permissible because notwithstanding the fact that the co-operative society described itself as a bank, it had been classified as a primary agricultural credit society by the Registrar of Co-operative Societies. It was in this context, the disallowance by the Assessing Officer was deleted in first appeal following *Chirakkal Service Co-operative Bank Ltd.* v. *CIT* [2016] 384 ITR 490 (Ker) directing relief. The Departmental appeal was dismissed by the Tribunal. It was also noticed, that the Board Circular No. 133/6 of 2007 dated May 9, 2009 had also clarified that the relief in a case of a bank can be denied only where it is recognised as a bank in Part V of the Banking Regulation Act, 1949. This view, though contrary to the view taken by the Full Bench of the Kerala High Court in *Poonjar Service Co-operative Bank Ltd./Mavilayi Service Co-operative Bank Ltd.* v. *CIT* [2019] 414 ITR 67 (Ker) [FB], is no longer good law after the decision of the apex court in *Citizen Co-operative Society Ltd.* v. *Asst. CIT* [2017] 397 ITR 1 (SC).

It was also pointed out in this case that the law that the Board Circulars and instructions are not binding on the courts, is also well-established as decided by the Supreme Court in *CIT* v. *Hero Cycles P. Ltd.* [1997] 228 ITR 463 (SC), where it was pointed out that it is equally well-settled that Circulars will bind the Income-tax Officers, but will not bind even the appellate authorities or the Tribunal and much less the courts or in fact even the assessee.

Refund

(i) Interest on refund

Where the assessee had deducted tax on interest payments made to IDBI and deposited the tax deducted with the Central Government, but received a refund of an amount running over Rs. 7 lakhs on the direction of the Commissioner, the assessee became entitled to interest on such refund under section 244A of the Act. Since it was not given by the Assessing Officer, the matter was taken up in appeal, where the assessee succeeded, but the matter was taken up by the Department to the Tribunal, which held in favour of the Department on the plea of the Revenue that interest on refund was not contemplated for items like refund arising out of excess deduction of tax and that the appellant before it was not the assessee but only a tax deductor and that interest under section 244A is available only for refund under section 237 and not for excess deduction of tax and that such interest is meant only for an assessee and not for a deductor. On further appeal by the assessee to the High Court, the Tribunal, in its order reproduced as a part of the judgment of the Supreme Court, held that the Tribunal was justified in view of Circular No. 285 dated October 21, 1980 [1981] 130 ITR (St.) 1 on the ground that the refund is independently of the Income-tax Act, 1961, so that the interest on refund is not mandatory. In further appeal by the assessee, the Supreme Court, in *Universal Cables Ltd.* v. *CIT* [2020] 420 ITR 111 (SC), reversed the decision of the High Court on the finding that a reference to section 237 clearly indicates refunds of all kind, so that no distinction need be made as between cases, where interest is charged under section 214 and/or 244 and that the assessee was entitled to interest on refund. The Supreme Court felt that it had already decided so in *Union of India* v. *Tata Chemicals Ltd.* [2014] 363 ITR 658 (SC), which made no distinction between tax refunds and that there was no justification for restriction on payment of interest in some cases and not in others. Since the amount has been deposited in the Treasury and the Government had the use of money, the assessee was held entitled to interest on refund, whenever refund is due, under section 244A.

Another issue that arose was whether the interest on enhanced refund claimed in a revised return should run from the date of original, or revised, return. Where the delay is attributable to the assessee, interest could run only from the date of revised return and not the date of filing the report for computing book profits under section 115JB in Form 29B on September 7, 2006, even where the original return had been filed on May 15, 2003 on which intimation was issued on July 20, 2003. It is under these circumstances, the date of filing Form 29B was not considered relevant for processing the refund, because interest can run only from the date on which revised return was filed as was decided by the High Court in *HHA Tank Terminal P. Ltd.* v. *Asst. CIT* [2020] 420 ITR 395 (Ker).

(ii) Power to withhold refund – Section 241A

Where an assessment in pursuance of notice issued under section 143(2) results in refund, such refund cannot ordinarily be withheld. Where the refund is the result of mere intimation under section 143(1), refund need not await scrutiny assessment in every case. It is only where the circumstances under section 241A has application, refund could be withheld after due application of mind on the part of the Assessing Officer. The discretion vested in section 241A for withholding refund has to be exercised judiciously for reasons to be recorded in writing. Where the issue of refund would adversely affect the interest of the Revenue, it could be withheld.

The exercise of discretion is not an empty formality, but should take into account all the relevant factors. It is only where a tax demand is anticipated on regular assessment and there is lack of creditworthiness on the part of assessee, so as to render recovery proceedings for the ensuing demand to be difficult, refund could be withheld. Mere fact of pending scrutiny assessment is not sufficient reason for withholding refund.

Where the reasons for withholding refund were not made available in a case, the assessee filed a writ petition against the Revenue for failure to issue the refund, which had become due to the assessee. The matter was examined by the High Court, both with reference to the citations on the subject and facts of the case and it was decided in favour of the assessee directing issue of refund. The High Court was prompted by the fact that there was no exercise of mind on the part of the Assessing Officer as was evident from the fact that he has completely misunderstood the import of section 241A as though it would justify withholding of refund in every case. Refund can be withheld only on the basis of strict guidelines available in the section itself. In this case, it was withheld merely because scrutiny assessment was pending. The requirements that reasons for withholding refund should be recorded and such reasons should be approved by the Principal Commissioner or Commissioner as per standing instructions were not followed, so that the order withholding the refund merely by reproducing certain words in section 241A could not justify withholding of the refund as decided in *Maple Logistics P. Ltd.* v. *Pr. CIT* [2020] 420 ITR 258 (Delhi).

Section 241A requires the Assessing Officer to withhold refund, where the grant of refund is likely to adversely affect the Revenue, a matter, which can hardly be left to the Assessing Officer, who cannot possibly judge the requirements of revenue to the State. In this decision, the High Court felt that the Assessing Officer has completely lost sight of this requirement stipulated under section 241A. But the High Court has not indicated how an Income-tax Officer can come to a judgment on the possible effect of a refund, which, however large, is only an insignificant part of the revenue of the State. This condition under section 241A is not practicable for implementation. But the High Court has only found that this exercise of the effect of refund in the case before him on the revenue of State under section 241A has not been correctly undertaken. In fact, it can hardly ever be correctly undertaken in the light of the need for expertise in public finance and familiarity with all the statistics relating to the revenue and expenditure of the State, both of which are not within his knowledge or within his competence. Section 241A itself needs review as it places an impossible burden on the Assessing Officer in the matter of refund to which the assessee is statutorily entitled to.

Revisional jurisdiction under section 263

Where the original assessment was a scrutiny assessment after issue of notice under section 143(2) with the Assessing Officer raising as many as 28 queries and the final order passed after considering elaborate replies thereto, the Commissioner acting under section 263 still found that part of the reply relating to unsecured loans and creditors were accepted without all the requisite details and confirmations, so that he felt, that this omission constituted prejudice to the Revenue and accordingly he remitted the matter for examination of unsecured loans and creditors. The objection that the original assessment, having been made under section 143(3), could not be subject matter of revision especially since no fault has been found in the assessment except for the Commissioner's inference that further verification was necessary as ordered by him. The Tribunal confirmed the order of the Commissioner, so that the assessee came up before the High Court in *Meerut Roller Flour Mills Pvt. Ltd.* v. *CIT* [2020] 420 ITR 216 (All), wherein it was found that no prejudice to the Revenue was indicated by the Commissioner and that a reply of the assessee to an enquiry needed verification. The order of revision was held not justified by the High Court after elaborately discussing the facts of the case and citing a large number of precedents on the subject.

Tax deducted at source

(i) Section 194C/194-I

The assessee, an airline company, was providing lounge services to its selected customers on payment of charges to the airport as per agreed terms. The payment was understood by the assessee as one for a works contract under section 194C and tax was accordingly deducted at the rate specified at 1 per cent. for individuals and Hindu Undivided Families and 2 per cent. for others. The Assessing Officer was, however, of the view that the payment was in the nature of rent under section 194-I so as to require tax deduction at 2 per cent. for use of any machinery or plant and 10 per cent. for use of land, building or furniture. The Commissioner (Appeals) and the Tribunal concurred with the claim of the assessee that the lower rate of tax under section 194C alone had application because it was not rent simpliciter but an agreement for providing service to its premier-class customers for stay during the waiting period in what is known as lounge, which was an exclusive space in the airport with comfortable sitting arrangement and washroom. The Assessing Officer had placed reliance on section 194-I on the decision of the Delhi High Court in *United Airlines* v. *CIT* [2006] 287 ITR 281 (Delhi) and *CIT* v. *Japan Airlines Co. Ltd.* [2010] 325 ITR 298 (Delhi). But the High Court found that the Supreme Court, in *Japan Airlines Co. Ltd.* v. *CIT* [2015] 377 ITR 372 (SC), had overruled the Delhi High Court's view while approving the decision of the Madras High Court in *CIT* v. *Singapore Airlines Ltd.* [2013] 358 ITR 237 (Mad) relating to payment for services connected with landing and take-off of the aircrafts besides provision for parking facilities, holding that it was not merely a case of renting space because air-traffic services, ground-safety services, aeronautical communication facilities, etc., did not constitute rent, so that the payment fell under section 194C and not under section 194-I following this law as held by the Tribunal and upheld by the High Court in *CIT (TDS)* v. *Jet Airways (India) Ltd.* [2020] 420 ITR 389 (Bom).

(ii) Section 194H

Where the payment by an assessee engaged in processing credit card payment was disallowed by the Assessing Officer for non-deduction of tax under section 40(a)(ia) of the Act on the ground that deduction was required according to him as commission under section 194H, the disallowance was concurrently found to require deletion in first appeal and the Tribunal. The High Court upheld the order of the Tribunal on the ground that the bank was not acting as an agent of the assessee, so as to justify the payment to be treated as commission and, as a result, there was no requirement for tax deduction at source under section 194H as rightly decided in first appeal and the Tribunal. The Tribunal decision was upheld by the High Court in *Pr. CIT* v. *Hotel Leela Venture Ltd.* [2020] 420 ITR 385 (Bom).

Writ

(i) Regarding seizure under section 132A

Where there was a seizure of Rs. 2.46 crores from two persons as per information received by the Income-tax Department from the police and it was found that the persons from whom the amounts were seized were employees of the assessee, which was carried in the course of courier service run by the assessee firm for delivery of cash from Nagpur to Ahmedabad. The assessee explained as to whom the money was meant to be delivered and that cash was drawn from the bank accounts of himself and his wife, but did not furnish necessary details or confirmation from the parties. The seizure of cash by warrant of authorisation under section 132A(1) was questioned by way of writ. However, the Revenue has acted on the information received by the police to justify the requisition of the assets under section 132A in this case. The Tribunal's non-acceptance of the assessee's explanation was upheld as there was no palpable error or gross illegality in its order. The seizure itself was on authorisation issued by the Commissioner under section 132A(1) of the Act, so as to be valid, as decided by the High Court in *Kamleshbhai Rajnikant Shah* v. *Deputy DIT* [2020] 420 ITR 274 (Guj).

(ii) Not maintainable

Where an issue raised in a writ petition was, whether there was escaped income to justify action under section 147 with reference to date of audit report cited by the assessee as one dated September 29, 2010, when the actual date of audit report was January 12, 2011, it was found that as long as the date of audit report did not have any live link as regards the inference of escapement of income, it is a matter to be decided in due course by the Tribunal and not under writ jurisdiction of the High Court, but pending such decision, the notice of reassessment could not be quashed as decided in *Doosan Bobcat India P. Ltd.* v. *Deputy CIT* [2020] 420 ITR 84 (Mad), so that the further question whether the mistake was merely inadvertent/ clerical or intended to mislead the Assessing Officer, is a matter which can be considered with reference to the main issue, whether the dates of audit report have a live link as regards the inference of escapement of income.

In another case of writ filed by an assessee, which was a non-resident German company rendering agency support services along with technical support services, through its permanent establishment in India, the Assessing Officer inferred that the profit of the branch office of assessee in India should be treated as liable to tax in India at 40 per cent. for assessment year 2016-17 in a matter of addition at the instance of Transfer Pricing Officer, which had also became subject matter before the Dispute Resolution Panel. In such cases, the Assessing Officer passes only a draft assessment order, so that there could be no writ action for quashing his draft assessment order after the matter has been decided by the Dispute Resolution Panel, so that the assessee's grievance was held unjustified. But at the same time, the High Court directed that, though the prayer for quashing the draft assessment order could not be acceded to, it was decided that the factual dispute has to be first settled under reference to the report of the Transfer Pricing Officer after which on difference, the Dispute Resolution Panel comes into the picture. Since the matter has to be settled by Dispute Resolution Panel after giving the Assessing Officer sufficient opportunity, the writ petition was dismissed, while granting liberty to the writ petitioner to file his objection before the Dispute Resolution Panel as well as the Assessing Officer within 30 days from the date of receipt of copy of its judgement and that the Dispute Resolution Panel should thereafter consider the matter and pass appropriate direction/orders on merits in accordance with law following the procedure under section 144C(5), (6) and (7) of the Act holding at the same time that the objections, whenever filed, will be taken to have been filed within time stipulated under section 144C(2)(b) apparently because of the intervening writ petition as decided in *EOS GmbH-India Branch* v. *Deputy CIT* [2020] 420 ITR 119 (Mad).

Though the availability of an alternate remedy was usually taken as a bar against exercise of writ jurisdiction on the part of the High Court, it was found that there may be a case, where it need not be taken as absolute bar as was found in *Deepak Dhanraj* v. *ITO* [2020] 420 ITR 105 (Karn) in a matter, where a revised return for claiming a deduction, was rejected without any reason for not considering the claim for deduction in the revised return. The availability of alternate remedy need not be a bar for writ jurisdiction against a palpably illegal order made without giving opportunity to the assessee and without any reason in this case for rejection of relief under section 54F claimed in the revised return.

Penalty

(i) Section 271(1)(c)

Certain documents were found during a search disclosing certain gifts received by the assessee's minor son to the extent of Rs. 1.52 crores and admitted during the course of assessment, though not in the return, but by way of an explanation that the gift was genuine. The Assessing Officer did not accept the explanation as the donor did not have creditworthiness and concluded that the transaction of gift was not genuine, so that he added the amount of alleged gift. The addition was sustained in first appeal but the Commissioner (Appeals) partly allowed the appeal by reducing the penalty from the maximum of 150 per cent. to 100 per cent. But the entire penalty was deleted by the Tribunal. The Department has not discharged its burden to prove that the assessee had concealed its income or furnished inaccurate particulars, so that the High Court upheld the Tribunal order in favour of the assessee after review of a number of decisions on the subject in the view that the Revenue had failed to establish that the assessee had concealed its income or furnished inaccurate particulars as held in *Pr. CIT* v. *Dinesh Chandra Jain* [2020] 420 ITR 364 (All).

(ii) Section 271AAA

Section 271AAA is applicable for post-search assessments providing for penalty at 10 per cent. for undisclosed income discovered during search, where such undisclosed income so discovered is admitted by the assessee in the course of search itself by way of a statement besides payment of tax and interest and substantiating the manner in which such undisclosed income was derived. Where the assessee had not satisfied this part of the requirements to avoid penalty by not disclosing the manner in which the undisclosed income, which is admitted, had been derived, the penalty of Rs. 26,80,025 was levied. Penalty, however, was deleted in first appeal which was confirmed by the Tribunal following *Pr. CIT* v. *Mukeshbhai Ramanlal Prajapati* [2017] 398 ITR 170 (Guj). The matter was taken up by the Revenue to the High Court, which found that the Tribunal had followed a decision of the jurisdictional High Court itself in upholding the deletion of penalty under section 271AAA and that there was no question of law arising out of the Tribunal order for the High Court to interfere as decided in *Pr. CIT* v. *Backbone Enterprise Ltd.* [2020] 420 ITR 305 (Guj).

In another case of penalty levied under this section, both the Commissioner (Appeals) and the Tribunal had held that all the three conditions imposed by the statute should be satisfied for sparing penalty, viz., admission during search, payment of tax together with interest, if any, and explanation as to the manner in which the income has been derived. The assessee in this case had not satisfied the last condition as it had not disclosed the manner in which undisclosed income was derived. It was found that the Revenue had failed to question the assessee, while recording the statement on this matter. But it was generally explained that undisclosed income was unaccounted cash receivable during the year as was admitted in a statement of a director as income earned out of booking/selling shops specifying the place relating to which the amount of income was concealed. The High Court found that the assessee could not, therefore, be blamed for not giving any more information as to the manner in which the income was derived. It is under these circumstances, the deletion of penalty by the Tribunal was upheld by the High Court in *Pr. CIT* v. *Patdi Commercial and Investment Ltd.* [2020] 420 ITR 308 (Guj) after review of the case law on the subject.

Black Money Act, 2015

Section 1 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (Black Money Act) provides that it would come into force from April 1, 2016. A notification dated July 1, 2015 had already provided for declaration of undisclosed assets located outside India on or before September 30, 2015. This involved an anomaly between date of commencement of the Act and the date mentioned in the Notification as between July 1, 2015 and April 1, 2016. This anomaly became the subject matter of decision of the Supreme Court in *Union of India* v. *Gautam*

Khaitan [2020] 420 ITR 140 (SC), where it was explained that the notification under section 86(1) providing that the Act shall come into force on July 1, 2015 itself and not April 1, 2016 as mentioned in section 1 of the Act was intended to remove the anomaly. It is not as argued before the court, that the Central Government was altering the commencement of the Act, a matter, which is not in its powers. It was found that this argument was not a case of Central Government altering the date of commencement, but was merely intended to remove the anomaly, so that the notification under section 86(1) cannot be questioned. The date was changed only to enable assessees to take the benefit of section 59 of the Act, where the High Court restrained the Department from prosecution under section 55 of the Act because the action complained of was before the Act itself came into force on April 1, 2016, so that the powers under this Act could not have been exercised by advancing the application to a matter on July 1, 2015. It is in this context, the interim order passed by the High Court on the assumption that the matter related to assessment year 2019-20, which would cover only offences till March 31, 2019, attracted the decision of the Delhi High Court in *Gautam Khaitan* v. *Union of India* [2019] 415 ITR 99 (Delhi) holding the applicability of powers under sections 85 and 86 by advancing it to July 1, 2015 was found to be incorrect and was reversed by the Supreme Court. However, it directed the High Court to decide the writ petition afresh on its own merits and not with reference to the dates on which the law relating to amended provision came into effect.

In another case, jurisdiction of the Settlement Commission in the context of Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (Black Money Act) in respect of cases of non-resident individuals, who opt for settlement for years for which their assessments were pending came up for adjudication. Though Black Money Act came into force from assessment year 2016-17, there could be liability for earlier years under this Act. The Finance (No.2) Act, 2019 had made an amendment to the definition of assessee-in-default with retrospective effect from July 1, 2015 to include a resident, who is not ordinarily resident (R & Not OR). Where settlement petition was filed disclosing income, which is ordinarily covered by the Black Money Act, the Income-tax Department had reservation as to whether such cases could be subject matter of settlement, where the foreign asset covered by the Act had not come to the notice of the Income-tax Department prior to the settlement petition. What is included under the Black Money Act would not ordinarily be also subject to normal assessment. Voluntary return on the part of the assessee or reassessment proceedings within the four-year time limit, where material fact has not been disclosed, are still open for dealing with black money in the normal course of assessment since section 245C of the Income-tax Act empowers the Settlement Commission to deal with a petition for settlement as long as related assessment is pending.

Where additional income is offered, the Settlement Commission can entertain the same as long as the foreign asset has not been disclosed in the original assessment. Where a search at the premises of a group of companies resulted in proceedings under sections 148 and 153A for a number of years, the assessee had responded to the notices by filing return disclosing foreign assets, but at the same time, filed separate application for settlement before the Settlement Commission under section 245C of the Act. In pursuance of the settlement application, which was admitted, the amount covered by the Black Money Act had been settled. The Assessing Officer gave effect to the settlement. The Revenue was not satisfied with what it considered as interference of the Black Money Act, so that a writ was filed by the Principal Commissioner against Settlement Commission before the Gujarat High Court, which decided, in *Pr. CIT* v. *ITSC* [2020] 420 ITR 149 (Guj), that the powers of the Settlement Commission were not taken away by the Black Money Act because income, which became subject to tax is not outside the scope of settlement by the Settlement Commission, so that the petition by the Department was dismissed pointing out that the declarants were not residents during the years for which income was admitted and that at any rate, they were not assessees in those years and, therefore, not covered by the Black Money Act at the time the search was undertaken. Black Money Act came into force only from assessment year 2016-17 onwards. But in view of its retrospective application, it covered all the earlier years. Where the Settlement Commission settled the liability for assessment years in which assessments were pending under section 148 or 153A, its powers were not in any manner diluted or barred by the Black Money Act. Where the Settlement Commission was satisfied that full and true disclosure was made before it, it could settle the matter, so that where the settlement was arrived at and given effect, the writ petition could not be entertained even for this reason. It, therefore, upheld the validity of settlement.

One of the matters covered by the decision related to Banco Group of cases, where pursuant to a search, notices under sections 148 and 153A were issued with the group companies admitting in one of the cases additional undisclosed foreign income of about Rs. 28 crores, Rs. 25 crores and Rs. 37 crores amounting in all to Rs. 90.28 crores. In another case, the amounts admitted were Rs. 41 crores, Rs. 37 crores and Rs. 51 crores in all adding to Rs. 129 crores. These were settled in this group of companies. Though the Department conceded that Black Money Act and Income-tax Act are not mutually exclusive, it excluded the matters covered by the Black Money Act after referring to various foreign jurisdictions with which the Central Board of Direct Taxes was in contact for details of assets held therein and responses were still awaited, so that the settlement in such cases was premature. The Settlement Commission cannot, therefore, bring finality by settlement in such matters covered by the Black Money Act. It was, however, found by the High Court, that there was no bar whatsoever for determination of tax liability, though the income may be covered by the Black Money Act, but it is still income, which are otherwise covered by normal provisions of the Act. The High Court further pointed out to the decision of the Supreme Court in *Gautam Khaitan's* case (supra), wherein it was decided that section 59 of the Black Money Act only gives an opportunity to the assessee to voluntarily return the income, but does not in any manner dilute the powers of the Government for action in normal course. Where no declaration is filed under the Black Money Act, it is normally covered for action in normal course. Where a person fails to take the benefit of section 59 of the Black Money Act, he would already be an assessee-in-default under the normal provisions of the law. Notwithstanding the damage the Black Money Act does to the economy, where Indian money is kept abroad. as explained in Explanatory Memorandum in the Finance (No.2) Bill, 2019, the legislative intent behind the Act is bring to tax such foreign income, which did not suffer tax in the relevant years. The Black Money Act as a legislation has to be given strict interpretation of law as ruled by the Supreme Court in *A. V. Fernandez* v. *State of Kerala*, AIR 1957 SC 657. The provisions of the Black Money Act have, therefore, to be interpreted strictly as it is a taxing statute even as held by the Supreme Court in *Union of India* v. *Ind-Swift Laboratories Ltd.* [2011] 7 GSTR 348 (SC).

The Black Money Act extends the normal time limit under section 148. In this case, the search was conducted after the Black Money Act came into force and the notices under sections 148 and 153A were issued after such date. On the basis of information that the assessee was found to have assets including financial interests in entities located outside India, the validity of the notices under the Black Money Act for the assessment year 2017-18 and the assessment year 2018-19 was justified. Section 245C makes a provision for application of settlement cases and the expression "case" has been defined in a wide sense to include reassessment and recomputation. The Settlement Commission has strictly followed the procedure prescribed under section 245D, so that the High Court found that there was no infirmity or illegality in the Settlement Commission's approach. The petitioners themselves cannot be permitted to approbate or reprobate. For finalising the settlement, initially the offer of income was of Rs. 8,65,63,679 with additional income offered during the hearing, so that the settlement was finally effected taking into consideration the additional income offered at Rs. 90,28,25,000. On consideration of all facts recorded by the Settlement Commission, the High Court found no infirmity in the settlement, so that it declined to interfere, while interim relief granted earlier was vacated. Even a short stay of two weeks requested by the Revenue to enable it to go to the Supreme Court, was declined since the order of Settlement Commission had meanwhile been given effect.

***State Bank of India's* case**

The following three issues were decided in a case of a bank by the High Court in *Pr. CIT* v. *State Bank of India* [2020] 420 ITR 376 (Bom).

The first issue in this case related to a remand order of the Tribunal in respect of a claim for deduction of interest credit to interest suspense account; the High Court upheld the order of remand for verification of the assessee's claim whether the amount carried to the suspense account towards contribution to retired employees benefit scheme was admissible in the year of payment. The same method of allowing the interest credit to suspense account in the year of payment should be followed. The remand for this purpose was upheld to follow the law as for earlier years.

The second issue in this case related to deductibility of amount of contribution itself to the retired employees benefit scheme, which was sought to be disallowed under section 40A(9), which bars deduction of any contribution other than those covered under section 36(1)(iv) or (iva) or (v) of the Act. Any payment under any other law was also permissible as a deduction as was also provided in the section. Since the contribution made to retired employees benefit scheme falls within the purview of section 40A(9) and the bona fides of the assessee had not been doubted by the Assessing Officer, the expenditure claimed was found to be admissible following *CIT* v. *Bharat Petroleum Corpn. Ltd.* [2001] 252 ITR 43 (Bom), *Pr. CIT* v. *Indian Oil Corporation Ltd.* [2019] 14 ITR-OL 176 (Bom) and *CIT-LTU* v. *Indian Petrochemicals Corporation Ltd.* [2019] 14 ITR-OL 481 (Bom).

The third issue related to the question whether deduction under section 80M in respect of certain inter-corporate dividends is permissible during the period. The provision for deduction was in vogue only for the assessment year 2003-04. Since the claim for deduction related to the very year for which it was in vogue as it happened in this case, the further question that arose was whether the deduction should be with reference to the rate provided on gross or net income. It was held that it could be allowed with reference to the gross income, following *CIT* v. *Modern Terry Towers Ltd.* [2013] 357 ITR 750 (Bom).

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