TRIBUNAL NEWS

PART A: REPORTED DECISIONS

C. N. Vaze, Shailesh Kamdar, Jagdish T. Punjabi, Bhadresh Doshi
Chartered Accountants

16 **(2012) 77 DTR 89 (Mum)**
Chemosyn Ltd. vs. Asst. CIT
A.Y.: 2007-08. Dated: 07-09-2012

Section 37 (1) Business Expenditure Allowability - Premium paid by company on purchase of own shares from warring group of shareholders as per order of Company Law Board is revenue expenditure and allowable as business expenditure.

Facts:

The assessee, a pharmaceutical company had two groups holding shares of a company i.e. one owning 66% and other 34%. Owing to differences between two groups which were headed by two brothers. The disputes between them reached the Company Law Board which directed assessee to buy 34% shareholding. The assessee purchased 34% shareholding and paid Rs. 6.81 crores as premium on purchase and cancellation of own shares. As per Assessing Officer, the said expenditure was incurred as a part of family dispute settlement and the same could not be attributed to the business of the company. The Assessing Officer disallowed the expenditure stating that even otherwise, the same was a capital expenditure since incurred for acquisition of a capital asset. The action of the Assessing Officer in disallowance was upheld by the learned CIT(A) stating that the purchase of shares was a result of mutual settlement amongst family members and hence was of personal nature.

Held:

In the given case, the warring group of shareholders were creating problems in the smooth functioning of the business. The total sales of the assessee which were in the range of Rs. 20 to 25 crore p.a. during the pre-dispute period had come down in the range of Rs. 10 to 14 crore during litigation period. After the settlement period there was substantial increase in sales. Similarly, negative profits during the period of disputes became positive after the settlement. Very few new products were launched by the assessee company during the period disputes, while many new products were launc during the post-settlement period giving boos assessee's business. Documentary evidence shov that demand notices were issued by the D Recovery Tribunal to the assessee for recovery debts during the period of disputes, whereas a fr loan was sanctioned by bank to the assessee for purpose of working capital as well as for the purp of acquiring new assets after the settlement. these facts are sufficient to show that the disp among the shareholders had affected the day-to-c business of the assessee and that the settlement the said dispute certainly helped the assessee to r its business smoothly and effectively. Therefo expenditure incurred by the assessee compa on payment of premium for purchase of its ov shares from warring group of shareholders a cancellation thereof is revenue expenditure and allowable as business expenditure.

17 **(2012) 77 DTR 235 (Jodhpur)**
Amit Jain vs. DCIT
A.Y.: 2007-08. Dated: 17-09-2012

Section 56(2)(vi) – Gift by father to son directly o of borrowings from HUF does not necessarily mea gift by HUF to the son and hence no tax leviable o such gift.

Facts:

The assessee received a gift of Rs. 5 lakh from hi father to enable the assessee to purchase a new flat. The father had received a loan of Rs. 5 lakh ir bank account of his proprietary concern from his HUF and on the same day he made gift of Rs. 5 lakh from that bank account. According to the Assessing Officer, the HUF had made payment to the assessee rotating the money through the father. Hence, the Assessing Officer treated the gift of Rs. 5 lakh as gift from HUF of father to the assessee. Since HUF is not covered under the definition of "relative" as given in the Explanation to section 56(2)(vi), the Assessing Officer treated the amount of Rs. 5 lakh ved as gift as income from other sources. The ed CIT(A) upheld the stand of the Assessing er stating that the so-called loan transaction een HUF to individual has to be ignored and ransaction was in the nature of gift from HUF e assessee.

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ie given case, the assessee received a gift of 5 lakh from his father who was assessed to me-tax. The father of the assessee being a or asserted in the declaration of the gift that ad given an absolute and irrevocable gift out of ral love and affection of Rs. 5 lakh to his son i.e., assessee. Also the father was having opening nce in his capital account at Rs. 20.24 lakhs and ing balance of Rs. 20.53 lakhs. Therefore, it is r that the donor was having the capacity to give gift which was given to his son under love and ction, there was also an occasion for which gift ; received and this contention of the assessee t the gift was received for purchase of a flat at mbai, has not been rebutted at any stage. The ount which was paid by way of an account payee eque by HUF to father had been shown under d "loan and advance" by HUF. Also the gift made father to son was by way of an account payee eque. Therefore, the transaction was a genuine nsaction. In the instant case, nothing was brought record to substantiate that the loan received by father of the assessee from his HUF was bogus non-genuine or it was taken with an intention of n-payment. In the present case, the donor was ntifiable, his creditworthiness was not doubted l occasion for giving the gift was also there. The nor being the father of the assessee, was a close ative and therefore it was a genuine gift received the assessee from his father and the same is not rgeable to tax as 'income from other sources' 56(2)(vi).

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(2011) 132 ITD 296 (Del)
Mrs. Maninder Sidhu vs. ACIT
A.Y.: 2004-05. Dated: 09-04-2010

tion 271(1)(c) - Set off long term capital loss inst short term capital gain wrongly claimed assessee - Withdrew the claim during course of essment- Revenue did not prove or show falsity facts as disclosed by assessee in computation income - In fact revenue accepted computation capital loss and gain - Assessee under bonafide belief that set off is allowed - in absence of any proof of falsity of facts in computation of income as submitted by assessee, penalty not to be levied- wrong claim is to be distinguished from false claim.

Facts:

The assessee had incurred long-term capital loss and short term capital gain. The loss was adjusted against the gain. However, after issue of notice u/s. 143(2), the claim of the adjustment was withdrawn in the course of hearing. Assessee explained that the adjustment was a mistake made while preparing the return. However, the AO initiated penalty proceedings u/s. 271(1)(c) of the Act as according to the him if there was no mala fide intention in making the claim, the assessee could have withdrawn the claim before the receipt of the notice. However, the claim was withdrawn only when notice was issued to the assessee.

Held:

The claim of assessee was a *bona fide* mistake. All facts regarding computation of the loss and the gain were furnished along with the return of income. Thus, it is neither a case of concealment of income nor furnishing inaccurate particulars of income.

Falsity of facts made by the assessee in computation of long-term capital loss or short-term capital gain was not proved by the revenue. On the contrary, computation of the loss and the profit had been accepted by the revenue.

Setting off of the loss against the gain was an inadvertent mistake by the assessee which should be taken as *bona fide* mistake. In absence of proof of falsity in the details regarding computation of income, it was held that the assessee cannot be charged with the penalty. In such matters, one has to distinguish between a wrong claim and a false claim. There was no falsity in the assessee's case. Penalty ought not to have been levied on assessee in respect of inadvertent but wrong claim.

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2012-TIOL-771-ITAT-KOL
DCIT v Rajeev Goyal
A.Y.: 2007-08. Dated: 01-06-2012

S/s 2(31), 54EC, 64(1A) – In a case where the income of minor child is clubbed with the income of the assessee u/s. 64(1A), the assessee is eligible for separate deduction u/s 54EC of the Act on investment in specified bonds on account of minor's income

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Facts:

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The Assessi 2006 d u/s 54EC to

Aggrieved, CIT(A) who

Aggrieved, Tribunal.

Held:

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being long term capital gains. Prior to insertion of proviso to section 54EC, for the purpose of section 54EC, the investment is limited to Rs 50 lakh in respect of a person and not in respect of an assessee. Minor child being a separate person, investment in the name of minor child, whose income is to be clubbed in the hands of the assessee, is eligible for separate limit of investment prior to insertion of proviso to section 54EC.

Facts:

During the previous year, the assessee and his two minor children sold shares which resulted in long term capital gains. The assessee invested Rs 50 lakh in bonds qualifying for deduction u/s 54EC of the Act. He also invested Rs. 49.50 lakh and Rs. 39.50 lakh in the names of two minor children. In the return of income filed, the assessee included total income of two minor children after claiming separate deduction for investment made in bonds, qualifying for deduction u/s. 54EC, in the names of the respective minor children. Thus, total deduction claimed u/s. 54EC was Rs. 139 lakh.

The Assessing Officer, relying upon Notification No. 380/2006 dated 22.12.2006, restricted the deduction u/s. 54EC to Rs 50 lakh.

Aggrieved, the assessee preferred an appeal to CIT(A) who allowed the appeal of the assessee.

Aggrieved, the revenue preferred an appeal to the Tribunal.

Held:

Section 54EC provides that capital gain is not to be charged to tax if net consideration is invested in certain bonds. Therefore, investments made in certain bonds shall be outside the scope of capital gain for the purpose of computation of total income itself. It is not a deduction under Chapter VI-A which comes into picture only after computing the total income and the deductions are being allowed from gross total income as per section 80A(1).

There is a difference between the word 'assessee' and the word 'person'. The notification on which the AO relied upon has not put any embargo on investments by an assessee but the embargo is on allotment of the bonds to a 'person' and such embargo is on the allotting authority. The bonds have been allotted to the three persons as per the notification itself and the assessee is entitled to th benefits as per provisions of section 54EC und which restriction has been put only for investmen from 1.4.2007.

The Tribunal noted that the ratio of the decision c Mumbai Tribunal in the case of *JCIT v Govind Rohir alias Srichand Rohra* 95 ITD 77 (Mum) and also othe decisions of the High Courts is that even if th income of the minor is clubbed with the income o the other individual, all the deductions are to b allowed while computation of income of the mino /spouse and only the net taxable income is to b clubbed u/s. 64.

The Tribunal allowed the claim of the assessee and directed the AO to re-compute the long term capital gains accordingly.

The appeal filed by the revenue was dismissed.

20 **2012-TIOL-703-ITAT-KOL**
Sri Raajkumar Jain v ACIT
A. Y.: 2004-05. Dated: 07-09-2012

S/s 263, 271(1)(c) – An order sheet entry dropping the penalty which was never communicated to the assessee can be construed as an order to take up action u/s. 263. What the CIT himself cannot do, he cannot get it done through the assessing authority by exercising revisional powers.

Facts:

There was a search and seizure operation in the case of Sri Gopal Lal Badruka and M/s Ahura Holdings on 26.7.2006, a copy of an agreement for sale deed dated 26.8.2003 was found, according to which the assessee had entered into an agreement for purchase of plot admeasuring 1529 sq. yards @ 11570 per sq. yard from M/s Ahura Holdings. The total sale consideration worked out to Rs. 1,79,65,750. In the registered sale deed the sale consideration was mentioned as Rs. 56,20,000 which worked out @ Rs 4000 per sq. yard. During the assessment proceedings in the case of M/s Ahura Holdings, Sri Gopal Lal Badruka had confirmed that he had received entire consideration of Rs. 1,65,08,750 from the assessee for 1405 sq. yards @ 11750 per sq. yard. As the difference of Rs. 1,08,88,750 between amount admitted to have been received by Sri Gopal Lal Badruka and the amount mentioned in the registered sale deed, represents the assessee's unaccounted purchase consideration of plot from M/s Ahura Holdings for the AY 2004-05, the AO issued notice u/s. 148. In response thereto, the assessee filed revised return admitting additional income of Rs. 1,08,88,750. The assessment was completed u/s. 143(3) r.w.s. 147 on 28.4.2010. The AO initiated penalty proceedings for concealment of income u/s. 271(1)(c) of the Act.

The AO after considering the submissions made by the assessee dropped the penalty proceedings u/s 271(1)(c) by order sheet noting as follows:

> "The assessee filed a detailed explanation in response to the notice u/s. 271(1)(c) of the Act read with section 274. Considering the facts and circumstances of the case and in the light of the explanation filed, the penalty proceedings initiated u/s. 271(1)(c) of the Act are dropped."

The CIT invoking his jurisdiction u/s. 263 of the Act held that the dropping of penalty proceedings u/s. 271(1)(c) is erroneous and prejudicial to the interest of the revenue.

Aggrieved, the assessee preferred an appeal to the Tribunal.

Held:

Even an order sheet entry as to be considered as an order in view of the judgment in the case of *H Rajdadi Smt. Badan Kanwar Medical Trust v CIT (214 ITR 130)(Raj).*

On merits, the Tribunal noted that the additional income was offered in revised return only on evidence found in search and on the basis of the statement of acceptance of the transaction by Sri Gopal Lal Badruka of M/s Ahura Holdings. The Tribunal noted that the reply given by the assessee was considered by the AO and his conclusion is based on the explanation offered by the assessee and he has taken one possible view. If the CIT is not agreeable with that proposal he cannot say that the order of the AO is erroneous and prejudicial to the interest of the revenue.

Levy of penalty is a quasi criminal proceeding. The AO must have enough material to prove that there is concealment of income or furnishing of inaccurate particulars of income. He cannot presume that there is concealment or furnishing of inaccurate particulars.

The Gujarat High Court has in the case of *CIT v Parmanand M. Patel (278 ITR 3)* held that the CIT is not empowered to record satisfaction by invoking section 271(1)(c) of the Act and if he is not entitled to do so, on his own, he cannot do it by directing the assessing authority. The Court observed that in other words, what the CIT himself cannot do, he cannot get it done through the assessing authority by exercising revisional powers. Considering these observations, the Tribunal vacated the direction of the CIT to AO to levy penalty u/s 271(1)(c) of the Act.

PART B: UNREPORTED DECISIONS

(Full text of the following Tribunal decisions are available at the Society's office on written request. For members desiring that the Society mails a copy to them, Rs.30 per decision will be charged for photocopying and postage.)

Jagdish D. Shah, Jagdish T. Punjabi
Chartered Accountants

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Pilot Construction Pvt. Ltd. v. ITO
ITAT Mumbai 'C' Bench
Before Rajendra Singh (AM) and Vivek Varma (JM)
ITA No. 5307/Mum/2011
A.Y.: 2007-08. Dated: 21-11-2012.
Counsel for assessee/revenue: Uttamchand Bothra / Vijay Kumar Jaiswal

S/s 44AB, 271B – In case of an assessee following project completion method, advance received which is required to be adjusted against future income cannot be considered as gross receipt of business or turnover. *Bonafide* belief constitutes reasonable cause for non levy of penalty.

Facts:
The assessee company was engaged in business of construction. It was following project completion method of accounting. In respect of a SRA project taken up by the assessee, it had received a booking advance of Rs. 11.25 crore from M/s Welspun Gujarat Stahi Robern Ltd. The advance was subsequently returned in 2010 since the property had several encroachments.

The assessee did not get its accounts audited as required u/s. 44AB of the Act since it was of the view that the provisions of section 44AB would apply only when sales, turnover or gross receipts exceed Rs 40 lakh. Since the assessee had only received an advance which was later refunded and the assessee was following project completion method and the sales would be accounted in the year of completion of the project.

The Assessing Officer (AO) relying on the decision of Lucknow Bench of ITAT in the case of Gopal Krishan Builders (91 ITD 124) levied penalty u/s. 271B of the Act.

Aggrieved the assessee preferred an appeal to CIT(A) who confirmed the action of the AO.

Aggrieved, the assessee preferred an appeal to the Tribunal.

Held:
The Tribunal noted that the assessee was following project completion method, the advance received has been subsequently returned, the project in respect of which advance was received had not commenced even when the matter was being heard by the Tribunal. It also noted that section 44AB applies only when sales, turnover or gross receipts of business exceed Rs. 40 lakh. The amount of advance received was only from one party and also this advance was subsequently returned.

The Tribunal relying on the decision of the Delhi High Court in the case of Dinesh Kumar Goel (239 ITR 46) held that the advance received which is required to be adjusted against future income cannot be considered as gross receipt of business or turnover. The decision of the Lucknow Bench of Tribunal in the case of Gopal Krishan (*supra*) cannot be followed in view of the decision of the Delhi High Court in Dinesh Kumar Goel. Moreover, the issue being debatable, the plea of the assessee that it was of the view th books were not required to be audited u/s 44A has to be considered as *bonafide*. *Bonafide* beli constitutes a reasonable cause.

The Tribunal set aside the order of CIT(A) ar deleted the penalty levied.

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Shri Rumi K. Pali v. Dy CIT
ITAT Mumbai 'D' Bench
Before D. Manmohan (VP) and N. K. Billai (AM)
ITA No. 7314/Mum/2011
A.Y.: 2008-09. Dated on: 17-10-2012.
Counsel for assessee/revenue: Reep Tralshawala/A B Koli

S/s 10(11) – ITAT can consider a new deductic which, inadvertently, was not claimed in th return filed by the assessee. Assessee is entitle to claim interest on PPF to be exempt eve though the same was not claimed in the incom tax return.

Facts:
The assessee in the return of income filed, whic return of income was revised on two occasion as well as in the two revised returns filed by hi offered for taxation under the head Income fro Other Sources, Rs 3,81,565 being interest on PP The Assessing Officer (AO) completed the scrutir assessment by accepting the returned income.

In an appeal to CIT(A), the assessee contende that he should be allowed exemption in respect interest on PPF deposit u/s. 10(11) of the Act. Th CIT(A), relying on the decision of the Apex Cou in the case of Goetze India Ltd. (284 ITR 323) he that no fresh claim can be made by the assesse He dismissed the appeal filed by the assessee.

Aggrieved, the assessee preferred an appeal the Tribunal where on behalf of the assesse it was contended that a statutory claim can b made at any stage; mistake which has crept the income-tax return was inadvertent; and th assessee cannot be put in a position so as to b taxed on something which he is not legally bour to. Reliance was also placed on the decision Bombay High Court in the case of *CIT v Pruth Brokers & Shareholders Pvt. Ltd.* (ITA No. 39 of 2010).

Held:

The Tribunal noted that the assessee failed to claim interest on PPF deposits as exempt from tax even in the revised returns and the impugned amount of interest is exempt from tax u/s. 10(11) of the Act. It noted that the Supreme Court, in the case of *National Thermal Power Company Ltd. v CIT 229 ITR 383 (SC)*, has observed that even if a claim is not made before the AO, it can be made before the Appellate authority. It also noted that the decision of the Bombay High Court on which assessee has placed reliance, having considered the decisions of the Supreme Court in the case of Goetze India Ltd. (*supra*) and also National Thermal Power Company Ltd. v CIT (*supra*), held as under:

> "The jurisdiction of the appellate authorities to entertain such a claim has not been negated by the Supreme Court in this judgment. In fact, the Supreme Court made it clear that the issue in the case was limited to the power of the assessing authority and that the judgement does not impinge on the power of the Tribunal u/s. 254."

Following the above mentioned decision of the Bombay High Court, the Tribunal directed the AO to allow exemption of interest on PPF deposit at Rs. 3,81,565. The appeal filed by the assessee was allowed.

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Chandrakant K. Shah v. ITO
ITAT Mumbai 'C' Bench
Before Dinesh Kumar Agarwal (JM) and B. Ramakotaiah (AM)
ITA No. 4913/Mum/2011
A.Y.: 1993-94. Dated: 17-10-2012.
Counsel for assessee/revenue: Aasifa Khan/ Rajarshi Dwivedy

Section 234B – At the time of passing an order giving effect to order of ITAT, interest u/s. 234B is to be computed on tax on total income finally determined under regular assessment as reduced by the amount of TDS and self assessment tax. Interest u/s. 234B cannot be levied on amount of interest chargeable u/s. 234A and 234C.

Facts:

The assessee filed its return of income declaring income of Rs. 1,51,351. The Assessing Officer (AO) vide order passed u/s. 143(3) of the Act assessed the total income of the assessee to be Rs. 15,93,220. After giving effect to the order of ITAT, the total income was determined at Rs. 14,41,074 as per order dated 28.11.2006 giving effect to the order of ITAT.

The AO while charging interest u/s. 234B calculated interest @ 2% per month for 19 months on Rs. 8,44,797 (i.e. Rs 5,63,906 amount of tax worked out after giving credit of TDS and self assessment tax (+) Rs. 1,09,440 amount of interest charged u/s. 234A (+) Rs. 1,70,230 amount of interest u/s. 234B up to 15.5.1994 and Rs 1221 amount of interest charged u/s. 234C). According to the assessee, the interest u/s. 234B was chargeable only on Rs 5,63,906 which is amount of tax worked out after giving credit of TDS and self assessment tax. Thus, according to the assessee interest u/s. 234B worked out to Rs. 2,14,284 as against Rs. 8,44,797 charged by the AO. The assessee filed an application u/s. 154 of the Act objecting that interest charged u/s. 234B is not correctly computed.

The AO rejected the claim of the assessee vide order dated 15.4.2010.

Aggrieved, the assessee preferred an appeal to the CIT(A) who held that the AO had rightly rejected the appellant's request for rectification of amount of interest charged u/s. 234B of the Act.

Aggrieved, the assessee preferred an appeal to the Tribunal.

Held:

The Tribunal noted that the there is no dispute that the interest u/s. 234B is leviable. The dispute was on the amount on which interest u/s. 234B is leviable. Having noted the provisions of section 234B of the Act, the Tribunal held that in the facts of the assessee's case, interest u/s. 234B for the relevant period is chargeable @ 2% per month for 19 months on the amount of Rs. 5,63,906 worked out after giving credit of TDS and self assessment tax.

The Tribunal directed the AO to verify the amount of interest calculated by the assessee as mentioned hereinabove and if he finds that the same is in order, reduce the levy of interest u/s. 234B accordingly.

The appeal filed by the assessee was allowed.

Compiler's Note: Though not mentioned in the order, it appears that 15.5.1994 was the date of filing of return by the assessee.

Kewal Silk Mills v. ACIT
ITAT Mumbai 'A' Bench
Before I. P. Bansal (JM) and Rajendra (AM)
ITA No. 4335/Mum/2012
A.Y.: 2009-10. Dated: 12-10-2012.
Counsel for assessee/revenue: Rajan Vora & Hemen Chandriya/Surinder Vit Singh

S/s 2(14), 45, 55(2) – Right to use a portion of the shed, in which the looms and machinery taken on license basis are situated, by way of permissible use on license basis as incidental to using the said looms and machinery is covered by the term "any kind of property" and is therefore a capital asset. Amount received on surrender of such right is chargeable to tax under the head Income from Capital Gains and not Income from Other Sources. Amount received by Licensees who are deemed to be tenants u/s. 15A of the Bombay Rent, Hotel & Lodging and House Rates Control Act, 1947, by virtue of amendment in 1973, on surrender of such license/tenancy is chargeable to tax under the head Income from Capital Gains.

Facts:

The assessee, a partnership firm, through its partners entered into an agreement dated 13.6.1972 with Modern Textile Rayon and Silk Mills Pvt. Ltd. (Modern) whereby it took on license basis, for a period of one year, loom and machinery described in first schedule of the said agreement on a monthly compensation of Rs. 3,250 per month. Modern was the tenant of the shed belonging to Mr. Paresh S. Shah. This agreement referred to the assessee as licensee. The assessee was entitled to use a portion of the shed in which the looms were situated by way of permissible use on license basis only as incidental to using the said looms and machinery. The agreement provided that the assessee shall never be construed as sub-lessee in any form of the said portion of the said shed. The assessee was also provided with access to the said portion of the said shed through portion of the shed retained by the licensors or otherwise. Thus, as per the agreement the assessee had incidental right of premises through which the looms were to be used. The said right of the assessee was recognised from the date of the agreement till the date of its surrender.

The assessee regarded this right as sub-tenancy and in the return of income filed the amounts received on surrender thereof were offered for taxation under the head Income from Capital Gains after claiming exemption u/s. 54EC of the Act.

The Assessing Officer after going through various clauses of the agreement dated 13.6.1972 came to the conclusion that the assessee was not a sub-tenant of the land which had been sold by the owner thereof but only had an incidental right to use the shed and that the amounts received are not assessable as capital gains. He also examined the purchasers of the said land who mentioned that only Modern and M/s Saurdeep Chemicals Pvt. Ltd were tenants of the land purchased by them. However, actual possession and occupation was held by the assessee and payments have been made to the assessee in order to get peaceful and vacant possession of the property. The AO observed that the payment received was in the nature of nuisance value and assessee did not have any capital right since the possession of portion of the shed was incidental to the license granted to it for use of machinery. The amount received was assessed to tax under the head Income from Other Sources.

Aggrieved, the assessee preferred an appeal to the CIT(A) who upheld the action of the AO.

Aggrieved, the assessee preferred an appeal to the Tribunal.

Held:

The Tribunal noted that the incidental right to use the premises was provided by the agreement dated 13.6.1972 itself and also that the assessee was referred to as the licensee in the said agreement. By an amendment in 1973, which is subsequent to the date of the agreement entered into by the assessee, certain licensees have been deemed to be tenants u/s. 15A of the Bombay Rent, Hotel & Lodging and House Rates Control Act, 1947 anc were to be considered as tenants. Therefore, ir any case the assessee had acquired the statu: of tenant of the landlord. As per provisions o section 55(2) tenancy right has been considere to be a capital asset. Moreover, the definitio of capital asset as per section 2(14) of the Act wide enough to cover "property of any kind" an the type of right acquired by the assessee in th property used by it cannot in any manner be sa to be less than "any kind of property" held by th assessee.

The Tribunal also observed from some of the rent receipts filed by the assessee before the Tribunal that the amount being paid by the assessee was considered to be rent by the other parties and thus parties in principle had accepted that the assessee was the tenant from whom the rent was being received by the other party. The further correspondence between the assessee and its licensor, the purchaser of the land and the assessee are also describing the right of the assessee as tenancy right only and the deed executed between purchaser of the premises and the assessee is also described as deed of surrender of tenancy. Thus, the assessee was enjoying a right over the property in the nature of being tenant of the same for the last so many years and that right of the assessee cannot be considered as evaluated much less than the right of tenancy right.

The assessee, in fact, was enjoying the possession of the impugned property and for peaceful vacation thereof it had received the impugned amount which was described by both the parties as the amount paid for surrender of tenancy rights. The assessee had acquired the said right long back and licensor to the assessee also had recognised the said right of the assessee. The right of the assessee was undisputed and nature thereof was "property of any kind" which was held by the assessee and was to be termed as capital asset within the meaning of section 2(14) of the Act. Tenancy right has also been recognised as capital asset within the meaning of section 55(2)(a) of the Act.

The tribunal held that the amount received by the assessee is assessable as capital gains and not as income from other sources. The appeal filed by the assessee was allowed.

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DP World Pvt. Ltd. vs. DCIT
ITAT Mumbai Bench 'D' Mumbai
Before D. Manmohan (V. P.) and N.K. Billaiya (A. M.)
ITA No.3627/Mum/2012
A.Y.: 2008-09. Dated: 12-10-2012
Counsel for Assessee/Revenue: Rajan Vora & Nikhil Tiwari/Rupnder Brari

Ss. 28(iv)/56(2) – Gift of residential flats through transfer of shares by foreign company to Indian company – Whether taxable – Held no.

Facts:
The assessee had received by way of a gift, three residential flats in Hill Park from its sister concern viz., BISNCL, a UK based company. BISNCL was holding shares of Hill Park Ltd. which entitled it for use and occupation of the said three flats and the gift was effected by transfer of the said shares. Both, the assessee and BISNCL, were 100% subsidiary of a U.K. based entity which in its turn was 100% subsidy of a Dubai based entity. This transaction, in the eyes of the AO, was a colourable device who taxed the value adopted for WT purpose as income from other sources. However, the same, in the eyes of the CIT[A], was nothing but a benefit derived by the donee out of its business relations with the donor company and therefore, he taxed the same as profit and gains of business & profession.

The issue before the tribunal was whether such transaction can be termed as a 'Gift 'or Income in the hands of the Donee.

Held:
According to the tribunal, such a transfer may trigger capital gains ramifications in India, since the shares of an Indian company were situated in India and when the transferor is a non-resident, the deeming provisions of section 9(i)(i) of the I.T. Act, 1961 came into play. However, referring to section 47(iii), the tribunal noted that the transfer of a capital asset, amongst others, under a gift is not treated as transfers for the purposes of section 45 of the Act. Referring to the provisions of section 5 and section 122 of the Transfer of Property Act ('TPA'), the tribunal noted that there was no requirement in the TPA that a 'gift' can be made only between two natural persons out of natural love and affection which means that as long as a donor company is permitted by its Articles of Association to make a 'gift', it can do so. In case where donor is a foreign company, the tribunal noted that the relevant corporate/commercial law of the jurisdiction where the donor is based needs to be considered. Referring to the Certificate and Attestation by the Notary Public of the City of London, England, wherein the authority has inter alia certified and attested that the Deed of Gift was binding on BISNCL in accordance with the relevant provisions of English law, the tribunal concluded that BISNCL was legally authorised to give gift of shares.

Therefore, it held that the gift of shares of an Indian Company by a foreign company without consideration has to be treated as gift within the meaning of section 47(iii) of the Act.