[2021] 133 taxmann.com 378 (Article)

Date of Publishing: December 31, 2021

25 key Income-tax rulings of the year 2021

EDITORIAL TEAM

The year 2021 was loaded with several significant Income-tax rulings a taxpayer andrevenuewill need to remember. Our editorial board has meticulously analysed all the judgments/orders throughout the year and reported over 1,400 judgments at taxmann.com.We have reported almost all good cases on all important aspects of the Income-tax Act.Every year we bring the list of top 25 cases reported at taxmann.com. The list for the year 2021 is given below.

1. Automatic vacation of stay granted by ITAT after the expiry of 365 days is unconstitutional : SC

Dy. CIT v. *Pepsi Foods Ltd. [2021] 126 taxmann.com 69 / 433 ITR 295 / 282 Taxman 10 (SC)*

The Supreme Court has held that the object of the *third proviso* to section 254(2A) is an automatic vacation of a stay that has been granted on the completion of 365 days. This automatic vacation is granted even if the assessee is not responsible for the delay caused in hearing the appeal. Such object is being discriminatory and is liable to be struck down as violating article 14 of the Constitution of India.

Also, the said *proviso* would result in the automatic vacation even if the Appellate Tribunal could not take up the appeal in time for no fault of the assessee. Further, the vacation of stay in favour of the revenue would ensue even if it is responsible for the delay in hearing the appeal. In this sense, the said proviso is also manifestly arbitrary as capricious, irrational and disproportionate so far as the assessee is concerned.

Thus, the third proviso to section 254(2A) will now be read without the word "even" and the words "is not"added after the words "delay in disposing of the appeal". Any order of stay shall stand vacated after the expiry of the period mentioned in the section only if the delay in disposing of the appeal is attributable to the assessee.

2. Supreme Court rules that ITAT has no power to recall its order even if submissions were filed on merits

CIT v. *Reliance Telecom Ltd. [2021] 133 taxmann.com 41 (SC)*

The Supreme Court held that the order passed by the ITAT recalling its earlier order is beyond the scope and ambit of the powers under section 254(2). In exercise of powers under section 254(2), the ITAT may amend any order passed by it to rectify any mistake apparent from the record only. The Tribunal cannot revisit its earlier order and go into detail on merits.

The powers under section 254(2) are only to correct and/or rectify the mistake apparent from the record. Merely because the assessee might have filed detailed submissions, it does not confer

jurisdiction upon the ITAT to pass the order *de hors* section 254(2).

In the instant case, a detailed order was already passed by the ITAT, which was held in favour of the revenue. Therefore, the said order could not have been recalled by ITAT in the exercise of powers under section 254(2). If the assessee believed that the order passed by the ITAT was erroneous, either on facts or in law, the only remedy available was to prefer the appeal before the High Court.

3. BCCI isn't engaged in commercial activities as funds generated from IPL are used for promoting cricket : ITAT

Board of Control for Cricket in India v. *Principal. CIT [2021] 132 taxmann.com 132 (Mum. - Trib.)*

The Mumbai Tribunal has allowed relief to BCCI and directed CIT to grant registration under Section 12A citing that BCCI is still promoting the game of cricket. The Court has ruled that the prime character of popularising cricket is not lost just because a sports tournament is structured to make it more popular, resulting in more paying sponsorship and greater mobilisation of resources.

The Court rules that the basic character of popularising cricket is not lost just because a sports tournament is structured in such a manner to make it more popular, resulting in more paying sponsorship and greater mobilisation of resources.

It is indeed possible that the predominant object remains the promotion of cricket but that activity is done in a more effective and financially optimal manner. There is no conflict in the cricket becoming more popular and the cricket becoming more entertaining after the introduction of the IPL tournament.

As long as the object of promoting cricket remains intact, the assessee cannot be said to be not following the object of promoting cricket.It will not impact the eligibility of the assessee just because the operational model of a cricket tournament, whether IPL or any other tournament, is more entertaining, more economically viable, and provides economic opportunities to all those associated with that tournament.

All the funds available at the disposal of BCCI, including the additional funds generated by holding IPL tournaments, are employed for promoting cricket, and that matters. Improvising the game's rules, adding entertainment value, and making it economically attractive may be a purist's nightmare. Still, the same factors can also be viewed as radical and innovative ideas to popularise a game.

Therefore, the assessee is entitled to the continuance of its registration under Section 12A, and the order passed by the CIT stands quashed.

4. The Delhi High Court quashes all re-assessment notices issued under the old provision

Mon Mohan Kohli v. *Asstt. CIT [2021] 133 taxmann.com 166 (Delhi) 396*

The Delhi High Court has quashed more than 1,300 writ petitions challenging re-assessment notice issued by the Income-tax Dept. after 31-03-2021, under the old regime. The Court held that the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 doesn't empower the Government to extend the applicability of erstwhile provisions of re-assessment.

The legislature has introduced new provisions of sections 147 to 151 by the Finance Act, 2021 with effect from 01-04-2021.

The Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 (TLA 2020) empowers the Government to extend only the time limits. It does not delegate the power to legislate on provisions to be followed for initiation of re-assessment proceedings. The TLA 2020 does not give power to Government to extend the erstwhile sections 147 to 151 beyond 31-03-2021 or defer the operation of substituted provisions enacted by the Finance Act, 2021.

Consequently, the impugned Explanations in the Notifications dated 31-03-2021 and 27-04-2021 are not conditional legislation and are beyond the power delegated to the Government and *ultra vires* the TLA 2020.

Revenue cannot rely on Covid-19 for contending that the new provisions sections 147 to 151 should not operate between 01-4-2020 to 30-6-2021 as Parliament was fully aware of Covid-19 Pandemic when it passed the Finance Act, 2021.

Thus, *Explanations A(a)(ii)/A(b)* to the Notifications dated 31-03-2021 and 27-04-2021 are declared to be *ultra vires* the TLA 2020 and are therefore bad in law, null and void. Thus, all re-assessment notices issued under old provisions of section 148 are quashed.

5. 'iPad' may have some computing functions, but it isn't a computer for higher depreciation : ITAT

Kohinoor Indian (P.) Ltd. v. *Asstt. CIT [2021] 129 taxmann.com 396 /191 ITD 593 (Asr.- Trib.)*

The Amritsar Tribunal has ruled that the predominant purpose of the iPad is communication, and it is not a computing device. Its main features are email, WhatsApp, Facetime calls, music, films, etc. Though the iPad may discharge some of the functions of computers, it is not a substitution for computers or laptops. In common parlance, the iPad is considered as communicating device with some additional features of a computer.

Further, apple stores do not sell the iPad as a computer device, but rather, it is selling it as communicating/entertainment device. Another reason the iPad can be held as a communication device is it has an IMEI number. Though the assessee had denied having an IMEI number, no concrete records have been produced on record in this regard. Accordingly, ITAT held that the iPad is not a computer.Hence, depreciation is applicable at a lower rate.

6. ITAT defines the meaning of 'set aside' and directsthat AO can't do fresh assessment if assessment order was set aside by ITAT

Jaya Prakash v. *ITO [2021] 133 taxmann.com 189 (Bang.- Trib.)*

The Tribunal had set aside the assessment framed by AO on the basis of Form 26AS. After that, Assessing Officer (AO) initiated a fresh assessment considering the remarks made by Tribunal in its order. The assessee filed appeal contended that the AO misunderstood the order of the Tribunal.

The AO believed that the disputed issue was remitted to him to do a fresh assessment. However, there was no such direction issued by the Tribunal.

The Tribunal held that it is essential to clarify the meaning of the word 'set aside'. As per Black's Law Dictionary, Sixth Edition at page 1372, the words "set aside" means :

'To reverse, vacate, cancel, annul or revoke a judgment, order, etc.'

Further, the meaning of the word 'annul' on page 90 of the Black's Law Dictionary has given as under :

> *"To reduce to nothing; annihilate; obliterate; to make void or of no effect; to nullify; to abolish; to do away with. To cancel; destroy; abrogate. To annul a judgment or judicial proceeding is to deprive it of all force and operation, either ab initio or prospectively as to future transaction."*

Furthermore, the meaning of the word 'annulment' is given on page 91 as under:

"To nullify, to abolish, to make void by the competent authority. An "annulment" defers from a divorce in that a divorce terminates a legal status, whereas an annulment establishes that a marital status never existed. Whealton v. *Whealton, 67 Cal. 2 d 656, 63 Cal Rptr. 291, 294, 432 P. 2 d 979. Grounds and procedures for annulment of marriage are governed by State Statutes."*

Thus, the word 'set aside' means that the earlier assessment order has been quashed, and there was no direction by the Tribunal to do any fresh assessment on the same issue. When there is no direction to do the fresh assessment and the earlier assessment year has been set aside, the AO cannot take advantage of passing remark/observation on the Tribunal order to frame fresh asst. on the same issue.

7. Non-deduction of tax on the purchase of assetscannottake awaythe right to claim

depreciation

Pr. CIT v. *Tally Solutions (P.) Ltd. [2021] 123 taxmann.com 21 / 430 ITR 527 / 278 Taxman 357 (Kar.)*

The Karnataka High Court held that section 40(*a*)(*i*) and 40(*a*)(*ia*) provide for disallowance only in respect of expenditure, which is revenue in nature.Therefore, the provision does not apply to the assessee claiming depreciation, which is not an expenditure but an allowance.

The depreciation is not an outgoing expenditure, and therefore, provisions of Section 40(a)(i) and 40(*a*)(*ia*) are not applicable. In the absence of any requirement of law for making a deduction of tax out of expenditure, which has been capitalised and no amount was claimed as revenue expenditure, no disallowance would be made.

It is also pertinent to note that depreciation is a statutory deduction available to the assessee on an asset, which is wholly or partly owned by it and used for business or profession. The depreciation is an allowance and not an expenditure, loss or trading liability.

8. Section 50C is not applicable on the transfer of leasehold rights in land and building

Noida Cyber Park (P.) Ltd. v. *ITO [2021] 123 taxmann.com 213/ 186 ITD 593(Delhi - Trib.)*

The Delhi ITAT held that the expression 'land or building' in its coverage is quite distinct from the expression 'any right in land or building'. The legislature, in its wisdom, has used the expression 'land or building or both' in section 50C, and not the expression 'any right in land or building'. Therefore, the express use of one expression would exclude the other.

The Hon'ble Supreme Court has supported these legal premises in the case of *GVK Industries Ltd.* v. *ITO [2011] 197 Taxman 337 (SC)*. Thus, transfer of leasehold rights does not warrant invoking section 50C as the said property is not of the nature covered by section 50C.

9. No denial of LTC exemption even if travel is not undertaken through shortest route : Mumbai ITAT

State Bank of India v. *Asstt. CIT [2021] 123 taxmann.com 447 (Mum. - Trib.)*

The Mumbai ITAT held that a plain reading of section 10(5) *read with* Rule 2B does not indicate any requirement of taking the shortest route for travelling to any place in India. It does not restrict the route to be adopted for going to such a destination. However, the statutory provisions do envisage the possibility of someone taking a route other than the shortest route. It is implicit in the restriction that only an amount not exceeding the air economy fare of the national carrier by the shortest route to the place of destination is eligible for exemption under section 10(5).

There is no specific bar in the law on the travel, eligible for exemption under Section 10(5), involving a sector of overseas travel. In the absence of such a bar, the assessee couldn't be faulted for not inferring such a bar. The reimbursement was restricted to airfare, on the national carrier, by the shortest route, as was the mandate of rule 2B. As part of that composite itinerary involving a foreign sector as well, the employee had travelled to the destination in India.

The guidance available to the assessee indicates that, in such a situation, the exemption under section 10(5) was available to the employee. Such exemption shall be available only to the extent of farthest Indian destination by the shortest route, and that was what assessee had allowed. In the light of this analysis of the legal position and the factual backdrop, whatever may be the position with respect to taxability of such a leave travel concession in the hands of the employee, the assessee could not be faulted for not deducting tax at source from LTC allowed by it to employees.

10. AO can't import the definition of 'Relative' from section 56 to invoke Section 40A(2)

Rajesh Bajaj v. *DCIT - [2021] 124 taxmann.com 69 / 187 ITD 230 (All.- Trib.)*

The Allahabad ITAT held that the definition of the term 'relative' provided under section 2(41) does not

cover the sister-in-law of the assessee. However, the sister-in-law of the assessee is covered within the definition of the term 'relative' as provided under section 56(2). Since the said definition is only for the relevant clause provided under section 56(2), therefore, the same couldn't be applied in respect of provisions of section 40A(2) when a general definition of the term 'relative' is provided under section 2(41).

Hence, the provisions of section 40A(2) couldn't be invoked in respect of a transaction of payment of rent to persons who are not falling in the definition in term of 'relative' provided under section 2(41).

11. Gain received on personal loan due to forex fluctuation is a capital receipt not liable to tax : ITAT

Aditya Balkrishna Shroff v. *ITO [2021] 127 taxmann.com 343 / 189 ITD 587 (Mum.- Trib.)*

The Mumbai ITAT held that even before deciding whether the gain was of income nature, AO had proceeded to put the cart before the horse by deciding the head under which the income is to be taxed. He mixed up the concept of income with the concept of gains. In the case of *Shaw Wallace & Co Ltd* v. *DCIT [2001] 117 Taxman 192 (Cal.)*, the ITAT held that a capital receipt, in principle, is outside the scope of income chargeable to tax. A receipt cannot be taxed as income unless it is in the nature of a revenue receipt or is specifically brought within the ambit of income by way of specific provisions of the Income-tax Act.

AO had accepted that the transaction was in the capital field and proceeded to hold that income arising out of the loan transaction was required to be treated as interest or income from other sources. If the transaction is in the capital field, the question of its taxabilitydoes not arise unless there is a specific provision of bringing such a receipt to tax. In any case, where the loan was foreign currency-denominated and the amount advanced as loan, as also received back as repayment, was precisely the same, there was no question of interest component at all.

The benefit or gain received by the assessee was on account of foreign exchange fluctuation. Since the foreign exchange fluctuation was with respect to a transaction in the capital field, the foreign exchange fluctuation receipt itself turned out to be a capital receipt.

12. AO rightly taxed fake agricultural income disclosed by a student in ITR to get an education loan : ITAT

Talluri Vijay Rahul v. *ITO [2021] 127 taxmann.com 697 / 189 ITD 221 (Hyd.- Trib.)*

The assessee filed an appeal before the CIT(A) and said that he was a student during the relevant year and did not derive any income. The ITR was filed under the guidance and advice of a tax practitioner who advised that if agricultural income were offered in ITR, he would get an educational loan from the bank. Since he did not have any source of income, additions made by AO were without any basis and should be deleted. However, the CIT(A) did not accept the assessee's contention and upheld the order of AO. Aggrieved-assessee filed the appeal before the Tribunal.

The Tribunal held that assessee's contention that he had been misguided by his tax practitioner year after year to declare agricultural income based on false documents couldn't be accepted. The returns of income were not filed at one point but were filed year after year; therefore, the assessee's bona fides were not proved.

Therefore, AO had rightly treated fake agricultural income shown in ITR as 'income from other sources' and brought it to tax. Assessee's grounds of appeal were liable to be rejected.

13. Amendment by the Finance Act, 2021 disallowing employee's contribution to ESI/PF is applicable prospectively

Salzgitter Hydraulics (P.) Ltd. v. *ITO [2021] 128 taxmann.com 192 / 189 ITD 676 (Hyd.- Trib.)*

The assessee filed the appeal against the order of the Commissioner of Income-tax (Appeals) [CIT(A)].

Assessee-company had contended that the CIT(A) erred in sustaining the addition on account of employees' contribution to PF & ESI without considering that they were paid before the due date of filing the return of income (ITR). In contrast, AO's stand was that the sum paid after the due date prescribed in the corresponding statutes should not be allowed as a deduction.

It should be noted that the legislature has incorporated necessary amendments in sections 36(*va*) and section 43B, *vide* Finance Act, 2021. Thus, after the amendment, the deduction of an employee's contributions to ESI/PF is allowed only if the same is paid within the due date prescribed in corresponding statutes.

The memorandum explaining the Finance Bill, 2021 has stated that the given amendments are effective from 01-04-2021. Thus, it can be concluded that amendments are clarificatory and are applicable only with prospective effect from 1-4-2021.

14. Assessee can raise contention before ITAT without filing cross-objections on issues related to question of law : HC

Peter Vaz v. *CIT [2021] 128 taxmann.com 180 / 281 Taxman 171/ 436 ITR 616 (Bom.)*

The Bombay High Court held that the Tribunal should not have stopped the assessee from raising the issue in appeals instituted by revenue without the necessity of filing any cross objections when it concluded that issues raised in cross-objection were legal issues.

Tribunal had not focused on the issue of whether there was sufficient cause for explaining 248 days delay in instituting cross-objections but rather had faulted assessees for not raising the issue of non-compliance with jurisdictional parameters. These were not relevant considerations when deciding whether sufficient cause was shown to explain 248 days delay in instituting cross-objections.

Therefore, the matter was to be remanded to Tribunal for fresh consideration of appeals instituted by revenue after permitting assessees to raise the issue of non-compliance within jurisdictional parameters

of section 153C.

15. AO can't recover taxes from assessee if tax deducted on his income wasn't deposited by deductor

Ashok Kumar B. Chowatia v. *Jt. CIT [2021] 128 taxmann.com 230 / 435 ITR 449/ 281 Taxman 405 (Mad.)*

The Madras High Court held that to the extent tax was deducted by the deductor and not remitted by him to the Income-tax Department, recovery can be only directed against deductor as he was the assessee-in-default. Deductee couldn't be made to pay tax two times on same income, and recovery of such tax deducted but not remitted by deductor has to be recovered from himonly.

Accordingly, the Madras High Court quashed the demand notices issued against the assessee. Further, it was made clear that to the extent tax was deducted but not remitted, no demand shall be made against the assessee. If the deductor had failed to remit the tax so deducted, it was open to the department to recover the same from the deductor in the manner known to law. Balance of tax, if any, which had escaped payment alone could be recovered from the assessee by issuing a suitable notice under the provisions of the Income-tax Act, 1961.

16. Section 24(b) does not mandate possession of the property to claim a deduction of interest on housing loan : ITAT

Abeezar Faizullabhoy v. *CIT [2021] 130 taxmann.com 156 / 191 ITD 509 (Mum- Trib.)*

The Mumbai Tribunal has held thatas far as the determination of the annual lettable value of a property is concerned, section 22 read with section 23 depends on the ownership of the property, irrespective of whether the assessee has taken possession of the same or not.

Further, as per the literal interpretation of section 24(*b*), there is no bar on claiminga deduction of

interest payable on a loan taken for purchasing a residential property, even if the possession of the same might not have been vested with him.

Thus, the interest that was admittedly paid on the capital borrowed for acquiring the property will be allowed under section 24(*b*) even if theassessee has not yet acquired possession of the property.

17. CSR expenses incurred by making donations are eligible for deduction under Section 80G : ITAT

JMS Mining (P.) Ltd. v. *Pr. CIT [2021] 130 taxmann.com 118 / 283 Taxman 118 (Kol. - Trib.)*

The Tribunal held that from a plain reading of the *Explanation 2* to section 37(1), expenditure incurred towards CSR activities shall not be allowed as 'business expenditure' and shall be deemed to have not been incurred for business. The embargo created by this *Explanation 2* inserted in section 37 by the Finance (No. 2) Act, 2014 was to deny the deduction for CSR expenses incurred by companies, as and by way of regular business expenditure while computing' income under the head of business and profession.

It can be seen that this *Explanation 2* to section 37(1), which denies a deduction for CSR expenses by way of business expenditure, applies only to the extent of computingbusiness income under Chapter IV-D. The said Explanation cannot be extended or imported to CSR contributions which are otherwise eligible for deduction under any other provision or Chapter, to say donations made by a charitable trust registered under section 80G.

Further, the Parliament intended certain restrictions to only CSR expenditure regarding two donations included by an assessee as CSR expenditure, i.e., Swachh Bharat Kosh and Clean Ganga Fund. It has impliedly not made any prohibition/restriction in respect of the claim of CSR expenses in other cases if it is otherwise eligible under section 80G.

In this context, it was found that the assessee had donated by RTGS through the bank, which was

received by Shree Charity Trust, which was approved under section 80G(5)(*vi*). Further, the assessee had made payment to Pt. Jashraj Music Academy Trust, which was also approved under section 80G(5)(*vi*). Therefore, the assessee's claim for deduction of CSR expenses/contribution under section 80G was to be allowed.

18. Set-off of losses couldn't be denied just because assessment of year in which loss was suffered is pending

Shelf Drilling Ron Tappmeyer Ltd. v. *Dy. CIT - [2021] 123 taxmann.com 49 (Mum. - Trib.)*

The assessee claimed set-off of unabsorbed business losses pertaining to a year in subsequent years. AO declined the claim for set off on the ground that the assessment of the year in which such loss was suffered was still pending.

It was contended that the scheme of the Income-tax Act does not visualise any action of declining set off on the part of AO till the assessment is finalised. No matter how desirable such a provision could theoretically be justified, it does not exist in the law. The action of AO in declining the set-off of the carried forward losses was thus without the authority of law and must be vacated.

On the other hand, revenue contended that if the assessee were allowed to set off of this loss in the subsequent years, the assessee would become eligible for a refund of taxes. Consequently, legitimate interests of revenue will be prejudiced by allowing such refunds. Thus revenue urges to defer a decision on this matter till the time the remanded assessment is finalised.

The Mumbai Tribunal held that the assessee's claim for set-off of losses, if otherwise admissible, could not be denied on the mere fact that the assessment for the year in which such loss was suffered is pending.

19. AO can't disregard a transaction just because it results in tax advantage to the assessee

Michael E Desa v ITO [2021] 130 taxmann.com 314/191 ITD 691 (Mum.- Trib.)

The Mumbai Tribunal has justified the action of the assessee in booking loss in the year in which he hadearned profit from another transaction to enable him to set-off the losses. The Tribunal held that it is legitimate tax planning without using colourable devices.

It was held that the benefit of long-term capital loss could not be declined to the assessee, only on the ground that if the assessee had not taken these proactive measures, he would have paid more taxes. The assessee may end up saving taxes, but that is perfectly legitimate.

The AO cannot disregard a transaction just because it results in a tax advantage to the assessee. Just as much as we cannot legitimise and glorify tax evasion through colorable devices and tax shelters, we cannot also deprecate and disapprove genuine tax planning within the framework of the law. The line of demarcation between what is permissible tax planning and what turns into impermissible tax avoidance may be somewhat thin, but that cannot be excuse enough for the tax authorities to err on the side of excessive caution.

Thus, the AO was directed to allow set-off of this long-term capital loss on the sale of shares in VCAM against the long-term capital gains on the sale of the property.

20. Sum reflected in Form 26AS can't be taxed unless it was established that the assessee was the actual beneficiary

Dr Swati Mahesh Vinchurkar v. *Dy. CIT [2021] 130 taxmann.com 320 /191 ITD 434 (Surat-Trib.)*

The Surat Tribunal has ruled that a payment reflected in Form-26AS could not be brought to tax if it could not be established that the assessee was the actual beneficiary of said payment. Once the assessee denied the transaction reflected in Form 26AS, the onus was on the revenue to establish that the assessee had entered into any such transactions.

It was held that the assessee had no concern or casual connection or any relation with the alleged deductor.The entry of TDS in the Form-26AS issued to the assessee was wrong. The assessee submitted her response to CPC Bangalore, and before CIT(A), she specifically denied having earned such income.

Further, it was submitted by the assessee that it is far from the imagination that the assessee served such organisation, which is 1,000 KM away from the residence of the assessee.

Once the assessee denied such transaction, the onus was on the revenue to establish that the assessee had entered into any such transactions. The CIT(A) had not made any verification or tried to verify such transactions. There was the possibility of entering the wrong PAN, which belonged to the assessee, and the assessee had been unnecessarily put under mental pressure by making such additions despite denying such income. Thus, addition merely based on TDS reflected in the Form-26AS, ignoring the submissions of the assessee, was liable to be deleted.

21. CBDT considering modification in faceless appeal Scheme, 2020

Central Board Of Direct Taxes v. *Lakshya Budhiraja [2021] 131 taxmann.com 51 (SC)*

The assessee challenged the Faceless Appeal Scheme, 2020, alleging that the scheme was discriminatory, arbitrary, and illegal to the extent it provided a virtual hearing as per circumstances to be approved by administrative authorities under Income-tax Act, 1961.

The instant petition was filed to transfer cases challenging Faceless Appeal Scheme, 2020, from High Courts to the instant Supreme Court.

The Additional Solicitor General submitted before the Supreme Court that the department is having a second look at the matter on the issue of Faceless Appeal Scheme, 2020. He may be granted a period of three months as it may require changing the law.

Considering the submission, the Supreme Court has deferred the matter for three months as sought by

the learned Additional Solicitor General.

Editor's Note: The Central Board of Direct Taxes (CBDT) has notified the Faceless Appeal Scheme 2021, effective from 28-12-2021. The new scheme is notified in supersession of the earlier Faceless Appeal Scheme, 2020. The new scheme has replaced the word 'may' with 'shall' with respect to allowing requests for a personal hearing. Thus, it would be mandatory for the Commissioner (Appeals) to allowa personal hearing if the taxpayer requests it during e-proceedings.

22. Furnishing of written submissions cannot be interpreted that assessee has waived off his right to be heard

Sukhvinder Pal Singh v. *ITO [2021] 131 taxmann.com 203/191 ITD 715 (Delhi - Trib.)*

The Delhi Tribunal has quashed the argument of revenue that it should be treated thatassessee had waived off right to be heardif he has made available written submissions to First Appellate Authority.

The Delhi Tribunal held that if an adjudicating authority finds the written submissions are not sufficient and complete, it should put this deficiency to the notice of the assessee. Without any specific communication to this effect, it cannot be said that an adequate opportunity of being heard has been granted to the assessee.

Once it is seen that the submissions were without supporting documentary evidence, then in an adequate representation, such an opportunity necessarily needs to be provided.

In the instant case, no such effort appeared to have been made. It is well settled that mere making available of the written submissions by an assessee cannot be unitedly so interpreted to mean that right to be heard has been waived off.

The onus to ensure that the waiver was made with full and conscious knowledge of the existence of this sacrosanct right rests on the shoulders of the adjudicating authority to ensure that the assessee stays

informed of his rights and consequent duties. There is nothing on record to show that the First Appellate Authority can be justifiably held to form the view in the facts of the present case that the assessee was so informed of its rights and still chose to waive them.

23. Interest paid by a builder on failure to construct a flat is compensatory in nature which is out of the preview of sec. 194A: High Court

Sainath Rajkumar Sarode v. *State of Maharashtra [2021] 131 taxmann.com 332/283 Taxman 494 (Bom.)*

The Bombay High Court has given an important ruling on the applicability of TDS provisions on the interest received by the buyer as compensation from the builder. The Court has ruled that no tax shall be deducted under section 194A from interest paid by the builder while refunding the advance to the buyer on its failure to handover possession of the flat.

It was held that the term 'interest' is defined under section 2(28A) of the Income-tax Act. From such definition, it appears that the term 'interest' has been made entirely relatable to money borrowed or debt incurred and various gradations of rights and obligations arising from either of the two.

In the instant case, the assessee had not given the money to the builder by way of deposit, nor had the builder borrowed the amount from the assessee. The sum paid to the assessee was a refund of the advance given to the builder. The interest was paid for damages suffered by the assessee on failure in delivering the flats.

Since the payment couldn't establish a debtor-creditor relationship between the assessee and the builder, the said sum or any part thereof cannot be liable fortax deduction under the relevant provisions of the Act.Therefore, the provisions of Section 194A were not applicable, and the builder was wrong in deducting the TDS from the interest payable to the assessee.

24. ITAT quashes revisionary order initiated on the basis of Cyrus Mistry's allegations against 'Tata Trust'

Sir Dorabji Tata Trust v. *Dy. CIT [2020] 122 taxmann.com 274/[2021] 188 ITD 38 (Mum.- Trib.)*

The Mumbai Tribunal heldthat a receipt of some inputs at the last minute from a third party could not extendthe time limit for completion of assessment under section 143(3). AO received additional material just six working days before completing the assessment, and these six days were less than sufficient for the basic exercise of investigation.

Thus, it was clear that AO was not in a position to examine the correctness or otherwise of the contents of material received from Cyrus Mistry in the course of completion of the scrutiny assessment proceedings.

It must be noted that it was always open to the AO to examine the material so coming into his possession and take actionlater. For example, AO can initiate re-assessment proceedings under Section 147 in the event of his concluding that income has escaped assessment.

Therefore, a *prima facie* view taken by AO cannot be enough to decline the assessee certain tax treatment which has been given to the assessee all along for decades. Still, it can indeed be a reason enough to leave a window for appropriate action being taken against the assessee, if so warranted- and that is exactly what the Assessing Officer has done.

25. No section 68 additions if accounts are manipulated by bogus entries without any actual flow of cash

Rich Paints Ltd. v. *ITO - [2021] 123 taxmann.com 40/186 ITD 425 (Ahd. - Trib.)*

The ITAT held that section 68 creates a legal fiction based on which an entry in the books of account is deemed to be the income of the assessee chargeable to tax in the event the assessee fails to discharge the onus imposed upon under said provision. However, such legal fiction can be applied in the case of actual transactions incorporated in the books and not be applied to the transactions that are merely book entries and represent the fake transactions, having no substance.

In the instant case, there was no cash inflow to enhance the share capital. Such enhancement in the share capital represents merely a book entry based on manipulating the accounts with the collaboration of bank staff. Thus, such cash credit was nothing but represented the bogus/fictitious entries after manipulation in the accounts. The assessee had used a fraudulent device to show the share capital in the books of account in order to comply with the SEBI Guidelines for bringing the public issue.

Thus, when the transaction was not based on substance, the question of discharging the onus imposed under section 68 does not arise, and the assessee cannot be held a defaulter.

■■