

Paper on current issues on appellate matters an analysis

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On basis of authors experience with the courts, following major issues are identified for confabulation in the program:

a) Reopening related issues under section 148 of the income tax act,1961

- i. requirement of fresh tangible material
- ii. overlapping in various remedial actions like section 263, 148, 154 the prevalent legal position
- iii. reopening on basis of cash deposits in bank accounts
- iv. :conundrum of investigation wing: based reopening
- v. earlier assessments being quashed possibility of reopening
- vi. 26 AS/AIR information related issues of reopening
- vii. section 143(2) notice importance in reopening under section 148

- viii. power of appellate authorities to direct reopening of same assessee for other years and for other assessees
- ix. Role of extended time limit provided under section 150
- x. explanation 3 to section 147 scope of reopening proceedings
- xi. audit objections based reopening

b) principles of natural Justice related issues especially on cross-examination

- i. stage of cross examination
- ii. not providing implications
- iii. significance of specific request by the assessee

c) Section 68 unexplained cash credit related issues

- i. assessment of accommodation entry cases/penny stock cases
- ii. decision of Supreme Court in Sumati Dayal 214 ITR 801 test of human probabilities and surrounding circumstances
- iii. current jurisprudence
- iv. Amendment by finance act 2012
- v. Section 115BBE

d) Capital gains related aspects

i. section 50 C related issues

- reference to departmental valuation officer powers under section 250(4) where assessing officer did not accept assesses request;
- how to determine fair market value vis-a-vis circle rate especially in distress sale (significance of contemporaneous transactions);
- investment under section 54, 54F, 54EC whether circle rate has any cascading implications?
- Whether leasehold rights covered?
- Position of penalty under section 271(1)(c)?
- Rent capitalisation method whether can be applied in case of rented properties?

ii. joint development Agreement/collaboration

Agreement related recent apex court ruling in Balbir Singh Maini

iii. SC decision in Sanjeev Lal on Agreement to sell
significance 369 ITR 389

- e) Amendments made in Statute whether retrospective or prospective judicial guidelines
- f) International taxation related latest development from apex court in cases of e-funds and Sedco
- g) Concealment penalty related issues
 - i. notices issued under section 274 whether same must be specific; in light of decisions of Karnataka High Court reported in 359 ITR 565, Bombay High Court reported in 392 ITR 4
 - ii. law after Dharmendra Textiles – No mens rea required in income tax law
 - 1. role of disclosure made in return and final accounts;
 - 2. role of assessee's conduct in imposition of penalty; whether active and conscious concealment required? In reference to Delhi High Court decision in case of Neeraj Jindal 393 ITR 1
 - 3. Role of human error/silly mistake in reference to Supreme Court decision in case of PricewaterhouseCoopers 348 ITR 306
 - 4. habitual offender angle

5. Role of returns being vetted by professionals and chartered accountants whether insulates from penal implications?
 6. Theory of equal hypothesis
 7. SC decision in Reliance Petro products 322 ITR 158
- iii. analysis of apex court decision in case of Mak data
358 ITR 593

h) Issues relating to assessment in search cases:

- i. Section 153A & Sec 153C conundrum
 - ii. statements recorded during course of search and survey
 - iii. Section 292C implications
 - iv. lose documents relevance
 - v. incriminating material - importance and significance
 - vi. recording of satisfaction notes under section 153C in light of apex court decision in case of Singhad technical education Society
- i) implications of passing of order under section 153

Now an analysis is made on aforesaid identified issues in brief in light of prevalent legal landscape demarcating assessee favouring and revenue favouring decisions.

On issues related to reopening under section 148 following is noteworthy:

Apropos requirement of fresh tangible material, following jurisprudence is prevailing *post-Kelvinator supreme court three-judge bench decision reported in 320 ITR 561*:

(in this context one has to keep in mind whether earlier assessment has taken place under section 143(3) or simply processing under section 143(1) is made, , and whether reopening action is done within 4 years or after 4 years)

Assessee favouring decisions	Revenue favouring decisions
Orient craft 354 ITR 536 Delhi HC	Gujarat high court in Olwin Tiles reported in 382 ITR 291

Tanamc India madras High Court 78 taxmann.com 155	Hon'ble Supreme Court decision in case of Zuari Estate 373 ITR 661 relying on Rajesh Jhaveri 291 ITR 500
	Indulata Rangwala 384 ITR 337 Delhi high court and 2

Apropos investigation wing based reopening action following jurisprudence is evolving:

Assessee favouring decisions	Revenue favouring decisions
G&G Pharma 384 ITR 147	Gujarat High Court in Yogender Kr Gupta 366 ITR 186 SLP dismissed by SC in 227 Taxman 374
Meenakshi Overseas 395 ITR 677	Hon'ble Supreme Court in Raymond Wolllen Mills 236 ITR 34
RMG Polyvinyl 396 ITR 5	Hon'ble Supreme court in Rajesh Jhaveri 291 ITR 500
Sabh Infrastructure 398 ITR 198	Hon'ble Supreme court in Phool Chand Bajrang Lal 203 ITR 456
Sarthak Securties 329 ITR 110	Delhi high court in 341 ITR 135 Rajat Export Import

Signature hotels 338 ITR 51	Delhi high court in AGR investments 333 ITR 146
SFIL 325 ITR 285	Delhi high court in AG holdings 352 ITR 364
	Delhi high court in Paramount 392 ITR 505
	Bombay high court in Bright Star 387 ITR 231

Latest words from Hon'ble Supreme Court in Larson & Tubro case (civil appeal 5390/2007 order dated 21/3/2017)

Apropos earlier assessments being quashed following is noteworthy when subsequent reopening action is made:

- a) revenue favouring Delhi High Court biotech 230 CTR 533
- b) revenue favouring P&H high court 254 ITR 273 with balanced approach
- c) Delhi High Court in Vishal Gupta 22 TAXMANN.Com 82

Apropos usage of correct remedial provision, following is noteworthy:

- a. Section 153C vs Section 148: Allahabad high court in Abhudya Builders and SC in Amitabh Bachan case (statutory language)
- b. Section 154 VS Section 148: Bombay High Court in Hindustan Unilever 325 ITR 102 assessee favouring; and Gujarat High Court in Damodar Shah 245 ITR 774; Allahabad High Court in Araul Refrigeration on 23/10/2017
- c. Section 263 vs Section 148 : where earlier assessment is made under section 143(3);

Apropos objection u/s 124 in reopening cases, following issues are highlighted:

- i. Where return u/s 148 is filed;
- ii. Whether same is for territorial objections only in

Bank deposit related reopening u/s 148: Courts have held in series of decisions that mere cash deposit is no ground to reopen the case especially where reasons are very sketcy and hollow

Apropos , issue of notice u/s 143(2) in reopening proceedings almost all courts have ruled that said notice is must except solitary decision of Madras high court in revenue favouring wherein it is held that

where assessee files return at fag end of asst, AO is not obliged to issue notice u/s 143(2) (refer Shri.T.Rangroopchand Chordia)

Apropos directions by appellate authorities, in authors opinion same are circumscribed and constructed by Hon'ble Supreme Court decisions in case of Rajender Nath 120 ITR 1 and GreenWorld 314 ITR 81 explaining the meaning of word direction. Further it seems appellate authorities cannot travel beyond subject matter of appeal so directions for other years and other assessee may not be possible.

Apropos, usage of extended time limit under section 150 it is noticeable that prevalent jurisprudence is underlying order of appellate authority which is basis of reopening action should have been passed within the time limit under section 149 otherwise extended time limit may not be usable.

Apropos, applicability of explanation 3 to section 147 on scope of reopening proceedings same is explained in detail in Ranbaxy decision of Delhi high court which line is adopted by almost all high courts in country reported in 336 ITR 136. (words “subsequent” “come to notice” are relevant)

Audit Para reopening is dealt in detail in recent decision by Hon'ble Delhi high court in Sun Pharmaceuticals _____, where in case it is

established on records that AO did not accept audit point of view but still made reopening as remedial action, same is clearly held to be bad. (Issue of change of opinion, review etc are relevant/apposite)

Courts are insisting strict compliance with GKN case 259 ITR 19 on communication of reasons and disposal of objections : wherein current trend is non communication of reasons and non disposal of objections shall be fatal to the proceedings. (refer Madras high court Jayanthi Natrajan case)

Apropos principle of natural justice, following jurisprudence is emerging:

Qua cross examination angle:

Assessee favouring decisions	Revenue favouring decisions
SC in Sahara 300 ITR 403	M.Pria Choodi SC 334 ITR 262
SC in Kishan Chand Chella Ram 125 ITR 713	Jai Prakash Singh SC 219 ITR 737
Bombay high court in H.R.Mehta 387 ITR 561	Guduthar Bros SC 40 ITR 298
Delhi HC Pardeep Gupta 303 ITR 95	
SC in Andaman Timber	

Industries 281 CTR 241	
SC Three judge bench in Sona Builders vs UOI (decision dated 24/07/2001)	

On Issues related to section 68 unexplained cash credit (in specific context of accommodation entry cases and penny stock cases) following is note worthy:

(SC decision in Sumati Dayal 214 ITR 801 in authors opinion cant be used as *carte blanche* manner)

Assessee favouring decision	Revenue favouring decisions
Madras high court in Lalitha Jewellery Mart case (11/08/2017) Gist:	Delhi high court Nova case 342 ITR 169 (SLP admitted-pending at SC)
Bombay high court recent decisions : 397 ITR 136, 397 ITR 148 Share premium aspect: Bombay high court Gagandeep 394 ITR 680	Youth construction 357 ITR 197 Delhi HC
Delhi high court N.C. Cables 391 ITR 11	Ultra Modern Ltd Delhi HC 40 taxmann.com 458
Delhi high court Softline 387 ITR	Onassis Axles Pvt Ltd 44

636	Taxmann.com 408
Delhi high court Fair Finvest 357 ITR 146	N.R.Portfolio Delhi HC 263 CTR 456
Delhi high court Best City 397 itr 82 Host of propositions laid down	Navodya Castles Delhi HC 367 ITR 306 SC SLP Dismissed 230 Taxman 26, 8
Delhi high court 397 ITR 106	Delhi high court Jansampark case 375 ITR 373
Delhi high court in Gangeshwari 361 ITR 10	Delhi high court in Nipun Builder 350 ITR 407
	Delhi high court in MAF Academy 361 ITR 258
	Delhi high court in Empire Buildtech 366 ITR 110

Delhi high court decision in D.K.Garg case on 2/8/2017 Balkaur radio
I was totally faster: the office of legal the recovery will recovery are
late and pseudomonas a bit outward as a man Micro on
accommodation entry meaning is important under section 68;

(Also see full bench P&H high court in 382 ITR 453)

On section 115BBE following are key points:

- a) That said provision is based on application of section 68 to sec. 69D;

- b) That said provision aimed to counter money laundering devices as stated in Finance act 2012 Memorandum;
- c) That said provision has undergone sea change post amendment by taxation amendment law of 2016 post demonetization w.e.f AY 2017-18 increasing tax rate from 30 to 60%
- d) That said provision is based on headless income concept where no set off and no further benefit is allowable;
- e) That said provision basically requires to assessee to establish the source of income and/or manner of earning of income on reasonable basis ;
- f) That said provision cannot be applied to income falling in five heads of income whether accounted or unaccounted ;
- g) That once income source remains totally unproved, then sec. 115BBE on strength of section 68 etc may be applied;
- h) P&H high court decision in Kim Pharma rev fav is worth noting whereas there are other high court to contrary too;
- i) Principle of consistency:
 - a. 394 ITR 449 SC Godrej case Sec.14A
 - b. 388 ITR 1 SC (first year relevance u/s 35D)
 - c. 358 ITR 295 (SC) Excel Industries case
 - d. 106 ITR 1 (SC) Parshuram Potteries
 - e. 193 ITR 321 (Radhaswami Satsang) SC
- j) Other notable citations
 - a. SC 61 ITR 428 (how to decide nature of income)

- b. SC 273 ITR 1 (Significance of five heads of taxation u/s 14)
- c. P&H 382 ITR 453 (unexplained income concept)

On Issues related to search based assessment following is noteworthy:

- a) Section 132(4) statement usage: Assessee Favoring decisions:
397 ITR 82, 390 ITR 189, 369 ITR 171 Revenue favouring
Bombay high court in 386 ITR 233
- b) Loose documents issue: Delhi high court 383 ITR 320 & SC in
394 ITR 220 Common cause case
- c) Section 292C Scope of rebuttable presumption (Delhi high court
Vinita Chaurasia case assessee favouring latest 394 ITR 758)
- d) Incriminating Material angle (concept of abatement important)
(leading decision Delhi high court Kabul Chawla case)
- e) Satisfaction notes u/s 153C : SC in Singhad case (sep'2017)
order approving Bombay high court & Pune ITAT decisions
(held year wise incriminating material required in satisfaction
note)

On deemed div sec.2(22)(e) CBDT Circular no. 19/2017 exempting
business transaction and SC latest decision in Gopal Sons reported in
390 ITR Page 1 are important

On accrual of income: reference can be made of SC recent decision in P.G.Sawoo reported in 385 ITR 60

On concept of hypothetical income: reference can be made to landmark decision in case of Balbir Singh Maini (4/10/2017) from Hon'ble Supreme Court

On sec. 14A issue:

- a) No tax free income no disallowance settled by various high courts latest by Delhi high court in IL&FS 84 taxmann.com 16 (also see Cheminvest Del HC 378 ITR 33, Guj HC Corrtch 372 ITR 97, Holcim Del HC 272 CTR 282, Madras high court in Redington case 23/12/2016, Allahabad high court in Shivam Motors 272 CTR 277, P&H high court in Lakhani Marketing & Winsome Textiles 319 ITR 204) (disallowance to the extent of div. Income) Contrary CBDT circular opined as ultra vires
- b) Requisite dissatisfaction u/s 14A is to be only recorded by AO and cant be recorded by CITA SC godrej case (Supra), Delhi high court Taikisha 370 ITR 338, & Delhi high court in Eicher ltd applied by Delhi ITAT in TTGA ltd
- c) Netting of interest: Gujarat high court held yes required under rule 8D (NIRMA CREDIT AND CAPITAL PVT.LTD.....)

d) Delhi itat Vireet Investment Special bench :_S. 14A/ Rule 8D:

(i) The computation under clause (f) of Explanation 1 to section 115JB(2) is to be made without resorting to the computation as contemplated u/s 14A read with Rule 8D of the Income tax Rules 1962, (ii) Only those investments are to be considered for computing the average value of investment which yielded exempt income during the year