

Judicial Decisions

Applicability of section 56(2)(vii) [now replaced by section 56(2)(x)] to issue of shares

Jigar Jashwantlal Shah vs. Asst. CIT [2022]142 taxmann.com 200 (Ahmedabad Tribunal)

In favour of Assessee and Revenue

Relevant facts

Kintech Synergy Limited, an Indian company issued 2,00,000 right shares during AY 2013-14 at face value of INR 10. Pursuant to the rights issue, the shareholding of the assessee in the company increased from 27.90% to 53.22%. This increase in shareholding was the result of renunciation of right shares by wife and father as well as by third party shareholders in favour of the assessee. The Assessing Officer sought to tax the disproportionate issue of shares to the assessee as his income under section 56(2)(vii) of the Act.

Held

While there are judicial precedents that issue of shares would not amount to transfer, the provisions of section 56(2)(vii) of the Act seek to

tax the recipient when he 'receives' shares and therefore, one cannot restrict the interpretation of the term 'receives' to apply only in the case of a 'transfer'. In other words, the provisions of section 56(2)(vii) shall apply in the case of issue of shares as well. With regards to the issue of right shares proportionate to the shareholding of the assessee, such issue would not trigger the provisions of section 56(2)(vii) of the Act. In respect of the rights shares received from the wife and the father of the assessee, such receipt would have been exempt in the hands of the assessee even if it was a transfer of shares by way of gift (as received from a relative) and therefore, such receipt of right shares proportionate to the shares held by the wife and the father would not be taxable in the hands of the assessee.

However, in respect of the right shares issued to the assessee as a result of third-party shareholders renouncing their rights to apply for the shares in favour of the assessee, as such receipt of right shares has resulted in the assessee gaining control of the company by investing at a value lower than the fair market value (FMV), the difference between the FMV and the issue share

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price paid on the disproportionate issue of shares would be taxed in the hands of the assessee shareholder. In case the Balance Sheet was not drawn up on the date of allotment, the previous Balance Sheet which was approved in the AGM has to be considered for the valuation of the FMV of the shares.

CNK Comments

Applicability of section 56(20)(vii) [replaced by section 56(2)(x)] to the issue of shares has always been a vexed issue. The Ahmedabad ITAT followed the earlier decision of Mumbai ITAT in the case of Sudhir Menon HUF wherein issue of shares disproportionately has been held to be taxable in the hands of the shareholders. The ITAT has in this case, however, distinguished between renunciation of right shares in favour of another shareholder as against only some shareholders exercising the option of right shares with others abstaining from exercising, and has held that only in the first scenario, would there be taxation in the hands of the shareholders which have gained control.

Delay in deposit of employees' contribution to PF/ESIC to be taxable even for years prior to AY 2021-22

Checkmate Services Pvt Ltd vs. CIT [2022] 143 taxmann.com 178 (Supreme Court) In favour of Revenue

The provisions of section 43B of the Act shall not apply in the case of delay in deposit of employees' contribution to PF/ESIC. Therefore, if the deposit of such amounts is delayed beyond the due date as prescribed under the relevant laws, such amounts would be disallowed under section 36(1)(va) of the Act and no deduction for the same would be available under section 43B even if such payment is made within the due date of filing the return. There is a marked distinction between employer's contribution to such PF/ESIC and employees' contribution as the latter represents deduction from employees' income and held in trust by the employer.

The employees' contribution is amount held in

trust and is deemed to be income of the employer, with the object of ensuring that such payments are made within the due date specified in the particular law

CNK Comments

Applicability of section 43B to delay in deposit of employees' contribution to PF/ESIC has been a litigative issue with High Courts divided on the matter. Various courts such as the Bombay High Court have applied the principles of an earlier Supreme Court ruling in the case of Alom Extrusions in holding the issue in favour of the assessee. However, in this judgement, the Supreme Court has stated that the provisions of section 36(1)(va) of the Act were not considered in the earlier decision of Alom Extrusion as it was delivered in a different context.

One may now need to evaluate the impact of the said ruling on the existing litigation on this subject.

Disallowance of expenditure cannot be made in intimation under section 143(1) without application of mind by the Assessing Officer

Jasbir Singh Kaberwal vs. Asst. DIT [2022] 142 taxmann.com 97 (Mumbai Tribunal) In favour of the Assessee

Relevant facts

The assessee's return of income for AY 2018-19 was processed under section 143(1) and an adjustment to the income was made on account of delay in deposit of employees' contribution to PF/ESIC as reported in the Tax Audit Report (TAR). This disallowance was made even though the deposit of such payments was made before the due date of filing the return of income.

Held

The opinion of the tax auditor as provided in the TAR is not binding on the assessee who is free to take a contrary stand. Moreover, disclosure of delay in deposit of employees' contribution to PF/ESIC would not be covered under section 143(1)(iv) which allows the Central Processing Unit (CPC) to adjust the income of the assessee

on the basis of disallowance of expenditure or increase in income indicated in the TAR but not included in the return of income. The TAR merely requires disclosure of the payments to PF/ESIC and would not constitute disallowance or increase in income indicated in the TAR. Lastly, when the assessee has responded to the proposed adjustment stating that the stand is in line with the decision of the jurisdictional High Court (of the State to which the assessee belongs), CPC cannot simply disregard the decision without any application of mind and providing reason for confirming the proposed adjustment.

CNK Comments

While this decision was rendered prior to the above Supreme Court ruling of Checkmate Services (which has laid down the law in respect of delay in deposit of employees’ contribution to PF/ESIC), taxpayers may still be able to argue on the basis of this decision as well as other recent decisions of the Mumbai ITAT wherein it has been held that such disallowance cannot be undertaken by the CPC without application of mind under section 143(1) and would need to be examined by the Assessing Officer.

Notifications and Circulars

Form notified for modified return to be filed by successor entity

[Notification No. 110/2022 dated 19.09.2022](#)

Section 170A of the Act was amended by the Finance Act, 2022 which allows the successor entity to file its modified return of income pursuant to a business reorganisation. Rule 12AD has been prescribed which provides ITR-A as the return to be filed by the successor entity.

The details of the modified return shall be taken into account when computing the total income under an assessment or reassessment of any assessment year to which the order of the business reorganisation applies. If the assessment or reassessment has already been completed, the Assessing Officer shall pass an

order modifying the total income of the relevant assessment year.

The section provides that the modified return is to be filed within 6 months from the end of the month in which the order of business reorganization was issued by the competent authority. The due date for filing ITR-A for entities, whose order of business reorganization has been received between 1 April 2022 and 30 September 2022 has been extended to 31 March 2023.

Form notified for application for recomputation of income in case deduction of education cess has been claimed

[Notification No 111/2022 dated 28.09.2022](#)

The Finance Act, 2022 has retrospectively clarified that education cess is not an allowable expenditure. Given that various taxpayers had already claimed the expenditure on the basis of certain High Court decisions, it was clarified that if an application was made to the Department in a specified manner and within a specified time, and the applicable tax has been duly paid by the assessee, penalty provisions shall not apply.

In this regard, Form No. 69 has been notified for application of recomputation of total income in cases where education cess has been claimed as a deduction. The form has to be filed before 31 March 2023.

On receiving the application, the Assessing Officer shall recompute the total income by amending the relevant order passed earlier, determine the amount of tax payable and issue a notice under section 156 specifying the time period for tax payment.

The assessee shall furnish Form No. 70 evidencing the payment made within 30 days of making the payment.



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