Exploring Provisions

2015, March Issue

Gopal Nathani & Associates

dailytaxreporter.com

Magic Circular ©reserved

303,DLFQutab Plaza,

DLF City Phase I,

Gurgaon, Haryana

0124-4061225/226

www.dailytaxreporter.com

TRACE
INTERMEDIARY
MEMBER

Disclaimer

The information contained in this document is published for the knowledge of the recipient but is not to be relied upon as authoritative or taken in substitution for the exercise of judgment by any recipient. This document is not intended to be a substitute for professional, technical or legal advice or opinion and the contents in this document are subject to change without notice.

Whilst due care has been taken in the preparation of this report and information contained herein, GNA does not take ownership of or endorse any findings or personal views expressed herein or accept any liability whatsoever, for any direct or consequential loss howsoever arising from any use of this document or its contents or otherwise arising in connection herewith**.** In no event shall GNA become liable to users of this data, or any other party, for any loss or damages, consequential or otherwise, including but not limited to time, money, or goodwill, arising from the use, operation or modification of the data. In using this data, users further agree to indemnify, defend, and hold harmless GNA for any and all liability of any nature arising out of or resulting from the lack of accuracy or correctness of the data, or the use of the data.

dailytaxreporter.com

TRACE
INTERMEDIARY
MEMBER

"YathaDrishti, TathaSrishti- As the vision, so the world"

PREFACE

It is a settled position in law vide Grindlays Bank Ltd. v. Central Government Industrial Tribunal [1980] (Suppl.) SCC 420 (SC) that every authority exercising quasi-judicial powers has inherent/incidental power in discharging of its functions to ensure that justice is done between parties, i.e., no prejudice is caused to any of the parties. Such power has not to be traced to any provision of the Act but inherent in every quasi-judicial authority. However more often the Assessing Officer will merely seek to disallow the amounts in the assessment order on mere technicalities such as either for want of approval of certain authority, absence of form or report, absence of claim in the return form, defect in form or claim, absence of entry in form 26AS etc. The Bombay High Court in Supreme Industries Ltd. v. Additional CIT (2014) 369ITR758 also held that it is expected from every quasi-judicial authority to adopt a justice-oriented approach and not defeat the legitimate rights on the altar of procedures and technicalities.

In Chokshi Metal Refinery v. CIT (1977) 107ITR63 it was the contention of the assessee that not to give relief under section 80J or section 84, as the case might be, when due, only because it is not claimed, is a mistake apparent on the face of the record. And in making such plea the assessee relied on the circular No. 14 (XL-35) of 1955 dated 11-4-1955 of the Central Board of Revenue. Though the Gujarat High Court declined to rectify on this limited ground it cautioned the AO to follow the circular of the Central Board of Revenue of 1955. The Bombay High Court in Supreme Industries Ltd. v. Additional CIT (2014) 369ITR758 held that it is fundamental principle of law that no party should be prejudiced on account of any mistake in the order of the Tribunal. The Court further held the following:

"Though not necessary for the disposal of this petition, we express our disapproval of the stand taken in the impugned order that section 254(2) of the Act are meant only for rectifying the mistakes of the Tribunal and not of the parties. The Tribunal and the parties are not adversarial to each other. In fact, the Tribunal and the parties normally represented by advocates/chartered accountants are comrades in arms to achieve justice. Therefore, a mistake from any source be it the parties or the Tribunal so long as it becomes a part of the record, would require examination by the Tribunal under section 254(2) of the Act. It cannot be dismissed at the threshold on the above ground."

Thus the magic circular of 1955 can be made use of during the course of any proceedings under the Act to secure rights and entitlements under the Act.

TRACE
INTERMEDIARY
MEMBER

Purpose of this Document

To bring awareness about this magic circular that can come to the rescue of assessee's where his claims are struck due to legal technicalities and also where other remedies of rectifications etc. fail.

dailytaxreport.com

Table of Contents

TRACE
INTERMEDIARY
MEMBER

I. Technicalities under income tax law

The following kinds of technicalities are often experienced in day to day management and administration of the procedures of income tax filing, assessment and collection and payment:

a. error in quoting exemption/deduction section;
b. inadvertently making claim though ineligible under the law;
c. claims not raised in ITR or during assessment
d. defects found in applications for registrations
e. failure to claim weighted deduction
f. minor defects in forms
g. Delay in filing applications for refund, registration, renewal etc.

These technicalities often derail the justice and cause tremendous hardship for an assessee and more so for an ordinary individual and small entities. Circular No. 14(XL-35), dated 11-4-1955 of the CBDT work as a magic circular in any above circumstances. The Circular call upon on functionaries of the department to work equally in the best interests of the taxpayer in order that not a single pie extra is collected in the name of income tax etc. Some may say that the Circular is not mandatory but actually speaking the Circular is to be followed in letter and spirit by all officers of the department including the Commissioner of Income tax and Commissioner (Appeals).

II. The Magic Circular or the Rescue Circular

Administrative instructions for guidance of Income-tax Officers on matters pertaining to assessment

1. The Board has issued instructions from time to time in regard to the attitude which the Officers of the Department should adopt in dealing with assessees in matters affecting their interests and convenience. It appears that these instructions are not being uniformly followed.
2. Complaints are still being received that while Income-tax Officers are prompt in making assessments likely to result into demands and in effecting their recovery,

dailytaxreporter.com

TRACE
INTERMEDIARY
MEMBER

they are lethargic and indifferent in granting refunds

and giving reliefs due to assessees under the Act. Dilatoriness or indifference in dealing with refund claims (either under section 48 or due to appellate, revisional, etc., orders) must be completely avoided so that the public may feel that the Government are actually prompt and careful in the matter of collecting taxes and granting refunds and giving reliefs.

3. Officers of the Department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard the Officers should take the initiative in guiding a taxpayer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit the department for it would inspire confidence in him that he may be sure of getting a square deal from the department. Although, therefore, the responsibility for claiming refunds and reliefs rests with assessee on whom it is imposed by law, officers should—

   (a) draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other ;

   (b) freely advise them when approached by them as to their rights and liabilities and as to the procedure to be adopted for claiming refunds and reliefs.

4. Public Relation Officers have been appointed at important centres, but by the very nature of their duties, their field of activity is bound to be limited.

The following examples (which are by no means exhaustive) indicate the attitude which officers should adopt :

(1) Section 17(1) of the 1922 Act [section 113 of the 1961 Act] - While dealing with the assessment of a non-resident assessee the officer should bring to his notice that he may exercise the option to pay tax on his Indian income with reference to his total world income if it is to his advantage.

(2) Section 18(3), (3A), (3B) and (3D) of the 1922 Act [sections 193, 197(1), 195(1), 195(2) and 194 of the 1961 Act] - The officer should in every

dailytaxreporter.com

TRACE
INTERMEDIARY
MEMBER

appropriate case bring to the assessee's notice the possibility of obtaining a certificate authorising deduction of income-tax at a rate less than the maximum or deduction of super tax at a rate lower than the flat rate, as the case may be.

(3) Section 25(3) and 25(4) of the 1922 Act - The mandatory relief about exemption from tax must be granted whether claimed or not ; the other relief about substitution, if not time barred, must be brought to the notice of a taxpayer.

(4) Section 26A of the 1922 Act [sections 184 to 186 of the 1961 Act] - The benefit to be obtained by registration should be explained in appropriate cases. Where an application for registration presented by a firm is found defective, the officer should point out the defect to it and give it an opportunity to present a proper application.

(5) Section 33A of the 1922 Act [section 264 of the 1961 Act] - Cases in which the Income-tax Officer or the Assistant Commissioner thinks that an assessment should be revised, must be brought to the notice of the Commissioner of Income-tax.

(6) Section 35 of the 1922 Act [sections 154 and 155 of the 1961 Act] - Mistakes should be rectified as soon as they are discovered without waiting for anassessee to point them out.

(7) Section 60(2) of the 1922 Act [sections 89(1) and 103 of the 1961 Act] - Cases where relief can properly be given under this sub-section should be reported to the Board.

5. While officers should, when requested, freely advice assessees the way in which entries should be made in various forms, they should not themselves make any in them on their behalf. Where such advice is given, it should be clearly explained to them that they are responsible for the entries made in any form and that they cannot be allowed to plead that they were made under official instructions. This equally applies to the Public Relation Officers.

6. The intention of this circular is not that tax due should not be charged or that any favour should be shown to anybody in the matter of assessment, or that where

dailytaxreporter.com

TRACE
INTERMEDIARY
MEMBER

investigations are called for, they should not be made. Whatever the legitimate tax it must be assessed and must be collected. The purpose of this circular is merely to emphasise that we should not take advantage of an assessee's ignorance to collect more tax out of him than is legitimately due from him.

Circular : No. 14(XL-35), dated 11-4-1955.

III. Supreme Court Verdict on 1955 Circular

Vide Navnit Lal C. Javeri v. AAC [1965] 56 ITR 198 the Apex Court held that it is incumbent on the Income-tax Officers to follow the circular of the Central Board of Revenue of 1955 and to further draw the attention of the assessee concerned to all the reliefs and refunds to which the assessee seems to be entitled on the facts of the case even though the assessee might have omitted to claim refund or relief.

Further it is by far well-settled after the decision of the Supreme Court in Ellerman's case [1971] 82 ITR 913, that even if there is a deviation on a point of law, so far as the circular of the Board is concerned, that circular will be binding on all officers concerned with the execution of the I. T. Act and they must carry out their duties in the light of the circular.

IV. Rescue cases

1. Electronic filing mistake

In Sanchit Software and Solutions P Ltd. v CIT (2012) 349ITR404 the assessee claimed exemption of dividends and long term capital gains in exemption section in ITR but not in the computation section of ITR. It lost on revision of ITR on account of time factor, rectification as well as in revision petition u/s 264. The Bombay High admitting a writ held that the Commissioner committed a fundamental error in proceeding on the basis that no deduction on account of dividend income and

TRACE
INTERMEDIARY
MEMBER

dailyexcelsior.com

income from capital gains under section 10 of the Act
was claimed since there was an error on the face of the order. It further directed the AO to pass rectification.

In referring to the magic circular the Court held that the entire object of administration of tax is to secure revenue for the development of the country and not to charge the assessee more tax than that which is due and payable by the assessee. On April 11,1955, the Central Board of Direct Taxes issued a circular directing the Assessing Officer not to take advantage of the assessee's ignorance or mistake.

2. Retraction case

In AjitChintamanKarve v. ITO (2009) 311ITR (AT) 66 an offer was made during survey and the addition followed solely on the same basis without gathering any incriminating material and without any note of defect in the books of account. It was sheer valuation of work in progress at some imaginary figure. The assessee later retracted and filed a revised return removing the offered amount. Once again taking note of the magic circular the Pune bench of ITAT held that merely because an offer was made having no cogent basis or approval of law should not estop a taxpayer from correcting his mistake. Rather, it is a duty of the Revenue Department to tax the legitimate amount from a taxpayer. This is what exactly was directed by the Central Board of Direct Taxes in a very old administrative instructions for guidance of the Income-tax Officer on matters pertaining to assessment vide Circular No. 14 (XL-35), dated April 11, 1955.

V. Even appellate commissioner bound by the Magic circular

Taking note of Ellerman's case referred to above the Gujarat High Court in CIT v. Ahmedabad Kaiser-E-Hind Mills Co Ltd. (1981) 128ITR486 also held that what was the obligation of the ITO would be the obligation of all officers of the department concerned with the execution of the I.T. Act. The Circular call upon the Commissioner to admit claims that are not made earlier before the AO. In other words there is no need to defend a case against Goetze ruling and one can

dailytaxreporter.com

TRACE
INTERMEDIARY
MEMBER

straightway go head on with the magic circular and press for any missed claims/additional ground at the appellate stage.

Interestingly when the department went in a reference to the Court in this case on the question whether the Appellate Assistant Commissioner had erred in law in entertaining the additional ground when it was not raised earlier before the ITO the Court made the following concluding observations:_

" We, therefore, decline to answer the question and send the matter back to the Tribunal so that the Tribunal can examine the question whether, in the light of what was disclosed in the proceedings or other particulars before the ITO, at the time of the original assessment proceedings, the ITO concerned should have taken the initiative in guiding the assessee before us in claiming this relief under s. 2(5)(a)(iii) of the relevant Finance Act. It is because of the above-mentioned circular alone that we are passing this order. There will be no order as to costs of this reference."

Seldom does an ITO would take an initiative of this kind and therefore in all importance it is wise for assessee's to make full closure in assessment proceedings of all facts and figures with relevant documents and more so they must file in their submissions a request to the ITO to allow all deductions and exemptions to which it is otherwise entitled to under the law even if not so mentioned in the return on the basis of the magic circular.

VI. Administrative commissioner also bound to follow magic circular Tax

In Parekh Bros. v CIT (1984) 150ITR105 the Kerala High Court held that the commissioner is duty bound to help the assessee in securing reliefs not claimed during assessment or appellate proceedings on the basis of magic circular. The Court also made it clear that this would be irrespective of whether the order passed is erroneous or not

VII. Exceptions

The magic circular does not help in certain situations. For instance where the assessee neither did ask for nor given relief of exemption but later sought relief on

TRACE
INTERMEDIARY
MEMBER

dailytaxreporter.com

rectification application. In Chokshi Metal Refinery v.
CIT (1977) 107ITR63 the rectification applications were field by the Income-tax Officer on the ground that the assessee had not claimed the deductions under section 84/80J in its returns of income nor was the claim put forward during the assessment proceedings for the two years.Even when the Gujarat High Court observed that the incumbent assessing officer should have pointed out have drawn the attention of the assessee to this relief under section 80J to which the assessee appeared to be clearly entitled but which the assessee had omitted to claim for some reason or the other it showed its helplessness considering the limited scope under rectification procedure.

There is a serious flaw noticed here as in this case on one hand the Court directed that the assessee will pay the costs of this reference to the Commissioner and on the other hand did not impose any costs upon the assessing officer who did not follow the rescue circular. In the right earnest any such costs must have been imposed on the ITO then the assessee. At lease the Court could have directed the CBDT to frame certain guidelines to give effect to the 1955 Circular with some sort of punishment for failure to follow 1955 Circular.

Yet again in Panasonic Energy India Co. Limited v. ACIT (2014) 367ITR245 the A O disallowed the claim for deduction under section 80-IB for want of receipt of audit report in Form 10CCB before completion of the assessment. Going forward the assessee did not even file such report at appellate stage. Taking it as a serious lapse the Gujarat High Court held that the assessee was not entitled to the deduction under section 80-IB.

At the same tile the Delhi High Court in Continental Construction Ltd. v. Union of India [1990] 185 ITR 230 in the context of alternate claim made by the assessee held that the Income-tax Department should not stand on mere technicalities and must give an opportunity to the assessee to fulfil the requirements of section 80HHB(3) within a reasonable time.

dailytaxreporter.com

TRACE
INTERMEDIARY
MEMBER

Thus the magic Circular may not help much if there is
continued failure on the part of the assessee or when the assessee does not file material evidence before the authorities in support of its claim for deduction.

VIII. Conclusion

In a recent decision rendered by the Pune bench in ITO v. Anirudha Ashok Jajoo (2015) 56taxmann.com 221 it is held that the relief which is otherwise due to the assessee should not be denied and that too even if the claimant is a chartered accountant himself who is expected to be aware of the relevant provisions of the Income tax Act. In this case the practicing chartered accountant ended up writing in the return wrong section of exemption in his own case.

Thus the 1955 Circular is a magic circular that can come to the rescue of assessee's where his claims are struck due to legal technicalities and also where other remedies of rectifications etc. fail. In fact the magic circular has become more relevant in view of section 292B in the Act of which the whole purpose is not to defeat on technicalities the object of the statute that is to assess and collect the tax legitimately due under the Act

dailytaxreporter.com

TRACE
INTERMEDIARY
MEMBER

Contact us:

gnathani@dailytaxreporter.com

rnathani@dailytaxreporter.com

Our Values:

TRACE
INTERMEDIARY
MEMBER