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FINAL MAY 2019 EXAM

SUBJECT- DT

Test Code – FNJ 7102

BRANCH - () (Date :)

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Answer 1:

(A)

X is required to maintain books of account as per section 44AA for the P.Y.2018-19 since his turnover exceeded Rs. 25 lakhs in the P.Y.2017-18. He also has to get them audited under section 44AB, since his gross sales in the P.Y.2018-19 exceeds Rs. 1 crore. **He is liable to pay penalty under section 271A for not maintaining his books of account as per section 44AA**. Accordingly, the action of the Assessing Officer in levying penalty of Rs. 25,000 under section 271A is correct. However, **where books of account have not been maintained, there cannot be a question of getting them audited. Audit of books of account presupposes maintenance of books of account**. When admittedly X has not maintained books, he cannot obviously get the audit done. **(3 marks)**

In **Surajmal Parsuram Todi v. CIT** (1996) 222 ITR 691, the Gauhati High Court has held that when a person commits an offence by not maintaining books of accounts as contemplated by section 44AA, the offence is complete and after that there can be no possibility of any offence as contemplated by section 44AB and, therefore, the imposition of penalty under section 271B is erroneous. **(2 marks)**

Therefore, in this case, the Assessing Officer is not justified in levying penalty under section 271B. **(1 mark)**

(B)

The **Apex Court, in CIT vs. Om Prakash Mittal** (2005) 273 ITR 326, observed that a plain reading of section 245D(6) shows that every order passed under sub-section (4) has to provide for:-

(i) the terms of settlement; and

(ii) that the settlement would become **void**, if it is **subsequently found** by the Settlement Commission that it has been **obtained by fraud or misrepresentation of facts.** **(1 mark)**

The decision that the order has been obtained by fraud or misrepresentation is that of the Settlement Commission. However, there is no requirement that the action be initiated by the Settlement Commission, **suo moto.** The Revenue can move the Settlement Commission for decision on an issue **if it has material to show** that the order was obtained by fraud or misrepresentation of facts. **(1 mark)**

The Supreme Court observed that the foundation for settlement is an application which an assessee can file at any stage of a case relating to him in such form and manner as may be prescribed. **The fundamental requirement of the application under section 245C is that there must be full and true disclosure of the income along with the manner in which it has been derived.** If an order is obtained by fraud or misrepresentation of facts, it cannot be said that there is a full and true disclosure and therefore, the Legislature has prescribed the condition relating to declaration of the order void when it is obtained by fraud or misrepresentation of facts. **(1 mark)**

The Supreme Court held that merely because section 245-I provides that the order of settlement is conclusive, **it does not take away the power of the Settlement Commission to decide whether the settlement order has been obtained by fraud or misrepresentation of facts**. If the Commissioner is able to establish that the earlier decision was void because of misrepresentation of facts, then it is open for the Settlement Commission to decide the issue. **It cannot be called by any stretch of imagination to be a review of the earlier judgment or the subsequent Bench sitting in appeal over the earlier Bench's decision.** **(1 mark)**

Therefore, Mr. Sunder's contention is, therefore, not correct.

Answer 2:

(A)

(i) An assessee, **aggrieved by the order passed under section 143(3)** by the Assessing Officer, can **file an appeal before the Commissioner of Income-tax (Appeals)** under section 246A(1) **within 30 days** of the date of service of the notice of demand relating to the assessment. However, where the assessee does not want to prefer an appeal, then he can move a revision petition before the Principal Commissioner or Commissioner of Income-tax under section 264 within a period of one year from the date of on which the order was communicated to him or the date on which he otherwise came to know of it, whichever is earlier.

(ii) An assessee, **aggrieved by the order passed under section 263** by the Commissioner of Income-tax, can **file an appeal to Income-tax Appellate Tribunal** under section 253(1)(c**) within 60 days** of the date on which the order sought to be appealed against is communicated to the assessee.

(iii) An assessee, aggrieved by the order passed under section 272A by the Director General, can **file an appeal before the Income-tax Appellate Tribunal** under section 253(1)(c) **within 60 days** of the date on which the order sought to be appealed against is communicated to the assessee.

(iv) An assessee, **aggrieved by the order passed under section 254** by the Income-tax Appellate Tribunal, can **file an appeal before the High Court** under section 260A **within 120 days** from the date of receipt of order of Income-tax Appellate Tribunal, only where the order gives rise to a substantial question of law. **(1 mark x 4 = 4 marks)**

(B)

Godrej Industries Ltd v. B.S. Singh Dy.CIT (2015) 377 ITR 1 (Bom) **(1 mark)**

High Court's Observations: The High Court observed that an identical issue had come up in Rallis India Ltd. v. Asst. CIT [2010] 323 ITR 54 (Bom) wherein a reopening notice was, inter alia, issued on the ground that the book profits have to be increased by the provision made for doubtful debts and for diminution in the value of investment in view of clause (c) of the Explanation to section 115JB. In the said case, the High Court recorded the fact that the **Apex Court had, in CIT v. HCL Comnet Systems and Services Ltd.** [2008] 305 ITR 409, held that the **provision for doubtful debts is a provision made for diminution in the value of assets and is not a liability.** Thus, it **would not fall under clause (c) of the Explanation to section 115JA** of the Act. Consequent to the aforesaid decision of the Apex Court, the **Parliament has amended the Explanation both under section 115JA as well as section 115JB of the Act in 2009 by adding clause (g) and clause (i) with retrospective effect from April 1, 1998, and April 1, 2001, respectively.** The Court held that though the amendment was made with the retrospective effect, the critical date is the date on which the Assessing Officer exercises jurisdiction under section 148 of the Act and the subsequent amendment could not have been and is in fact not a ground on which the Assessing Officer sought to reopen the assessment. It was held that the validity of a reopening notice of Assessing Officer is to be determined with reference to the reasons which are recorded in support of thereof and nothing else.

In this case also, it is clear that the reasons stated for reopening the assessment are that provision for doubtful debts and depletion in value of investments are both amounts set aside for meeting liabilities other than ascertained liabilities and hence, constitute income escaping assessment. The reasons recorded are not valid as the said items were not related to liabilities as perceived by the Assessing Officer. These provisions are made to take care of the likely fall in the value of assets.

The High Court observed that it is the Assessing Officer's belief at the time of issuing the

reassessment notice that determines the validity of the notice. In this case, he wanted to apply clause (c) of the Explanation to section 115JA and whereas the issues got covered by subsequent amendment by means of insertion of clause (g) to the Explanation to section115JA by the Finance (No.2) Act, 2009 with retrospective effect from 1.4.1998. The subsequent event could not put life into the Assessing Officer's reason that income chargeable to tax had escaped assessment when the reasons as originally recorded are still born.

High Court's Decision: **The position of law on the date of issue of notice under section 148 must be looked into and the retrospective amendment subsequent to issue of notice could not validate a notice issued earlier.** It could only amount to **change of opinion** and the notice for reopening of assessment would become unsustainable.

The High Court, accordingly, allowed the writ and held that the reason for reopening the assessment cannot get validated by the retrospective amendment of law. **(6 marks)**

Note – It may be noted that section 115JA levying MAT was applicable from A.Y.1997-98 to A.Y.2000-01. From A.Y.2001-02, MAT is attracted under section 115JB. Clause (c) of Explanation 1 to section 115JB requires addition of amount set aside to provisions made for meeting liabilities, other than ascertained liabilities, to the net profit for arriving at the book profit for levy of MAT. Clause (i) was inserted by the Finance (No.2) Act, 2009 retrospectively with effect from 1st April, 2001 providing for addition of amount set aside as provision for diminution in the value of any asset, to the net profit for arriving at the book profit for levy of MAT. The rationale of the above ruling would, therefore, also apply in the context of examining the validity of notice issued for reopening an assessment on the basis of clause (c) of Explanation 1 to section 115JB, consequent to subsequent retrospective insertion of clause (i) in Explanation 1 to section 115JB.

Answer 3:

(A)

(a) The authorised officer being DDI, Delhi is not having any jurisdiction over Shri Krishna Ltd., Mumbai, and therefore as per section 132(9A), **the papers seized relating to this company shall be handed over by him to the Assessing Officer having jurisdiction over Shri Krishna Ltd., Mumbai within a period of 60 days** from the date on which the last of the authorisations for search was executed for taking further necessary action thereon.

(b) The contention raised by the Director will not be acceptable because as per the provisions of sub-section (4A)(i) of section 132, where any books of account, other documents, money, bullion, jewellery or other valuables are found in the possession or control of any person in the course of search, then, in respect thereof, **it may be presumed that the same belongs to that person**.

(c) As per section 132(4A), the presumptions in respect of the papers, indicating transactions not recorded in the books but having direct nexus with the business of the company, are that the same belong to the company, contents of such papers are true and the handwriting in which the same are written is/are of the persons(s) whose premises have been searched.

(2 marks x 3 = 6 marks)

(B)

The Supreme Court in **Rajesh Kumar & Ors. v. DCIT** (2006) 287 ITR 91 observed that the order under section 142(2A) is a quasi judicial order. Therefore, the **principles of natural justice have to be applied** and the assessee has to be given an **opportunity of being heard before directing the special audit.** The principles of natural justice are based on two principles, namely, (i)

nobody shall be condemned unheard; (ii) nobody shall be a judge of his own cause. Once it is held that the assessee suffers civil consequences and any order passed would be prejudicial to him, the principles of natural justice must be held to be implicit. If the principles of natural justice were to be excluded, the Parliament could have said so expressly.

Accordingly, to give effect to the observation of the Supreme Court, it has been provided that the Assessing Officer is required to give the assessee an opportunity of being heard before issuing directions for special audit under section 142(2A).

Therefore, on the basis of above discussion we can conclude that The contention of Mr. Abhishek is tenable under law. **(4 marks)**

Answer 4:

(A)

Mega Trends Inc. v. CIT (2016) 388 ITR 16 (Mad). **(1 mark)**

High Court's Observations: The Revenue contended that the CIT(Appeals) has power to modify assessee's status, since a partnership firm is a relationship between persons who have agreed to share the profits of the business carried on by all or any of them acting for all, and **the term persons only connotes natural persons**. Since some of the partners are other firms, the assessment cannot be carried out as a firm. They relied on the **Supreme Court's ruling in Dhulichand Laxminarayan v. CIT** (1956) 29 ITR 535 (SC) to argue this point.

The High Court observed that, under section 251(1), the **powers of the first appellate authority are coterminous with those of the Assessing Officer** and the appellate authority can do what the Assessing Officer ought to have done and also direct him to do what he had failed to do. If the Assessing Officer had erred in concluding the status of the assessee as a firm, it could not be said that the Commissioner (Appeals) had no jurisdiction to go into the issue. The appeal was in continuation of the original proceedings and unless fetters were placed upon the powers of the appellate authority by express words, the appellate authority could exercise all the powers of the original authority. **(3 marks)**

High Court's Decision: The High Court held that the power to change the status of the assessee is available to the assessing authority and when it is not used by him, the appellate authority is empowered to use such power and change the status. The Court relied on a full bench decision of the Madras High Court in State of Tamil Nadu v. Arulmurugan and Co. reported in [1982] 51 STC 381 to come to such conclusion. **(1 mark)**

(B)

Hemant Kumar Sindhi & Another v. CIT (2014) 364 ITR 555 (All) **(1 mark)**

High Court's Observations: The High Court observed that section 132B(1)(i) uses the expression "the amount of any existing liability" and "the amount of the liability determined". The words "**existing liability" postulates a liability that is crystallized by adjudication**; Likewise, "a liability is determined" **only on completion of the assessment**. Until the assessment is complete, it cannot be postulated that a liability has been crystallized. **(2 marks)**

As per the first proviso to section 132B(1)(i), the **assessee may make an application to the Assessing Officer for release of the assets seized.** However, he has to **explain the nature and source of acquisition of the asset to the satisfaction of the Assessing Officer**. It is not the ipse dixit of the assessee but the satisfaction of the Assessing Officer on the basis of the explanation tendered by the assessee which is material. **(1 mark)**

High Court's Decision: The High Court, accordingly, held that the Assessing Officer was justified in his conclusion that **it is only when the liability is determined on the completion of assessment** that it would stand crystallized and in pursuance of which a demand can be raised and recovery can be initiated. Therefore, in the present case, the first proviso to section 132B(1)(i) would not be attracted. The High Court, thus, dismissed the writ petition. **(1 marks)**

Answer 5:

(A)

The **power of Settlement Commission to grant immunity from prosecution and penalty is provided for in section 245H.**

In respect of an application made on or after 1st June, 2007, the Settlement Commission's power to grant immunity from prosecution is restricted to offences under the Income-tax Act, 1961. The Settlement Commission can also grant immunity from penalty imposed under the Income-tax Act, 1961. Such immunity from prosecution and penalty may be granted subject to conditions as it may think fit to impose.

However, the Settlement Commission may grant immunity only if the person who has made the application has **co-operated with the Settlement Commission** and **made a full and true disclosure of his income and the manner in which it was derived**. Further, the Settlement Commission while granting immunity to any person from prosecution shall record the reasons in writing in the order passed by it.

Also, the Settlement Commission cannot grant immunity if the prosecution proceeding for any such offence has been instituted before the date of receipt of application for settlement under section 245C. **(4 marks)**

(B)

M/s. XYZ is deemed to have under-reported its income since:

(1) its income assessed under 143(3) exceeds its income determined in a return processed under section 143(1)(a); and

(2) the income reassessed under section 147 exceeds the income assessed under section 143(3).

Therefore, penalty is leviable under section 270A for under-reporting of income. **(1 mark)**

Computation of penalty leviable under section 270A

Particulars	Rs.	Rs.
Assessment under section 143(3) Under-reported income:		
Total income assessed under section 143(3)	75,00,000	
(-) Total income determined u/s 143(1)(a)	60,00,000	
	15,00,000	
Tax payable on under-reported income:		
Tax on under-reported income of Rs. 15 lakhs plus tax on total income of Rs. 60 lakhs determined u/s 143(1)(a) **[30% of Rs. 75 lakh + HEC@4%]**	23,40,000	
Less: Tax on total income determined u/s 143(1)(a) **[30% of Rs. 60 lakh +HEC@4%]**	18,72,000	
	4,68,000	
Penalty leviable@50% of tax payable		2,34,000
Reassessment under section 147 Under-reported income:		
Total income reassessed under section 147	95,00,000	

(-) Total income assessed under section 143(3)	75,00,000	
	20,00,000	
Tax payable on under-reported income:		
Tax on under-reported income of Rs. 20 lakhs plus tax on total income of Rs. 75 lakhs assessed u/s 143(3) **[30% of Rs. 95 lakh + HEC@4%]**	29,64,000	
Less: Tax on total income assessed u/s 143(3) **[30% of Rs. 75 lakh + HEC@4%]**	23,40,000	
	6,24,000	
Penalty leviable@50% of tax payable		3,12,000

(5 marks)

Note – The following assumptions have been made -

(1) None of the additions or disallowances made in assessment or reassessment qualifies under section 270A(6); and

(2) The under-reported income is not on account of misreporting.