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Amended provisions of section 115BBE brought in by the 'Taxation Laws (Second Amendment Act), 2016' whether applicable prospectively or retrospectively.

1.Introduction:

Any income either received by an assessee or accrued to the assessee in the previous year for which source of income is known and accounted is subject to income-tax under the particular head under which that source of income falls.

Issue arises when the source of income is unknown or hidden from the revenue. In order to charge income tax on such unaccounted income, the Parliament introduced section 115BBE in the Income Tax Act, 1961 through the Finance Act, 2012.

2.History:

The provisions of section 115BBE were held to be applicable from the assessment year 2013-14. This section is contained in Chapter XII of the Income Tax Act, 1961. The title of the section is "Tax on income referred to in section 68 or section 69 family."

Any income falling under the section 115BBE shall be subject to tax at the maximum marginal rate that is 30% plus applicable surcharge and cess. It is also provided in section 115BBE of the Act that no basic exemption limit or deduction of any expenditure or allowance and no set off of any loss shall be allowed. Thus, if any such income is added to the income of the assessee under the section 68 or section 69 family is added to the income of the assessee and the gross amount of such income would be taxed at 30% plus applicable surcharge and cess and against such addition no deduction or setoff would be available. However, there is no restriction for availing deductions under Chapter- VIA as given under the section 80 family.

3.Amendment by the 'Taxation Laws (Second Amendment) Act,2016':

According to statement of objects and reasons the 'Taxation Laws (Second Amendment Act),2016' which received the assent of the President on 15th Decemeber,2016 has been brought before the parliament to plug the loop holes in the existing provisions of Income Tax Act,1961 and to ensure that defaulting assesses are subject to tax at a higher rate and stringent penalty provisions.

The 'Taxation Laws (Second Amendment Act),2016' was passed in the parliament with the aim to tax the black money holders in the series of denomination of the value of five hundred rupees or one thousand rupees (Specified Bank Notes) which have been ceased to legal tender with effect from 9th November,2016 as declared by 'The Specified Bank Notes (Cessation of Liabilities Bill),2017'.

With the introduction of the 'Taxation Laws (Second Amendment Act),2016' amendment was brought in the provisions of the section 115BBE with effect from the assessment year 2017-18 to tax the income assessed under section 68 or section 69 family at higher rate of 60% plus surcharge 25% and applicable cess.

Provisions of section 115BBE was amended in the middle of the previous year 2016-17 that is on 15th December,2016.But the amended provisions were said to be applicable retrospectively right from 1st April,2016. Thus , even those transactions that took place on or before 14th Decemeber,2016 was covered when the amended provision of section 115BBE was not in force to tax at higher rate of 60% plus surcharge 25% and applicable cess.

4.Imposition of higher tax rate by the amended provisions of section 115BBE through enactment of the 'Taxation Laws (Second Amendment Act),2016' , can it be applicable retrospectively to cover the transactions from 1st April,2016 ?:

'Taxation Laws (Second Amendment Act),2016' received assent of the President on 15th Decemeber,2016 accordingly changes brought in section 115BBE for imposing higher rate of 60% plus surcharge 25% with applicable cess ideally should be made applicable prospectively to cover those transactions happened from 15th December,2016 on wards.

Amended provisions of section 115BBE was enacted in the I.T Act-1961 on 15th December,2016 can not be applicable retrospectively to cover transactions from 1st April,2016 to 14th December,2016 to tax at higher rate of 60% plus surcharge 25% with applicable cess where income was assessed

under section 68 or section 69 family.

Judicially it was well settled under the Income Tax Act, 1961 that amended provisions which modify accrued rights or which impose obligations or create new liabilities or attach new disability have to be treated as prospective unless the language of the statute is clear that it has retrospective operation.

The above proposition regarding operation of the amended provision was accepted by the Apex Court and that of High Courts in plethora of judgments.

Reliance is placed upon the following land mark legal precedents :

CIT Vs. Vatika Township (P.) Ltd (2014) 367 ITR 466 (SC).
CIT Vs. Walfort Shares & Stock Brokers (P.) Ltd (2010) 326 ITR 1 (SC).
CIT Vs. Gold Coin Health Food (P.) Ltd (2008) 304 ITR 308 (SC).
Sedco Forex International Drill Inc. Vs. CIT (2005) 279 ITR 310 (SC).
CIT Vs. Hindustan Electro Graphites Ltd (2000) 243 ITR 48 (SC).
P. Ram Gopal Varma Vs. Dy. CIT (2013) 357 ITR 493 (AP. HC)
Modern Fibotex India Ltd Vs. Dy. CIT (1995) 212 ITR 496 (Cal. HC).
Govind Das Vs. ITO (1976) 103 ITR 123 (SC).

In the case of '**CIT Vs. Vatika Township (P.) Ltd (supra)**' it was held as under:

"Of the various rules guiding how legislation has to be interpreted, one established rule is that unless a contrary intention appears, legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's background adjustment of it. Our belief in the nature of the law is founded on the bed rock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as *lex prospicit non respicit*: law looks forward not backward. As was observed in Phillips vs. Eyre: a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law."

In the case of '**CIT Vs. Walfort Shares & Stock Brokers (P.) Ltd (supra)**' the Apex Court opined as follows:

"Retrospective operation of law should not be given so as to effect, alter or destroy an existing right and to create new liability or obligation. New liability can not be created by a subsequent amendment in respect of a transaction when such law was not in the Statute book.

In the case of '**CIT Vs. Gold Coin Health Food (P.) Ltd (supra)**' it was held as under :

"It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations."

In the case of '**Sedco Forex International Drill Inc. Vs. CIT (supra)**' the Apex Court thus held as under:

"Taxing provision imposing extra liability upon the assessee shall not be held as applicable retrospectively. A provision must be read subject to the rule that in the absence of an express provision or clear implication, the Legislature does not intend to attribute the amending provision, a greater retrospectively than is expressly mentioned. It is settled law that a taking provision imposing liability is governed by the normal presumption that is not retrospective."

In the case of '**Govinddas Vs. ITO (1976) 103 ITR 123 (supra)**' it was held as under:

"Now, it is a well settled rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."

In the case of '**CIT Vs. Hindustan Electro Graphites Ltd (supra)**' it was held as under :

"Retrospective Amendment of law could not compel the assessee to deposit tax on additional income."

The principles that emerge from the aforesaid decisions indicate as follows:

(i) A statute is prima facie prospective in operation, but it may be given retrospective operation expressly or by necessary implication.

(ii) If a statute affects a vested right or creates a new obligation, it is prospective in nature.

(iii) If a statute changes the existing legal position and creates new obligation or liability then it is not retrospective unless it is declared to be so.

(iv) An intention to enact a retrospective statute must be clearly expressed. The mere use of words conveying such an intention is not by itself sufficient to hold operation retrospectively.

Comments:

When viewed in the light of above discussion and that of judicial precedents including '**Taxation Laws (Second Amendment) Act, 2016**' amendment brought in section 115BBE w.e.f 1st April, 2016, it is quite clear that it creates a new liability (of tax rate 60%) or at least impairs an existing right (of tax rate @30%) that an assessee had prior to its insertion in the statute.

The existing right of the assessee to tax @ 30% has been taken away by the '**Taxation Laws (Second Amendment) Act, 2016**' and has made the assessee open to greater liability of tax @60%, hence the amended provisions of section 115BBE does not have retrospective operation w.e.f 1st April, 2016, in as much as it changes the existing legal position and creates a new obligation on the assessee. Also there is also noting in the language of the statute that compels the amended provisions of section 115BBE to give it retrospective effect.

5. SECTION 115BBE BEING MACHINERY PROVISION HAS TO BE INTERPRETED LIBERALLY:

The Income Tax Act is a self contained code consists of both charging and machinery sections.

Charging sections are those sections by which liability is created or fixed.

Machinery sections are those sections which ensures quantification, imposition and collection of tax created by the 'charging sections'. Thus 'Machinery Provisions' are basically subordinates to the charging

section.

On applying the above principles section 115BBE is categorized as 'machinery provision' which is subordinate to the charging sections 68 and section 69 family.

There is a very practical rule in the interpretation of taxing Statutes that 'charging provisions' are interpreted strictly while the 'machinery provisions' are interpreted liberally.

The above criteria of interpretation of the 'Statute' is supported by several judicial precedents.

Some land mark judicial precedents are as under:

- (i) J.K. Synthetics Ltd Vs. The Commercial Tax Officer (1994) 1994 taxmann.com 370 (SC).
- (ii) Gurshai Saigal Vs. CIT (1963) 48 ITR 1 (SC).
- (iii) India United Mills Ltd Vs. CEPT (1955) 27 ITR 20 (SC).
- (iv) CIT Vs. Mahaliram Ramjidas (1940) 8 ITR 442(PC).

The Hon'ble Supreme Court in the case of **J.K.Synthetics Ltd Vs. The CTO'** (supra) held as under:

"It is well-known that when a statute levies a tax it does so by inserting a charging section by which a liability is created or fixed and then proceeds to provide the machinery to make the liability effective. It, therefore, provides the machinery for the assessment of the liability already fixed by the charging section, and then provides the mode for the recovery and collection of tax, including penal provisions meant to deal with defaulters. ... Ordinarily the charging section which fixes the liability is strictly construed but that rule of strict construction is not extended to the machinery provisions which are construed like any other statute. The machinery provisions must, no doubt, be so construed as would effectuate the object and purpose of the statute and not defeat the same. (*Whitney v. Commissioners of Inland Revenue* 1926 A C 37, *CIT v. Mahaliram Ramjidas* (1940) 8 ITR 42 (PC) , *Indian United Mills Ltd. v. Commissioner of Excess Profits Tax, Bombay*, (1995) 27 ITR 20 (SC) and *Gursahai Saigal v. CIT, Punjab*, [1963] 48 ITR 1 (SC)."

The Hon'ble Supreme Court in the case of **Gursahai Saigal Vs. CIT'** (supra) held as under:

"Those sections which impose the charge or levy should be strictly construed; but those which deal merely with the machinery of assessment and collection should not be subjected to a rigorous construction but should

be construed in a way that makes the machinery workable.”

The Hon’ble Supreme Court in the case of **‘India United Mills Ltd Vs. CEPT’ (supra)** applied the principles laid down by the Privy Council in the case of **‘CIT Vs. Mahaliram Ramjidas (supra)’** held as under :

“Ordinarily, the charging section which fixes liability is strictly construed but the rule of strict construction is not extended to the machinery provisions which are construed like any other statute. The machinery provision must , no doubt, be so construed as would effectuate the object and purpose of the Statute and not to defeat the same.”

Comments:

When viewed in the light of above discussion and that of judicial precedents section 115BBE being a machinery provision was amended by the ‘Taxation Laws (Second Amendment) Act,2016’ to curb black money holders in the possession of ‘Specified Bank Notes ’ having denomination in the series of Rs500/- or Rs1,000/- which were ceased to be a legal tender from 9th November,2016 . Accordingly this section 115BBE being machinery provision has to be interpreted liberally , hence having regard to the intention of the Legislation the amended provision of section 115BBE should be operated prospectively that is from 15th December,2016 when the ‘Taxation Laws (Second Amendment) Act,2016’ received assent of the President and not to be operated retrospectively from 1st April,2016 .

Concluding Remarks:

6. When viewed in the light of above discussions, existing provisions of the section 115BBE, the amended provisions of the section 115BBE brought in by the ‘Taxation Laws (Second Amendment) Act,2016’ and that of judicial precedents , normally amended provisions which modify accrued rights or which impose obligations or create new liabilities or attach new disability have to be treated as prospective accordingly amended provision of the section 115BBE should be operated prospectively w.e.f 15th December,2016 when the ‘Taxation Laws (Second Amendment) Act,2016’ received assent of the President.

Similarly section 115BBE being machinery provision should be interpreted liberally to satisfy the intention of the Legislation to curb black money holders in the series of denomination of Rs.500/- or Rs.1,000/- thus amendment effected in the middle of the financial year 2016-17, accordingly the amended provisions of section 115BBE should operate prospectively that is from 15th Decemeber,2016 when the ‘Taxation Laws (Second Amendment) Act,2016’ received the assent of the President and it

should not be operated retrospectively to cover transactions from 1st April, 2016.

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