IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA No.185 of 2015 (O&M)
Date of decision: 11.8.2015

The Commissioner of Income Tax, Faridabad

……Appellant.

Naresh Jindal

…..Respondent

CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE RAMENDRA JAIN

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr. Tajender K.Joshi, Advocate for the appellant-revenue.

Ajay Kumar Mittal,J.

1. The delay in refiling the appeal is condoned.

2. The revenue has preferred this appeal under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 18.5.2012, Annexure A.III passed by the Income Tax Appellate Tribunal,

Delhi Bench 'E' New Delhi (in short, "the Tribunal) in ITA No.2462/Del/2011 for the assessment year 2007-08, claiming following substantial questions of law:-

> "i) Whether on the facts and in the circumstances of the case, the Hon'ble ITAT was right in law in deleting the addition of ₹ 45,03,927/- made by the AO on account of advance against order when the nexus between sending of money as against sale was not established and no service was rendered by the foreign buyer/receiver of the money and that too without deduction of tax at source as required under section 40(a) of Income Tax Act, 1961?
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> ii) Whether on the facts and in the circumstances of the case, the Hon'ble ITAT was right in law in deleting the addition of ₹ 5,00,000/- made by the AO on account of payment of rent made in contravention to provisions of section 40(a)(ia) of Income Tax Act, 1961?"

3. A few facts relevant for the decision of the controversy involved as narrated in the appeal may be noticed. The assessee is an individual. He was running two proprietorship concerns at the relevant time namely M/s Jindal Enterprises and M/s Indosun Global. For the assessment year 2007-08, he filed his return on 31.10.2007 declaring total Income at nil. After hearing the assessee, the Assessing Officer passed assessment order under Section 143(3) of the Act on 31.12.2009. He determined the taxable Income of the assessee at ₹ 52,64,659/-. The following additions/disallowances were made by the Assessing Officer:-

i) Addition on account of advance against order	₹45,03,927/-
ii) Disallowance under section 40(a)(ia)	₹ 5,00,000/-
iii) Addition on account of purchases	₹ 32,657/-

iv) Addition on account of sampling expenses ₹ 48,075/-

v) Disallowance on account of conveyance repair and maintenance and staff welfare expenses ₹ 90,000/-

viii) Disallowance on account of depreciation on car, insurance, repair and maintenance and telephone expenses. ₹ 90,000/-

On appeal by the assessee, the CIT(A) vide order dated 17.2.2011, Annexure A.II deleted the additions mentioned at Sr.No.1 but confirmed the additions at Sr.Nos.2 to 6. Before the Tribunal, the revenue challenged the deletion of addition of ₹ 45,03,927/- at Sr.No.1 whereas the assessee challenged confirmation of additions by the CIT(A) at Sr.Nos. 2 to 6. The Tribunal vide order dated 18.5.2012, Annexure A.III dismissed the appeal filed by the revenue and partly allowed the appeal filed by the assessee. Hence the instant appeal by the revenue.

4. We have heard learned counsel for the appellant.

5. The following two additions made by the Assessing Officer which were deleted by CIT(A) or the Tribunal arise for consideration in this appeal:-

(a) Addition on account of advance against order: ₹ 45,03,927/-

(b) Disallowance under Section 40(a)(ia) : ₹ 5,00,000/-

6. The CIT(A) while deleting the addition of ₹ 45,03,927/- had noticed in its order dated 17.2.2011, Annexure A.II that the assessee was in the business of manufacturing and production of home furnishing items for the domestic market and was also carrying the job work for the exporters since 1997. M/s Indosun Global was established by him during

previous year 2005-06 for carrying out the export business of home furnishing items and had obtained EC Code number for the said purpose. The assessee had become member of 'Export Promotion Council for Handicrafts'. The assessee had paid the amount of ₹ 45,03,927/- towards Attorney fees, Bid security amount, EU taxation and Locked Fund Insurance. The aforesaid amount was transferred on various dates from the account of the assessee through wireless transfer. It was recorded that the transaction was bonafide and the Assessing Officer was not right in holding it otherwise. The relevant findings are as under:-

> "4.10. It has also been stated by the Assessing Officer while making the disallowance that no tax at source has been deducted on these remittances. Therefore, the amount is disallowable as per section 40(a) of the IT Act. The appellant has submitted that TDS was not deductible from these remittances as the amount in question was towards the attorney fees, taxation etc. which is not taxable as per the provisions of the Act. It has been stated that the security amount was refundable as per the contract and thus no income had arisen to the beneficiary. Similarly, in the case of locked fund insurance the funds were transferred for insurance policy and thus there was no income to the beneficiary. In case of EU taxation, the funds were transferred to EU taxation and again there was no income to the beneficiary so as to require deduction of tax at source. As regards, the attorney fee, it has been stated that the same is covered under double taxation agreement with Spain notification NO.GSR 356(E) dated 21.4.1995. The article 7 of the agreement reads as under:-
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> > "The profits of an enterprise of a contracting State shall be taxable only in that State unless the enterprise carried on business in other contracting State through

a permanent establishment situated therein."

4.11 As per the appellant, no TOS was required as the beneficiary does not have permanent establishment in India. Therefore, in view of the above submission of the appellant, the contention of the Assessing Officer that tax should have been deducted at source is also held to be not supported by facts.

4.12 Thus, the various reasons given by the Assessing Officer to disallow the loss incurred by the appellant due to the sham order do not have any merit. The issue is whether there was any such transaction in which the appellant suffered the loss which has been claimed in the return of the income. The appellant has brought on record sufficient evidence to suggest that such like transaction did take place. It needs to be noted that the amounts in question have been remitted through the banking channels. The appellant has also lodged a complaint with the police, filed a case with the Hon'ble Punjab and Haryana High Court and has been following up the issue with the embassy of Spain. The various e-mails exchanged between the appellant and the United National Children Fund, the alleged prospective buyer indicate that such transaction took place. The appellant has also placed on record the newspaper cutting supporting his case that he was the victim of the fraud. After appraising the varied documentary evidence, it is held that the appellant was victim of fraudulent transaction. Having held so now the question is whether the loss arising due to the fraud as mentioned above is a business loss allowable as per the Income Tax Act. It has been contended that the loss has taken place during the course of business and should be allowed as such.

4.13. On careful consideration of the appellant's submission, it is held that the loss has been caused to the appellant due to the fraud which he fell victim to in the course of his business. The Hon'ble P&H High Court in the case of CIT vs. Pukhrajwati Bubber 296 ITR 290 on which the appellant has also relied, while allowing the loss caused due to embezzlement observed as under:-

> 'The liability to tax is on profits or gains of business computed in accordance with sections 30 to 43 of the Income tax Act, 1961 (for short, "the Act"). Though there is no provision for allowing deduction of a trading loss on account of embezzlement, section 37 of the Act provides for any expenditure for the purpose of business and there has to be nexus between the business operation and the loss. If the loss was directly connected with the business operation and incidental to carrying on of the business, the same has to be allowed as a deduction.'

Therefore, keeping in view the facts of the case and also the ratio of Hon'ble Punjab and Haryana High Court decision in the case of CIT vs. Pukhraj Wati Bubber (supra) the loss so incurred is held to be an allowable business loss. The addition of ₹ 45,03,927/- made by the Assessing Officer is therefore deleted. This ground of appeal is allowed."

The Tribunal affirmed the said findings. In the absence of any illegality or perversity demonstrated by learned counsel for the revenue, no legal issue arises for consideration in this Court.

7. Next taking up the issue of ₹ 5,00,000/- disallowed under section 40(a)(ia) of the Act, the Tribunal had set aside the order of the Assessing Officer and the CIT(A). It was recorded that the security deposit was refundable and therefore, in view of circular, no tax at source was deductible. However, the landlord had later on adjusted the said amount towards rent and in such circumstances, the assessee could not have deducted tax at source

and the adjustment of security deposit against rent due was a revenue expenditure. The finding of the Tribunal is as follows:-

> "10. We have duly considered the rival contentions and gone through the record carefully. The relevant question in the circular referred by the learned counsel for the assessee reads as under:-
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> Question No.2 Whether tax is required to be deducted at source where a non refundable deposit has been made by the tenant?
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> Ans: In cases where the tenant makes a non refundable deposit, tax would have to be deducted at source as deposit represents the consideration for the use of the land or the building etc. and therefore partakes the nature of rent as defined in section 194-I. If, however, the deposit is refundable, no tax would be deductible at source. It is further clarified that if the deposit carries interest, the tax to be deducted on the amount of interest will govern it.
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> 11. There is no dispute that the amount paid by the assessee was a refundable security. The only dispute raised by the Assessing Officer is that the assessee failed to deduct the TDS. Learned first Appellate authority confirmed the disallowance on the ground that it is capital expenditure. We are of the view that refund was adjusted towards rent in peculiar facts and circumstances When assessee made the payment of refundable security, as per circular, he was not supposed to deduct the tax at source. The security was paid in order to cover such type of unforeseen circumstances. The landlord has forfeited it and adjusted it towards the rent. Thus, it was a revenue expenditure in the hands of the assessee and it did not deserve to be disallowed. We allow this ground of appeal and delete the disallowance."

8. Again, learned counsel for the revenue was unable to

show that there was any error or perversity in the approach of the Tribunal warranting interference by this Court. Consequently, finding no merit in the appeal, the same is hereby dismissed.

(Ajay Kumar Mittal)
Judge

August 11, 2015 **(Ramendra Jain)**
Judge

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