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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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\+ **W.P.(C) 5509/2014**

COMMISSIONER OF INCOME TAX-I ..... Petitioner

Through: Mr. Rahul Chaudhary, Senior Standing counsel.

versus

M/S ARDEE BUSINESS CENTER PRIVATE LIMITED ..... Respondent

Through: Mr. Satyen Sethi and Mr. Arta Trana Panda, Advocate.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE VIBHU BAKHRU

O R D E R

% **30.03.2016**

1. The challenge in this writ petition by the Income Tax Department ('Department') is to an order dated 9th October 2013 passed by the Income Tax Appellate Tribunal ('ITAT') by which the Department's application being MA No. 415/Del/2009 in ITA No. 69/Del/2008 was dismissed.

2. The background facts are that the Respondent Assessee, which is engaged in sub-leasing of space and leasing of furniture and fixtures, filed its return declaring an income of Rs. 11,31,750. The return was picked up for scrutiny and an assessment order was passed on 23rd March 2001 by the Assessing Officer ('AO') assessing the net taxable income of the Assessee at Rs.1,53,02,991. Among the various additions made by the AO was one in the

sum of Rs. 1,24,59,874 under Section 2(22)(e) of the Income Tax Act, 1961 ('Act'). The AO proceeded on the basis that the Assessee held 33% shares in Gopal Das Estate & Housing (P) Ltd. ('GDEHPL') till 22nd September 1997 after which the shareholding was reduced to 3% as per the annual returns filed before the Registrar of Companies (RoC) on that date. The further premise was that the Assessee was controlling 8.18% shares of GDEHPL through M/s Ardee Finvest (P) Ltd in which the Assessee was holding 25.27% shares. Therefore it was concluded that the Assessee held 11.8% (3% + 8.18%) of the voting power in GDEHPL, and hence the pre-condition for attracting Section 2(22)(e) of the Act stood fulfilled. The stand of the Assessee, on the other hand, was that it held only 3% shares in GDEHPL as on 1st April 1997 which was reflected in the annual returns filed before the RoC and therefore Section 2(22)(e) did not apply.

3. The Commissioner of Income Tax (Appeals) [CIT(A)] by an order dated 25th October 2002 upheld the assessment order affirming the additions made by the AO. The Assessee then filed an application under Section 154 of the Act seeking rectification of the order. The CIT(A) by an order dated 20th January 2003, allowed the said application and rectified the order by holding that the Assessee held only 3% shares in GDEHPL as on 1st April 1997 and therefore Section 2(22)(e) had been wrongly applied.

4. Against the order dated 20th January 2003 of the CIT(A), the Revenue first filed ITA No. 1891/Del/2003 in Form No. 36. In this appeal only the following ground was urged:

> "1. On the facts and in the circumstances of the case, ld. CIT(A) has erred in deleting the addition of Rs. 1,24,86,124/- made in terms of section 2(22)(e) ignoring the facts that the assessee company was

holding more than 10% of the share holding of M/s Gopal Dass Estate and Housing P. Ltd. "

5. The said appeal was dismissed by the ITAT by order dated 29th August 2008 upholding the order of the CIT(A). A perusal of the said order dated 29th August 2008 passed by the ITAT shows that there is a discussion as regards the share holding of the Assessee in GDEHPL. The ITAT appears to have rendered a factual finding that the Assessee was not holding requisite percentage of the shares of GDEHPL to attract Section 2(22)(e) of the Act.

6. It appears that even prior to dismissal of the above appeal of the Department by the ITAT on 29th August 2008, the Department had filed another appeal on 8th January 2008 against the same very order of the CIT dated 20th January 2003 with a delay of 4 years and 64 days.

7. Although it was repeatedly urged by learned counsel for the Revenue before this Court that the Department had only file "additional grounds of appeal" the fact remains that the Department filed another appeal in Form No. 36 and this was separately numbered as ITA No. 69/Del/2008. Although in the said appeal, three 'additional grounds' are purportedly raised, in fact there is only one effective ground, i.e. Ground No. 2, contending that the CIT (A) ought not to have exercised its powers under Section 154 of the Act to reverse its earlier decision. It appears that this appeal ITA No. 69/Del/2008 was itself not listed for hearing. However, the Department filed an application being MA 415/Del/2009 in the said appeal ITA 69/Del/2008 seeking recall of the order dated 29th August 2008 in ITA 1891/Del/2003.

8. It is in this application that the impugned order dated 9th October 2013 was passed by the ITAT noting that ITA 69/Del/2008 was barred by limitation

having been filed with a delay of 4 years and 64 days. The ITAT correctly noted that no order had been passed in the said appeal till then and therefore the question of recalling an order passed in that appeal did not arise.

9. There are several mistakes by the Department which cannot be condoned, especially by resorting to alternative remedy of filing writ petition to challenge the order of the ITAT. The fact remains that against the order of the ITAT dismissing its appeal on 29th August 2008, the Department did not file an appeal in this Court. Secondly, instead of filing an application to urge additional grounds in ITA No. 1891/Del/2003, while it was still pending, the Department filed a separate appeal against the very same order of the CIT (A) with a delay of 4 years and 64 days. Apart from being hopelessly barred by limitation, the said appeal was plainly not maintainable. The third mistake was to file an application for recall of the order dated 29th August 2008 not in the appeal in which that order was passed i.e. ITA No. 1891/Del/2003 but in the fresh appeal i.e. ITA No. 69/Del/2008 in which no order had been passed till then. The said application was, therefore, rightly dismissed by the ITAT.

10. In the circumstances, the Court sees no justification for entertaining the present writ petition filed by the Department. The writ petition is dismissed.

S.MURALIDHAR, J

VIBHU BAKHRU, J

MARCH 30, 2016
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