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

+ **ITA 751/2016 & CM Nos.40127-28/2016**

PR. COMMISSIONER OF INCOME TAX, DELHI Appellant
Through: Mr. Dileep Shivpuri, Mr. Sanjay
Kumar and Mr. Vikrant A.
Maheshwari, Advocates.

Versus

M/S RELIGARE ENTERPRISES LTD. Respondent
Through: None.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

ORDER

% **13.02.2017**

CM No.40127/2016 (for exemptions)

1. Allowed, subject to all just exceptions.
2. The application stands disposed off.

ITA 751/2016 & CM No.40128/2016

3. The question of law urged by the Revenue is “*whether the Income Tax Appellate Tribunal (ITAT) fall into error in holding that the amounts of loss reflected could not be adjusted with the income, in the circumstances of the case?*”

4. The facts of the case are that the assessee Trust is a pass through entity meant for pay outs to the employees as a part of their terms and conditions of service of its sister concern. In the course of its activities, it primarily manages amounts which the employees would be entitled to at the end of their tenure or in accordance with their conditions of service; these

include management of funds through investment in securities and other specified instruments. Therefore, the only income of the Trust is interest/dividend from such specified securities. It reported interests' income of ₹253/- and dividend income of ₹397,654/- for Assessment Year 2009-10. During that year, it sold some of its securities and incurred loss to the tune of ₹2.04 crores. A part of the amount that it realised led to loss which it claimed to be as 'capital loss'. This was treated by the Assessment Officer as income and also by the Commissioner of Income Tax (Appeals), both of whom made disallowance under Section 41(1) of the Income Tax Act, 1961 (hereinafter to be referred as 'the Act'). The capital loss was not permitted to be set off on the ground of applicability of Section 74 of the Act. The ITAT, accordingly, relied and reasoned as under:-

“6. On a careful consideration of the facts and circumstances of the case, on perusal of orders of lower authorities, material on record and case laws cited, we hold as follows.

7. In the audited financial statements the Trustees of the assessee have recognized liabilities written back, dividend and bank interest as income. Loss on sale of investments was claimed as expenditure. No doubt entries in the books of accounts do not determine the taxability or otherwise of a transaction, but at the same time the entries give a good indication as to the understanding of the management of the nature of the transactions.

7.1 The assessee claims that it is a pass through entity. This means that the parent company, has taken into account the income, expenditure and losses of the assessee Trust while computing its income. The assessee for the AY 2009-10 has

disclosed dividend income of Rs.397654/- as well as interest income of Rs.253/-. If the arguments of the assessee has to be accepted, then it has to be seen as to in which entity's hands this income has been offered to tax. From the facts on record this is not clear. If the loss on sale of investments has been booked in the hands of the Holding Company or any of the Subsidiary Companies, on the ground that they are the real owners, then the dividend income has to be taken in their account. This needs verification.

7.2 Be it as it may, when the loan taken by the assessee is written off, the same cannot be treated as income of the assessee u/s 41(1) as the loan was taken on capital account. The Hon'ble Delhi High Court in the case of Logitronics Pvt. Ltd. Vs. CIT reported in 333 ITR 386 has laid down the principle that if a loan was taken for acquiring a capital asset, waiver thereof would not amount to any income exigible to tax.

7.3 Similarly the Hon'ble Delhi High Court in the case of CIT vs. Tosha International Ltd. reported in 331 ITR 440 (Delhi) held as follows.

“4. We see no reason to interfere with the conclusion of the Tribunal as the same have been rendered on a correct appreciation of law. The principles enunciated in Mahindra and Mahindra Ltd. Vs. CIT (2003) 261 ITR 501 (Bom) are fully applicable and we see no reason to take a different view.

5. Consequently, no substantial question of law arises for our consideration. The appeal is dismissed.”

7.4 If the propositions laid down in these case laws are applied to the facts of the case, then the liabilities written off cannot be brought to tax. The assessee is not claiming any deduction on the loss on sale of investments. The issue now

boils down to dividend income and bank interest. As the facts are not clear, we are of the considered opinion that the issue of taxability of dividend and interest should be set aside to the file of the AO for fresh adjudication after verification.”

5. This Court has carefully considered the submissions. The ITAT, in our opinion, correctly followed the ratio in ***Logitronics (supra)***. Besides the true nature of amounts received or entries reflected, are to be determined by law not by the treatment reflected in the books or the understanding of the parties, as held by the Supreme Court in ***Kedarnath Jute Mfg. Co. Ltd. Vs. Commissioner of Income Tax [1971] 82 ITR 363***.

6. For the above reasons, the Court finds no substantial question of law. The appeal alongwith pending application is, therefore, dismissed.

S. RAVINDRA BHAT, J.

NAJMI WAZIRI, J.

FEBRUARY 13, 2017

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