

IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH.

Income-tax Appeal No.351 of 2013 (O&M)

Date of Decision: November 03, 2014

Commissioner of Income Tax-I, Ludhiana

...Appellant

Versus

Shri Paramjit Singh

...Respondent

**CORAM: HON'BLE MR. JUSTICE RAJIVE BHALLA
HON'BLE MR. JUSTICE AMIT RAWAL**

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.Rajesh Katoch, Advocate,
for the appellant.
None for the respondent

AMIT RAWAL, J.

The revenue has approached this Court by invoking the provisions of Section 260A of the Income Tax Act, 1961 (hereinafter called "the Act") by challenging order dated 21.5.2013 passed by the Income Tax Appellate Tribunal, Chandigarh Bench, Chandigarh (for short "ITAT") in I.T.A. No.105/CHANDI/2012 in respect of assessment year 2008-09. The revenue has, in the appeal, raised the following substantial questions of law:-

- "i) Whether on the facts and circumstances of the case, the Hon'ble Income Tax Appellate Tribunal was justified in law in upholding the order of the Ld.Commissioner of Income Tax(A) in which addition of Rs.52,46,062/- made by the A.O u/s 2(22)

(e) of the Act was deleted, ignoring the facts brought on record by the A.O that the assessee had 38.8% shareholding in M/s Frontier Cycles (P) Ltd.

ii) Whether on the facts and circumstances of the case, the Hon'ble ITAT erred in not appreciating the facts brought on record by A.O in para 4.2 of the order that the change in shareholding is an afterthought.

iii) Whether on the facts and circumstances of the case, the Hon'ble ITAT has erred in law in not considering the ratio of decision of Hon'ble Supreme Court in the case of Durga Parsad More 82 ITR 540 (SC) and the decision of Punjab & Haryana High Court in the case of Som Nath Maini 306 ITR 414 (P&H) relied upon by A.O in para 4.3 of order.”

As per the facts culled out from the appraisal of the paper book, Paramjit Singh on 20.8.2008 (hereinafter called “the assessee”) filed his return of income tax individually for assessment year 2008-09 by showing an income of ₹34,12,120/-. The income of the assessee was processed under Section 143(1) of the Act at an income of ₹34,12,120/-. Subsequently, the return of the assessee was selected for scrutiny and accordingly a notice dated 18.9.2009 under Section 143(2) of the Act was served upon the assessee on 18.9.2009 and thereafter notice dated 6.1.2010 along with questionnaire under Section 142(1) of the Act was served upon the assessee on 9.1.2010. The Assessing Officer on 22.7.2010 commenced assessment proceedings and during the proceedings, again served a notice under Section 142(1) upon the assessee on 14.5.2010.

In response to the notice dated 14.5.2010, the assessee appeared through his representative. The point raised in the aforesaid notice by the Assessing Officer was that on perusal of the copy of the account of the assessee in the books of M/s Frontier Cycles Pvt. Ltd. of which assessee is also a Director showed, that during the relevant assessment year, the assessee had received loans from the said Company. The assessee was called upon to furnish the share holding pattern. On examination of the annual returns of the Company, the Assessing Officer found that the assessee was holding 3200 shares out of 36000, i.e., a share holding of 8.8%. It would not be out of place to mention here that the annual returns produced before the Assessing Officer were revised ones.

In order to ascertain the veracity/genuineness of the revised returns, the Assessing Officer downloaded the annual returns from the website of Registrar of Companies and found that the assessee had owed 14000 shares out of 36000 which amounted to a share holding of 38.8%. The Assessing Officer on browsing through the website of the Registrar of Companies found that the Company had allegedly filed a revised return on 22.2.2010, whereby the share holding pattern of the assessee was changed from 38.8% to 8.8% and the shares were transferred to none else but to his wife and son. Accordingly, the Assessing Officer opined that it was a loan received by the assessee from the Company and, therefore, it was termed to be deemed income as envisaged under Section 2(22)(e) of the Act.

During the course of the assessment proceedings, the assessee vide letter dated 3.9.2010 sought directions to be issued to the Assistant Commissioner of Income Tax, Circle-I, Ludhiana under Section 144A of the

Act and on the basis of the said application, the Assessing Officer was also asked to furnish report on the contention in the application. However, for the sake of brevity, the contentions raised in the application under Section 144A of the Act are reproduced herein below:-

“1. That the assessee has gifted the shares to his wife & son on 03.03.2007 as per share transfer deeds lodged with the company. The said share transfer deeds were duly stamped by the Registrar of Companies on 29.01.2007. After lodging of share transfer deeds, the company held the board meeting on 10.03.2007 & approved the share transfer. Copies of the share transfer register, members register, share transfer deeds and share certificates showing endorsement on 10.03.2007 in favour of the transfers have been filed with the ACIT on 03.09.2010 vide our Letter dated 02.09.2010.

2. The company's person who was handling the company law matters regarding filing of balance sheet and annual returns with the ROC, has forgotten to take effect of share transfer in the annual returns filed for the year 31.02.2007, 31.03.2008 & 31.03.2009. When the mistake was found, these annual returns were revised and filed with the ROC on 10.02.2010 and the copies of said annual revised returns as permitted by the company law & accepted by the ROC have been filed with the ACIT.

We are to further state that the shareholder had a credit balance in the beginning of year & at the end of year. The said credit

balance has been treated by the company as an unsecured loan in the previous years. We have already filed copy of the interest account of this loan and after calculating the interest, the interest payable is more than the interest receivable on the debit balance during the year. Copy of interest account is again enclosed herewith for your honour's ready reference.

In view of the facts stated above, it is clear that S.Paramjit Singh had a shareholding of 8.89% as on 31.03.2008 less than 10% which is required for invoking the provisions of Section 2 (22)(e) of the I.T.Act, 1961 against the assessee. This addition, if made, shall be against the provisions of law and will create un-necessary litigation and harassment to the assessee. Therefore, your honour is requested to kindly direct the ACIT not to treat the advance to the shareholder as deemed dividend as per provisions of section 2(22)(e). We have also relied upon the direct judgment of Hon'ble Kerala High Court in the case of CIT vs. Smt.S.Parvathavarthini Ammal 131 CTR 433 and the Hon'ble ITAT Delhi Bench judgment in the case of Victor Aluminium Industries Pvt.Ltd. Vs. ACIT 9 SOT 197, copies of both the judgments have already been filed with the ACIT & are also enclosed herewith for your honour's ready reference.”

The Assessing Officer submitted report dated 21.10.2010 on the said application of the assessee. After pondering such report, it was allegedly found that the returns furnished by the assessee during the assessment proceedings were actually revised returns and the returns were

filed after 18.9.2009 when the notice under Section 143(2) of the Act was served upon the assessee and the assessee did not disclose before the Assessing Officer that the annual returns filed by the Company were revised ones and, therefore, as per the report it was *prima-facie* opined that the returns were revised in February, 2010 and not on 30.3.2010 as alleged by the assessee.

The Assessing Officer also sought a reply from the Ludhiana Stock Exchange on 28.9.2010 with regard to the authenticity/genuineness of the share transfer forms, which were purportedly found to have been issued on 28.1.2007. On the basis of the reply of the Ludhiana Stock Exchange, the Assessing Officer formed an opinion that there was no proof of sale of form on 29.1.2007, but yet while noticing the reply of the Ludhiana Stock Exchange that some forms lying with it could have been sold at later date formed an opinion that in case of a private limited company, the possible verification available with the Assessing Officer was the return filed by the Company with the Registrar of Companies and according to it, the return was revised for all four years only in February, 2010.

It is pertinent to mention here that the assessee was not confronted with the letter of the Ludhiana Stock Exchange, much less, was the assessee given an opportunity of personal hearing as to what was held by the Commissioner of Income Tax (Appeals) after receipt of report on the application filed under Section 144A of the Act. It is borne out that the Additional Commissioner of Income Tax (Appeals) did not provide an opportunity of being heard to the assessee as per the provisions of Section 144A of the Act. For the sake of brevity, the provisions of Section 144A of

the Act are reproduced herein below:-

“144A A Joint Commissioner may, on his own motion or on a reference being made to him by the [Assessing] Officer or on the application of an assessee, call for and examine the record of any proceeding in which an assessment is pending and, if he considers that, having regard to the nature of the case or the amount involved or for any other reason, it is necessary or expedient so to do, he may issue such directions as he thinks fit for the guidance of the [Assessing] Officer to enable him to complete the assessment and such directions shall be binding on the [Assessing] Officer:

Provided that no directions which are prejudicial to the assessee shall be issued before an opportunity is given to the assessee to be heard.

Explanation.-For the purposes of this [section] no direction as to the lines on which an investigation connected with the assessment should be made, shall be deemed to be a direction prejudicial to the assessee.”

Similarly, the assessee was also not given an opportunity to controvert the information received from the Ludhiana Stock Exchange. The Assistant Commissioner of Income Tax, Circle-I, thus, did not accept the explanation submitted by the assessee and found that amount of ₹52,46,063/- received by the assessee from the Company M/s frontier Cycles Pvt.Ltd. was a deemed dividend as per Section 2(22)(e) of the Act and, thus, treated the same as taxable income in the hands of the assessee.

Besides treating the income as deemed dividend, the Assistant Commissioner of Income Tax, Circle-I, Ludhiana also ordered for initiation of the penalty proceedings as enshrined under Section 271(1)(c) of the Act on account of concealment and furnishing of incorrect particulars of income.

The order dated 1.11.2010 of the Assistant Commissioner of Income Tax, Circle-I, Ludhiana was challenged by the assessee by filing an appeal bearing No.248/IT/CIT(A)-I/LDH/2010-11, *inter-alia*, on the grounds, which, in brief, are summarized herein below:-

- a) Section 162 of the Companies Act envisages filing of the revised annual returns;
- b) The Additional CIT, Range-I to whom the application for issuance of directions under Section 144A of the Act was submitted and after appearance, the Additional Commissioner of Income Tax though called for the report of the Assessing Officer vide letter dated 22.10.2010 and the directions under Section 144A were issued against the assessee on 29.10.2010 and in that process the assessee was not given any opportunity to give reply to the report of the Assessing Officer, whereas as per the proviso to Section 144A of the Act, no directions can be issued which are prejudicial to the interest of the assessee;
- c) The assessee was not given opportunity of hearing for not confronting with the material confirmed from Ludhiana Stock Exchange;

d) The order of the Assessing Officer is based on the assumptions and suspicion and did not consider the share holding of the assessee as 8.89% after the transfer of shares in March, 2007 and, thus, made the addition of loan received as deemed dividend under Section 2(22)(e) of the Act.

The Commissioner of Income Tax (Appeals)-I, Ludhiana, on the basis of the submissions made on behalf of the authorised representative of the assessee and as well as on behalf of the revenue, again sought a report from the Assessing Officer on the following issues:-

- i) The AO has relied upon enquiries conducted from the Ludhiana Stock Exchange but the information so obtained as detailed in the assessment order had not been confronted to the assessee.
- ii) The assessee had filed an application u/s 144A of the I.T.Act seeking directions to the AO and the Addl.CIT after obtaining the report of the AO on the issue did not give any opportunity of being heard especially when the directions given to the AO were prejudicial to the interests on the assessee. The AR referred to the proviso to Section 144A in this regard.”

On the basis of the said directions, the Assessing Officer gave the following report:-

“i) During the course of assessment proceedings, the assessee vide letter dated 03/09/2010, applied before Addl.CIT, Range-I, Ludhiana that directions u/s 144A be issued to the ACIT, Circle-I, Ludhiana regarding assessment in his case.

ii) While giving directions u/s 144A, vide letter No.1340 dated 29.10.2010, Addl.CIT, Range-I, Ludhiana has stated (para 1.2) that the assessee was given an opportunity to present his case and that Sh.L.C.Gupta, counsel for the assessee appeared on 28.09.2010 and reiterated that the stand and views as stated in his application dated 03.09.2010 be considered. The AO was asked to furnish a report on the contentions of the assessee which was furnished by the AO vide letter dated 21.01.2010.

iii) Para 4.1 of letter No.1340 dated 29.10.2010, vide which directions u/s 144A had been given, reads as under:-

“The contentions of the assessee and the report of the AO have been carefully considered. After perusal of these and discussion with the Ld.Counsel for the assessee Sh.L.C.Gupta, FCA, it is observed that the assessee has mainly relied upon the following factors...”

iv) Thus, as per para 4.1, after perusal and

consideration of the contention of the assessee as well as report of AO and after discussion with the Ld.Counsel of the assessee, Addl.CIT could the contentions of the assessee unacceptable and directed the AO to treat the sum of advance/loan given by the company to the assessee as deemed dividend u/s 2(22)(e) of the I.T.Act, 1961.

v) In view of the directions given by the Addl.CIT, Range-I, Ludhiana, the AO examined the case and held that the amount of ₹52,46,062/- received by the assessee from M/s Frontier Cycle Pvt.Ltd. falls within the purview of dividend u/s 2(22)(e) and hence added back to the total income of the assessee.”

On the basis of the above-mentioned report, the Commissioner of Income Tax (Appeals) came to a categorical conclusion that Additional Commissioner of Income Tax did not provide mandatory opportunity of being heard before issuing directions to the Assessing Officer, which were prejudicial to the interest of the assessee under Section 144A of the Act, which was apparent from the report of the Assessing Officer. The Commissioner of Income Tax (Appeals) further found that the Additional CIT while relying upon the report of the Assessing Officer while conducting the enquiry and while ascertaining the fact of issuance of the share transfer forms from the Ludhiana Stock Exchange did not provide any opportunity of being heard to the assessee to rebut or lead evidence in support of the defence and the said enquiry was conducted at the back of the assessee.

It is pertinent to mention here that during the course of the appellate proceedings, the Commissioner of Income Tax (Appeals) directed the Assessing Officer to make enquiry from the Ludhiana Stock Exchange on the claim of the appellant vis-a-vis the view of the Assessing Officer as to whether the impugned share transfer forms were sold in January, 2007 or February, 2010.

The Assessing Officer submitted his report after recording the statement of one Mrs.Pooja Kohli, Executive Director of Ludhiana Stock Exchange, who had been working for the Exchange since 1.3.2005. As per her statement, the forms in questions, which bore Sr.Nos.64001 to 68000 and another bundle of share transfer deed forms bearing Sr.No.68001 to 72000 were sent to the Registrar of Companies vide letters dated 29.1.2007 and 6.2.2007 respectively.

On the basis of the enquiry conducted by the Assessing Officer, the Commissioner of Income Tax (Appeals) found that the share transfer forms had been purchased and stamped in March, 2007. The Commissioner of Income Tax (Appeals) also found that the annual return filed with the Assessing Officer did not reflect the changed share holding pattern and the mistake was corrected by filing revised return in February, 2010, which is permissible as per Section 162 of the Companies Act and, therefore, the addition made by the Assessing Officer treating the assessee as the substantial share holder having a share holding of 38.8% was deleted.

In the instant case, the share transfer forms for which the share holding pattern had been changed bore Sr.No.65672 and 65673.

The revenue on principles of law assailed the order of the

Commissioner of Income Tax (Appeals) before the Income Tax Appellate Tribunal, Chandigarh Bench, Chandigarh by filing ITA No.105/CHANDI/2012. The ITAT dismissed the appeal while rejecting the findings of the Commissioner of Income Tax (Appeals) on the appreciation of the facts and law.

Counsel appearing for the revenue submitted that the ITAT has committed a perversity and an illegality in dismissing the appeal as the Assessing Officer had rightly made an addition of ₹52,46,062/- by considering the same to be a deemed income as per provisions of Section 2 (22)(e) of the Act, as there was no business exigencies involved in the transaction made by the Company M/s Frontier Cycles Pvt.Ltd. to the assessee and, thus, sought interference of this Court by raising the questions of law (supra).

We have heard the learned counsel for the appellant and appraised the orders of the Assessing Officer, Commissioner of Income Tax (Appeals) and as well as the ITAT and do not find any substance in the submissions made by the counsel appearing for the revenue. The orders of the Commissioner of Income Tax (Appeals) and the ITAT are based on finding of the facts and as well as on appreciation of the material brought on record during the proceedings pending before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) while examining the material and substance brought on record, particularly the statement of the Executive Director of Ludhiana Stock Exchange, who in unambiguous terms stated that the forms bearing Sr.No.64001 to 68000 and 68001 to 72000 were sent to the Registrar of Companies on 29.1.2007 and

6.2.2010 respectively. Admittedly, the share transfer forms bearing No.65672 and 65673 were issued in the lot dated 29.1.2007 and, therefore, the erroneous and perverse opinion formed by the Assessing Officer, to the effect that the said share transfer forms were submitted in February, 2010, does not have any basis much less any substance once the provisions of the Companies Act permit the Company to file a revised annual report, Income Tax authorities cannot sit over the statutory provisions which permit the Company to file a revised annual report and form a different opinion that too on the basis of suspicion.

The Commissioner of Income Tax (Appeals) and as well as ITAT found that the Assessing Officer did not comply with the statutory provisions of law, inasmuch, as that the assessee was not given sufficient opportunity to rebut the report of the Assessing Officer. Not only this, even the assessee was not confronted with letter obtained from the office of Ludhiana Stock Exchange in order to enable him to rebut or lead evidence in support of his stand, particularly when it has come on record that the forms were issued during the relevant period when the annual returns were filed on 3.3.2007, on a duly stamped form, submitted by the Registrar of Companies on 29.1.2007. The effect of the same was also duly recorded in the board meeting of the Company held on 10.3.2007. There was no occasion for the Assessing Officer to disbelieve the explanation submitted by the assessee before the Assessing Officer. The clarification sought from the office of the Ludhiana Stock Exchange during the appellate proceedings leaves no manner of doubt that the entire transaction by the Company was done in accordance with the provisions of the Companies Act and there was

no deviation from the Act, which could have led the Income Tax authorities to form an opinion different from the decision of the Registrar of Companies. The judgments cited in the proposed questions of law does not support the case of the revenue as admittedly in the instant case the assessee was not given opportunity to confront with the material relied upon by the Assessing Officer during the assessment proceedings and rightly, the Commissioner of Income Tax (Appeals) and as well as the ITAT found that a sum of ₹52,46,062/- could not be treated as loan given by the Company to the assessee being deemed income as per provisions of Section 2(22)(e) of the Act. The Commissioner of Income Tax (Appeals) in its order also extracted the statement Mrs.Pooja Kohli, Executive Director of the Ludhiana Stock Exchange. From the perusal of the statement of Mrs.Pooja Kohli, it leaves no manner of doubt that the share transfer forms were purchased and submitted on 29.1.2007 and the share holding pattern was effected on 3.3.2007, which was duly approved by the Company on 10.3.2007 in the meeting of the Board of the Directors.

The discretion exercised by the Commissioner of Income Tax (Appeals) and the Tribunal is neither arbitrary nor perverse and does not suffer from any error of jurisdiction or of law. We find no reason to differ with the findings recorded by the Tribunal. The questions of law are answered accordingly against the revenue and the appeal is dismissed.

(RAJIVE BHALLA)**JUDGE****(AMIT RAWAL)****JUDGE****November 03, 2014****ramesh**