Court No. - 33 **Reserved**

Case :- INCOME TAX APPEAL No. - 16 of 2004
(A.Y. 1998-99)

Appellant :- Sh.Raj Kumar Bhardwaj
Respondent :- Commissioner Income Tax
Counsel for Appellant :- Rakesh Ranjan Agarwal,Suyash Agarwal
Counsel for Respondent :- A.N.Mahajan(S.C. Inc.Tax),A.Kumar,B.J.Agarwal,C.S.C.,D. Awasthi,G. Krishna,R.K. Upadhyay,S.Chopra

AND

Case :- INCOME TAX APPEAL No. 729 of 2007.
(A.Y.-1998-99)

Appellant :- Commissioner Of Income Tax, Meerut
Respondent :- Raj Kumar Bharadwaj, Prop. M/S Raj Jewellers
Counsel for Appellant :- R.K. Upadhyaya, S.C.
Counsel for Respondent :- R.R.Agrawal,Suyash Agrawal

Hon'ble Tarun Agarwala,J.
Hon'ble Dr. Satish Chandra,J.

(Delivered by Dr. Satish Chandra,J.)

Cross appeals have been filed against the orders dated 10.10.2003 & 16.03.2007 passed by the Income Tax Appellate Tribunal, New Delhi in I.T.A. No.17 & 3639/Del/2003 for the assessment year 1998-99 by the assessee as well as by the department.

On 13.04.2007, a Co-ordinate Bench has admitted the Appeal No. 16 of 2004 on the following substantial questions of law:-

> *"(I) Whether Ld. CIT, Meerut in the facts & circumstances of the case had jurisdiction to invoke the provision of Section-262 of I.T. Act particularly when order passed by the I.T.O. was neither erroneous, nor prejudicial interest or revenue. Therefore, Income Tax Appellate Tribunal is in error to conclude that CIT rightly acted U/S 263 and brought to tax the sum of which had been*

claimed as a loss by the assessee.

(II) *Whether in facts & circumstances of the case. Hon'ble Income Tax Appellate Tribunal in holding that C.B.D.T. Circular No. 560 dated 18.05.1990 clarifying that*

'For the purpose of Section 54F, the date of transfer in such case is the date on which, capital assets is converted by the assessee into stock in trade and not the date on which, such stock in trade is sold or transfer by the assessee' .

has for limited purposes only.

Whether the pitch and substance and the ratio decided of Circular No. 560 dated 18.05.1990 could be held as not applicable to the provision of Section-45(2) which happen to be sister provision of the same Chapter IV, Section E, that of Capital gain."

The brief facts of the case are that during the assessment year under consideration, the assessee was engaged in the business of manufacturing and sale of jewellery items. On 03.01.2001, the A.O. has passed an assessment order under Section-143(3). But on 21.11.2002, the C.I.T. has passed an order under Section-263 of the Act and enhanced the income of the assessee while making the addition of Rs. 2,73,879/-. Being aggrieved, the assessee has filed an appeal before the Tribunal which was dismissed by impugned order. Still not being satisfied, the assessed has filed the present appeal.

With this background, heard Sri Suyash Agarwal, learned counsel for the appellant-assessee. He submits that, the assessee has shown in the return that jewellery of 2626.95 gms. for a consideration of Rs. 8,61,640/- was sold. But the C.I.T. found the value too low so he has taken the value as per cost index and made the said addition.

The learned counsel submits that in fact, no jewellery was sold but it was converted into **"stock in trade"** as per the rate prevailing in the market. The assessee has shown the loss which was accepted by the A.O., but not by the C.I.T. The learned counsel also submits that the issue whether the capital gain is leviable either on transfer of capital goods or its conversion into "**stock in trade**"is debatable. When two views are possible then there is no question that the order was erroneous.

Lastly, he submits that the order passed by the A.O. was neither erroneous nor it is prejudicial to the interest or revenue, so there was no occasion to pass the order by C.I.T. under Section-263 of the Act.

On the other hand, Sri R.K. Upadhayay, learned counsel for the department has justified the impugned order. He submits that assessee has shown the loss on the sale of the jewellery. The assessee did not indicate that the loss claimed by him was pertaining to the conversion of the asset into **stock in trade** and the assessee has used the specific words as "sale value of jewellery". In other words, it appears that it was a case where the assessee sought to misguide the A.O. and the said officer did not care to make any enquiry during the assessment proceedings whether it was actually a sale of jewellery or the conversion into **stock in trade**.

We have heard both the parties at length and gone through the materials available on record. From the records, it appears that C.I.T. has valued the jewellery as per cost index, but the fact remains that jewellery always contains some impurity. In other words, no jewellery can be made from pure gold. This aspect was not examined by the C.I.T. before enhancing the addition. Had he given the benefit of impurity, perhaps there was no occasion to enhance the addition. Further, in the instant case, the jewellery was converted into **stock in trade** by the assessee. It was not an actual sale. Moreover, when there are two interpretation pertaining to the charging of the capital gains as mentioned above, then the order passed by Assessing Officer is not erroneous. It is case of "change of opinion" which is not permissible as per the ratio laid down in following cases:-

(I) Tech Span India Ltd Vs. I.T.O. 283 ITR 212 (Delhi);

(II) C.I.T. Vs. Kelvinator of India 256 ITR 1 (Delhi).

(III) Commissioner of Income-tax Vs. Max India Ltd. [2007]295 ITR 0282;

(IV) Malabar Industrial Co. Ltd. Vs. Commissioner of Income-tax [2000] 243 ITR 0083;

(V) Commissioner of Income-tax Vs. Mahendra Kumar Bansal; and

(VI) Idea Cellular Ltd. Vs. Deputy Commissioner of Income-tax.

In view of the above, we are of the opinion that the order passed by the A.O. is neither erroneous nor prejudicial to the interest of the revenue. Hence, we set-aside the impugned order passed by the Tribunal. In other words, the order of the A.O. is hereby restored as the same was neither erroneous nor prejudicial to the interest of revenue.

Answer of the substantial questions of law is in favour of the assessee and against the department.

Appeal No. 729 of 2007 is pertaining the cancellation of the penalty levied under Section-271(1)(c) of the Act. Regarding the penalty, it is evident that the Tribunal has cancelled the levy of the penalty for the reasons mentioned in its order. When we have deleted the addition in quantum appeal (supra), then there is no justification to levy any penalty under Section-271(1)(c). Hence, we find no reason to interfere with the impugned order passed by the Tribunal. The same is hereby uphold. The appeal filed by the department is dismissed.

In the result, the Appeal No. 16 of 2004 filed by the assessee is allowed and the Appeal No. 729 of 2007 filed by the department is dismissed.

Order Date :- 17.09.2014
pp/-

(Dr. Satish Chandra,J.) (Tarun Agarwala,J.)