

Court No. - 32

Case :- INCOME TAX APPEAL DEFECTIVE No. - 158 of 2001

Petitioner :- Commissioner Of Income Tax

Respondent :- M/S Misra Preservers (Pvt.)Ltd.

Petitioner Counsel :- S.C.,A. Kumar,B.J. Agrawal,D. Awasthi,G. Krishna,R.K. Upadhyay,Sambhu Chopra

Respondent Counsel :- A. Bansal,S. Pathak,S.K.Garg

Hon'ble Sunil Ambwani,J.

Hon'ble Aditya Nath Mittal,J.

1. We have heard Sri Shambhu Chopra for the appellant. Sri S.K. Garg appears for the respondent-assessee.

2. This Income Tax Appeal under Section 260-A of the Income Tax Act 1961, filed by the department, is directed against the order dated 31.05.2001, passed by the Income Tax Appellate Tribunal, Agra Bench, Agra in ITA No. 7152/Del/1992 for the Assessment Year 1988-89.

3. The assessee Company is engaged in the business of running a cold storage. For the Assessment Year, the Assessing Officer made an assessment under Section 143 (3) of the Act on 16.03.1992, on a total income of Rs.25,59,137/-. The Assessing Officer made additions on account of unexplained share capital, unexplained share application money, unexplained sundry creditors, difference in the cost of construction being unexplained investment, FDRs purchased by the company, loading and unloading and salary expenses.

4. The Commissioner of Income Tax (Appeals) allowed the appeal on 31.07.1992, deleting the addition of Rs.15,07,920/- made against unexplained share capital, Rs.3,13,500/- out of addition made against unexplained share application money of Rs.4,68,100/-, and Rs.46,500/- out of addition made against difference in the cost of construction of Rs.2,47,994/-, and confirmed the other additions made by the Assessing Officer. The Commissioner of Income Tax (Appeals) revised its earlier order dated 31.07.1992, and allowed further relief of Rs.54,800/- and Rs.20,848/- out of total addition of Rs.3,05,493/- made on account of unexplained

sundry creditors for goods and expenses.

5. The Department filed an appeal before the Tribunal against the order of the CIT (Appeals) dated 31.07.1992. The assessee also filed an appeal against the order of the CIT (Appeals) by which it upheld the addition of Rs.5,00,000/- made by the Assessing Officer in respect of FDRs purchased by the assessee.

6. The Tribunal decided all the three appeals on 31.05.201, by partly allowing the appeals of the Department as well as assessee.

7. This appeal under Section 260-A of the Act was admitted for hearing on the following substantial questions of law:-

"1. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was correct in law in deleting the additions made by the Assessing Officer regarding unexplained share capital and unexplained share application money relying on the decision of the Supreme Court in the case of Stellar Investment whereas the assessee company being a Pvt. Ltd. Company and the shares allotted on private placement basis and also assessee failed completely to produce these share holders and the summons issued by the Assessing officer at the given addresses are received back unserved?

2. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was correct in law in allowing the assessee's appeal in respect of charging of interest under Section 215/217 of the Income Tax Act, 1961, even when a direction to this effect had been given by the Assessing Officer in the assessment order?"

8. We have gone through the orders passed by the Assessing Officer, CIT (Appeals) and the Tribunal and find that the assessee had produced, relevant evidence before the CIT (Appeals) establishing that all the persons, who had deposited the share application, were not fictitious persons. Most of them were identifiable; they made the payment by cheques and most of them were assessed to Income Tax. The Tribunal has given further relief to the assessee and has not accepted the argument of the department that the explanation furnished by the assessee for the addition under Section 69 on account of unexplained investment was not to the satisfaction of the Assessing Officer.

9. We do not propose to go into each and every investment made by the

persons, as the CIT (Appeals) in its original order and the revised order as well as the Tribunal has considered these facts in detail and have recorded findings of fact that these persons are not fictitious.

10. The Supreme Court by order dated 11.01.2008, dismissed the Special Leave to Appeal No. 11993 of 2007, arising out of the judgment of the Court in **CIT Vs. Lovely Exports** [216 ITR 195], with following observations:-

"Delay condoned.

2. Can the amount of share money be regarded as undisclosed income under S. 68 of IT Act, 1961? We find no merit in this Special Leave Petition for the simple reason that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in accordance with law. Hence, we find no infirmity with the impugned judgment.

3. Subject to the above, Special Leave Petition is dismissed."

11. In **Stellar Investment [174 CTR SC]** the Supreme Court held that no addition in share application can be made in the accounts of the Company. In such case, the department can assess the individuals, who have contributed the share.

12. This Court in **CIT Vs. Jay Dee Securities & Finance** (Income Tax Appeal No. 328 of 2010 decided on 11.08.2011), followed the judgment in CIT Vs. Lovely Exports (Supra).

13. In view of above, the question No.1 is decided against the revenue, and in favour of the assessee.

14. So far as question No.2 is concerned, the ITAT found, relying upon **CIT Vs. Ranchi Club Ltd** [(2001) 247 ITR 209], that the Assessing officer did not make any specific order charging interest under any specific provision. He just mentioned at the end of the order:- "charge interest as per Rules"

15. In **CIT Vs. M/s. Deep Awadh Hotel** [Income Tax Appeal No. 81 of 2002 decided on 3.8.2011, this Court held as follows:-

"In CIT Vs. Ranchi Club Ltd., (2001) 247 ITR 209 decided by the three judges of the Supreme Court, the SLP was dismissed on merits. The facts stated in

the note published in ITR demonstrate that the High Court had held that the order of the assessing authority in the assessment order to charge interest is to be specific and clear and the assessee must be made to know that the assessing officer after applying its mind has ordered charging of interest. We do not find that the judgment in Ranchi Club Ltd. has either been expressly overruled or any different view has been taken in Anjum M.H. Ghaswala's case. We also do not find force in the argument advanced by Shri Mahajan that even if assessment order or computation sheets do not provide for interest, since interest is mandatory, it can be charged in the demand notice, which according to Shri Mahajan is signed by the Assessing Officer.

Even if any provision of law is mandatory and provides for charging of tax or interest, the view taken in Ranchi Club Ltd. is that such charge by the assessing officer should be specific and clear and assessee must be made to know that the assessing officer has applied its mind and has ordered charging of interest. The mandatory nature of charging of interest and the actual charging of interest by application of mind and the mention of the proviso of law under which such interest is charged are two different things."

16. The question No.2, is thus decided against the revenue and in favour of the assessee.

17. The Income Tax Appeal is **dismissed**.

Order Date :- 26.7.2012

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