Court No. - 35
Case :- INCOME TAX APPEAL No. - 310 of 2010
Appellant :- M/S Shiva Auto Mobiles (Auto Division)
Respondent :- Commissioner Of Income Tax,Aligarh And Another
Counsel for Appellant :- Shakeel Ahmad
Counsel for Respondent :- C.S.C./Income Tax,Gaurav Mahajan

Hon'ble Bharati Sapru,J.
Hon'ble Neeraj Tiwari,J.

This appeal under Section 260A of the Income Tax Act, (hereinafter referred to as the 'Act') has been filed by the assessee for the assessment year 2001-02 against the order of the Tribunal dated 13.04.2010 passed by the third member of the Tribunal as well as against the order of the Tribunal dated 11.12.2008 and 21.01.2010 passed by the Accountant Members of the Tribunal. The appeal has been admitted on the following questions of law:-

i. Whether upon the facts and circumstances of the case, the Hon'ble Tribunal was justified that the order of the Commissioner of Income Tax, Aligarh was erroneous and prejudicial to the interest of revenue partly?

ii. Whether upon the facts and circumstances of the case the Tribunal by its majority judgment, was justified in holding that no due enquiry was completed by the A.O. while allowing salary and interest to the partners ignoring the fact all the three conditions given in the amended Section 184 and 185 were met and the firm had to be assessed in the same status as earlier in view of the Section 184(3) of the Act?

iii. Whether upon the facts and circumstances, the Tribunal by its majority judgment was justified in upholding the order of the Commissioner of Income Tax (Administration) passed under Section 263 of the Act ignoring the fact that the order of the Commissioner of Income Tax was based on grounds different from that in the notice issued under the said Section?

iv. Whether upon the facts and circumstances of the case, the Tribunal by its majority judgment was justified the dividend received or receivable on the shares by the partners directly, the profit has not been distributed in accordance with the provisions of the partnership deed in the absence of any evidence for the same and Commissioner of Income Tax had no material what so ever while passing the order under Section 263 of the Act?

v. Whether upon the facts and circumstances of the case the Tribunal by its majority judgment was correct in holding that the assessee firm is liable to be assessed as an Association of Persons (AOP) in terms of Section 185 of the Act over looking the fact that the amended of provisions of 184 and 185 have complied with the firm has to be assessed in the same status as in the earlier year?

vi. Whether upon the facts and circumstances of the case the investment in shares, dividend, exempt under Section 10(33) of the Act and the interest thereon was rightly allowed by the AO under Section 36(i)(iii) read with Section 40(b) of the Act and the Tribunal vide its majority judgment was justified in holding otherwise?

The facts of the case are that the appellant's firm was doing the business of sale and purchase of Bajaj two Wheelers, Five Wheelers/Motorcycle. They filed a return for the assessment year 2001-02 declaring an income of Rs.52,720/-. Subsequently, the case was selected for deeper scrutiny and notice under Section 143(2) (II) of the Act were issued to the appellant. Certain queries were raised by the Assessing Officer with regard to the source of investment in the capital account of the partners, which was processed under Section 143(3) of the Act on 29.08.2003 on an income of Rs.91,210/- in the status of the firm.

A notice was issued to the assessee under Section 263 of the Act on 09.03.2006 claiming that the assessment order dated 29.08.2003 is erroneous and prejudicial to the interest of the revenue as certain benefits had been sought by the assessee under Section 14A of the Act with regard to certain shares which had been issued in their favour individually as member of the firm and had not been issued to the firm itself.

The assessee filed an objection which was rejected by an order dated 31.03.2006. Against this order dated 31.03.2006, the appellant herein filed an appeal and a difference of opinion arose between the Judicial Member and the Accountant Member of the Tribunal. The Judicial Member allowed the appeal setting aside the order of the CIT (Appeals) and restored the assessment order. The Accountant Member passed a separate order on 11.12.2008 and allowed the appeal in part. The matter was referred to the third member of the Tribunal who has passed an order on 21.01.2010 agreeing with the view taken by the learned Accountant Member.

We have heard Sri Shakeel Ahmad, learned counsel for the appellant and Sri Gaurav Mahajan, learned counsel for the department.

One thing which is clear that the assessee was not trading in shares. The business was a different nature and it was to sale motorcycle and its parts. It is admitted to the assessee that the amount which was received as capital assets in the shape of shares were in the name of the partnership himself and did not form any part of the capital account of the firm and, therefore, the claim made by the firm under Section 36(1)(iii) read with Section 14-A was not allowable in favour of the partners as such deduction can only be granted to a firm.

In view of the admitted position and in view of the opinion of the third member of the Tribunal and after examining the matter, we are also of the view that since the assessee failed to establish that the capital assets which had received were ever part of the firm's capital account. The deduction which had been allowed to them under that head could not have been allowed. It has rightly been disallowed. Insofar as the other aspects are concerned, the Tribunal has recorded that the assessee is a firm and is also assessed as a firm.

In view of above, the question of laws are answered against the assessee and in favour of the department.

The appeal is accordingly dismissed. No order as to costs.

Order Date :- 8.1.2018
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