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This issue contains:

Kind Regards,

Huzaima Bukhari
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Protecting land barons

by
Huzaima Bukhari & Dr. Ikramul Haq

Levying of "agricultural income tax" is the sole prerogative of provinces under the 1973 Constitution (hereinafter: "the Constitution"). All four provinces have enacted laws for imposing 'agricultural income tax', but these are mere deceptions. In reality, the provincial assemblies have violated the constitutional provisions relating to income tax on "agricultural income". They have failed to realise that if the expression "agricultural income" can be construed in any manner, it can render the application of Entry 47 of the Federal Legislative List contained in the Constitution as meaningless.

The National Parliament also violated the Constitution in 1988 by adding two provisos in clause (1), Second Schedule to the repealed Income Tax Ordinance, 1979 requiring that in the case of directors of companies and persons engaged in business or profession, "agricultural income" should be included in their total income for "rate purpose." The Parliament, in fact, indirectly levied tax on "agricultural income" violating the cardinal principle that what is not permitted directly is equally prohibited indirectly. This gross violation of Article 70(4) &142(c) read with Entry 47 of Federal Legislative List was challenged in writ petitions and matter is sub judice before a High Court for the last 25 years!

The vital question as to what constitutes "agricultural income" for the purpose of Entry 47, Part 1 of Federal Legislative List provided in Fourth Schedule to the Constitution, has been ignored by all. It is obvious that if no authoritative definition of "agricultural income" exists, the National and Provincial Parliaments can encroach upon each other's constitutional jurisdiction. Uniformity is necessary for determining the expression "agricultural income" so that all provincial laws conform to the Constitutional command and no discrimination occurs among the people of the four provinces and those living in federally-administrated areas. The answer as to what constitutes "agricultural income" is available in Article 260(1) of the Constitution, which says:

> **In the constitution, unless the context otherwise requires, the following expressions have the meaning hereby respectively assigned to them that is to say, –**
>
> ***"Agricultural income" mans agricultural income as defined for the purpose of the law relating to income tax.***

This is an exhaustive and exclusive definition leaving no room for any controversy. In terms of Article 70(4) read with Entry No. 47, Part 1 of the Federal Legislative List and Article 142(c) of the Constitution of Pakistan, the provinces alone are competent to levy income tax on "agricultural income", as defined in the Income Tax Law. Unfortunately, no Provincial Legislature paid attention to this constitutional command.

The definition of "agricultural income" as contained in Income Tax Law cannot be altered even by the National Parliament without the prior sanction of the President of Pakistan as provided in Article 162 of the Constitution that says:

> **162. Prior sanction of President required to Bills affecting taxation in which Provinces are interested: -** No Bill or amendment which imposes or varies a tax or duty the whole or pat of the net proceeds whereof is assigned to any Province, or which varies the meaning of the expression "agricultural income" as defined for the purposes of the enactments relating to income-tax, or which affects the principles on which under any of the foregoing provisions of this Chapter, moneys are or may be distributable to Provinces, shall be introduced or moved in the National Assembly except with the previous sanction of the President."

Since the issue is that of distribution of legislative powers between Federation and Provinces, the Constitution is unequivocal in defining what "agricultural income" is. For protection of the rights of Provinces it imposes a restriction on the National Parliament not to introduce any Bill aimed at varying the meaning of the expression "agricultural income" except with the previous sanction of President of Pakistan.

Very few people know that in the wake of the tragic coup d'état on July 5, 1977, a military dictator not only overthrew the elected government of Zulfikar Ali Bhutto but also thwarted the historic decision of taxing "agricultural income" made through Finance (Supplementary) Act, 1977. The feudal legacy under Zia's 11-year rule continued, rather strengthened as mighty generals emerged as the 'new land barons'—see details in chapter 7 of **Military INC: Inside Pakistan's Military Economy** by Ayesha Siddiqa. **A**bsentee landlords that include politicians and mighty militro-judicial-civil complex pay not a single penny or negligible amount as agricultural income tax.

The provinces have no will to collect income tax from the rich and mighty absentee landlords. Even a cursory look at laws promulgated by them to tax "agricultural income" (and amendments therein from time to time) proves this point. KPK has not even provided the definition of "agricultural income" in its Agricultural Income Tax Ordinance, 1993. The tax levied under the name of "Income Tax" is, in fact, a land tax on the basis of produce index units. The same has been the case with Sindh Agricultural Income Tax Act of 1994 as amended from time to time similar to the Punjab Agricultural Income Tax of 1997. No effort was made till 2000 to impose income tax on total income earned from this source. A face-saving device was restored to satisfy the foreign donors by enhancing land tax on acre basis providing different rates in respect of irrigated and non-irrigated lands. In Baluchistan, the position was no different till 2000. From 1993 to 1999, the Baluchistan Legislature promulgated various Agricultural Income Tax Ordinances, amended from

time to time, following the same pattern as was adopted in the other three provinces. Neither any province nor the federal government for areas administered by it has provided basis for computing "net agricultural income". They also extend no exemption to small farmers. The enactments are favourable for the rich land barons and detrimental to small farmers, who are paying exorbitant sales tax on many inputs used by them.

The above analysis shows that all the four provinces and federal government while levying tax on "agricultural income" violated Article 260 of the Constitution. The so-called laws imposing income tax on "agricultural incomes" are nothing but land tax. No income tax on net agricultural income has been levied till today as was the case under Finance (Supplementary) Act, 1977, passed by the National assembly in the last year of Zulfikar Ali Bhutto's rule. All the military and so-called democratic governments since then have shown no will to tax rich absentee landlords—many politicians, judges and members of civil-military bureaucracy own substantial cultivated lands, in some cases given to them as perks, meritorious or gallantry awards.

It is tragic that while the poor farmers pay 16-20 percent sales tax, the rich and mighty absentee land barons enjoy state lands as perks and pay no taxes. The Provinces either do not levy income tax on "agricultural income" (as defined in the Constitution) and where such a tax is imposed, it is just eyewash. As shown above, the military as well as civil governments are guilty of total disrespect to the Constitution. This explains why democracy has failed to work in Pakistan. No country can become a democratic society by just holding elections unless it demonstrates respect for rule of law by action and not through mere lip-service (highly widespread in Pakistan). In our country we have witnessed just the opposite; lawmakers themselves violate the law while advising others to show respect for rule of law!

United States

IRS offers tax tips for year-end charity contributions

The United States Internal Revenue Service has advised that individual and business taxpayers making contributions to charity should keep in mind several important tax law provisions that have taken effect in recent years.

For example, while this provision is currently scheduled to expire at the end of 2013, the owner of an individual retirement arrangement (IRA), aged 70½ years or over, can directly transfer tax-free up to USD100,000 per year to an eligible charity. However, distributions from employer-sponsored retirement plans are not eligible, and, to qualify, the funds must be transferred directly by the IRA trustee to the charity.

With regard to donations to charities, to be tax-deductible, clothing and household items donated to charity generally must be in good used condition or better. An item for which a taxpayer claims a deduction of over USD500 does not have to meet this standard if the taxpayer includes a qualified appraisal of the item with the return, while donors must get a written acknowledgement from the charity for all gifts worth USD250 or more.

In similar fashion, to deduct any charitable donation of money, regardless of amount, a taxpayer must have a bank record or a written communication from the charity showing the name of the charity and the date and amount of the contribution.

The IRS also reminded taxpayers that contributions are deductible in the year made. Thus, donations charged to a credit card before the end of 2013 count for 2013. This is true even if the credit card bill is not paid until 2014. Also, checks count for 2013 as long as they are mailed in 2013.

For individuals, only taxpayers who itemize their deductions can claim a deduction for charitable contributions. This deduction is not available to individuals who choose the standard deduction, while a taxpayer will have a tax savings only if the total itemized deductions (such as, mortgage interest, charitable contributions, and state and local taxes) exceed the standard deduction. – *Courtesy tax-news.com*

Australia

Reforms 'Restore Integrity' to Australian tax system

The Australian Government has announced the outcome of its consultations on a number of unlegislated tax and superannuation measures.

Shortly after it came to power, the Coalition began a review of 92 outstanding tax proposals. It confirmed that 18 would be continued with, three would be amended and seven would not go ahead.

Consultations were subsequently launched on the remaining 64 measures. Of these, 16 will proceed, and 48 will be scrapped. These decisions will have a net negative financial impact of AUD3.1bn (USD2.77bn) in fiscal balance terms, and AUD2.9bn in underlying cash balance terms over the forward estimates period.

According to Assistant Treasurer Arthur Sinodinos, the blame for this cost lies with the former Labor Government, which introduced reforms that were undeliverable or unrealisable.

The majority of the measures given the green light date from the 2010-11, 2011-12, and 2012-13 Budgets. The Coalition will implement Labor's planned changes to the capital gains tax (CGT) treatment of earn-out arrangements, the income tax treatment of instalment warrants, and the goods and services tax (GST) reverse charge for going concerns. The oldest unresolved proposal was made in the 2004-05 Mid-Year Economic and Fiscal Outlook (MYEFO), and relates to the taxation of financial arrangements.

Among the schemes that will be axed are a research and development tax incentive, new tax credits, and a series of superannuation and GST reliefs.

The verdict on the delayed superannuation overhaul is intended to provide certainty for an industry the Government says has been swamped by modifications over the last few years. Although it will not proceed with recommendations for not-for-profit tax concessions at this stage, the Government will explore simpler alternatives to address the risks to revenue. It will also consider the barriers to the development of longevity insurance products, as part of a broader review of the regulatory arrangements for retirement income streams.

Sinodinos said that "clarifying the status of these measures is about the Government taking the necessary decisions to finally provide certainty on a large number of announced by unenacted taxation measures, the bulk of which were left behind by the ad

hoc dysfunctional process of decision-making of the former Labor Government."

"We have delivered on our commitment to clear the backlog of tax measures and provide significant operational certainty for businesses and consumers," he added. – *Courtesy tax-news.com*

United Kingdom

UK Government Doubts Scottish Tax Promises

The UK Government has published a document claiming that key commitments made by the Scottish National Party relating to Corporation Tax and Air Passenger Duty in an independent Scotland are "unfunded."

The analysis has been published in response to the Scottish Government's *Scotland's Future* document, which promises to cut Air Passenger Duty (APD) by 50 percent and corporation tax by up to three percentage points should Scottish residents vote for independence next year. The UK Government maintains that the APD cut would require annual tax revenue or spending cuts amounting to GBP130m at today's prices by the end of the first Parliament, while a lower Corporation Tax rate would alone create a shortfall of GBP300m.

The UK Government further warns that a commitment to providing extensive childcare would raise the total amount to GBP1bn, while plans to return the Royal Mail in Scotland to public ownership and increase the National Insurance Employment Allowance cannot be costed due to lack of detail.

These policies are in addition to a set of spending commitments that the Scottish Government says it will fund through defence cuts.

The UK Government says that its figure on APD is based on a proportion of the latest national forecast by the Office for Budget Responsibility (OBR), while the corporation tax figure is derived from an HM Revenue and Customs UK-wide estimate using an approach that has been endorsed by the OBR.

Should Scotland not vote for independence next year, the Corporation Tax rate will continue to be set in Westminster, although there are plans to devolve some other tax-setting powers. However, the UK Government recently rejected devolution of APD and Corporation Tax in relation to Wales. – *Courtesy tax-news.com*

WeBOC system still running with flaws

Exporters, importers and traders of the country expressed their reservation over a sluggish approach in resolving serious flaws in the Web-Based One Customs (WeBOC) system.

Pakistan Tanners Association (PTA), All Pakistan Dry Ports Association (APDPA), Pakistan Yarn Merchants Association (PYMA) members, exporters and importers expressed concern over implementation of the WeBOC system at various dry ports without preparations and removal of flaws detected during training sessions.

Nearly 45 percent exporters had been registered so far in WeBOC system office only due to a dull registration process.

The Federal Board of Revenue (FBR) could not remove the bottlenecks and flaws after a lapse of so much time as this system is implemented in phases at different centres.

Exports from Karachi, Faisalabad, Lahore and Multan were badly affected, the customs laws and rules restricted bonded carriers to use vehicles registered in the name of other bonded carriers with the customs department, thereby creating a somewhat monopolistic situation and exporters and importers might be penalised with excessive freight charges.

The availability of registered vehicles at upcountry dry ports was limited and in the One Customs System and upcountry dry ports were using registered vehicles of other bonded carriers.

They alleged slow response by FBR in conflict resolution, which resulted in hoarding containers at different dry ports and a number of export consignments had already missed vessels and caused huge financial losses to exporters and foreign exchange to the country.

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The implementation of WeBOC, a semi-automated system introduced by FBR in replacement of Pakistan Automated Customs Computerised System (PaCCS) 24 months ago, has increased the cost of doing business by Rs 2.5 million to Rs 3.5 million or 30 percent.

No fixed total amount can be given as the businesses fluctuate, like, human mobility-containers and goods transfer, demurrage and delays in transportation, documentation process and the most time consuming.

The importers and customs agents said they have rejected this system because its collectorate has ignored assessment of consignments for evaluation.

WeBOC has no provision to settle consignments without undergoing physical verification of consignments, they added.

At the launch of WeBOC, the FBR promised clearance of consignments would be categorised in yellow, red and blue to facilitate but failed to introduce the initiative even after so much time operations, which has increased the procedures.

After all the dereliction and delays, PaCCS chapter has been closed down permanently. After the rollback of PaCCS from the trading terminals, all the existing Goods Declarations (GDs) on PaCCS remain unclear.

The conflict of interest between the service provider's company and FBR has put traders in trouble for future businesses. – *Courtesy Daily Times*

Professional cameras: LCCI urges FBR to curtail duties, taxes

The Lahore Chamber of Commerce and Industry (LCCI) on Wednesday urged the Federal Board of Revenue to bring considerably down the rate of taxes and duties on professional cameras to save the imaging industry. LCCI President Sohail Lashari was talking to a two-member Japanese business delegation comprising Mitsuhiro Tanaka and Shinobu Ikuta called on him at the Lahore Chamber.

He said LCCI believes the government could get more revenues by lowering the rate of taxes on duties on various items and 45 percent taxes and duties on professional camera should be curtailed to 10 percent. He said he was unable to understand the

logic of subjecting the cameras of high duty structure when mobile phones fitted with latest cameras are being imported on comparatively lower duty tariff. He also gave a detailed briefing to the Japanese delegation about the working of the LCCI and its role for the betterment of economy.

LCCI President suggested to the visiting delegates to arrange a countrywide photo exhibition in Pakistan as it would not only promote professional cameras but would also help highlight the image of Pakistan. Mitsuhiro Tanaka thanked the LCCI President for paving the way for the revival of imaging industry in Pakistan. He said Japanese private sector was planning to increase their investment in Pakistan as the grant of GSP plus status to Pakistan by European Union had sent a good message to the foreign businessmen.

He said Pakistan was a good business destination as its strategic location gives it an edge on a number of other regional players in many ways. He said there was no second opinion about it that investment made in Pakistan finds its way to land-locked Central Asian States. – *Courtesy Business Recorder*

December 16 deadline ends: non-filers liable to pay penalty: FBR chief

Federal Board of Revenue (FBR) Chairman Tariq Bajwa on Wednesday said that the FBR will impose penalty for non-filing of income tax returns after expiry of the extended deadline of December 16, 2013. Talking to here on Wednesday, the FBR Chairman shared the future strategy to deal with the non-filers of income tax returns and wealth statements and showed commitment that the FBR will now collect penalty as per law from such taxpayers.

The future plan of documentation has also been discussed between the Finance Ministry and the FBR. Tariq Bajwa stated that the non-filers will be liable to pay penalty for each day of default as per provisions of the income Tax Ordinance 2001. Those who would delay filing of returns would be liable to pay penalty as per law. The FBR will now issue notices to the non-compliant existing taxpayers, who failed to file their income tax returns by the extended deadline of December 16, 2013.

He added that the government's new incentive scheme for dormant taxpayers and new taxpayers cover filing of returns for the past

years. However, existing taxpayers were required to file returns for Tax Year 2013 by the extended date of December 16. The penalty provisions would be invoked against the taxpayers, who have not filed their returns for Tax Year 2013 as admissible under the law, FBR Chairman added.

When contacted, sources said that the FBR will launch enforcement drive against the non-compliant taxpayers by issuing notices to the non-filers under Section 114 of the Income Tax Ordinance 2001. Despite repeated extensions in the date of filing of income tax returns, certain existing taxpayers have not filed their tax returns for Tax Year 2013. The FBR will launch action against the non-compliant taxpayers after expiry of extended last date for filing of returns.

Meanwhile, a statement of the Ministry of Finance issued here on Wednesday said that Finance Minister Ishaq Dar has expressed satisfaction over the performance of the FBR with regard to collection of revenues in the last 5 months of the tax year 2013-14. These observations were made by him during the presentation made by the FBR at the Finance Ministry Wednesday.

The Finance Minister was informed by the Chairman FBR that an amount of Rs 797 billion was collected by FBR up to November 2013 which shows an increase of 17 percent as compared to the corresponding period last year. The chairman also informed the Finance Minister Ishaq Dar that 814,981 tax returns were filed in the financial year 2013-14 up to 16 December, 2013 only. Whereas, during the whole financial year 2012-13 the number of returns filed were 744,866.

The Finance Minister directed FBR to facilitate investors and implement the new incentive scheme announced by Prime Minister Mian Mohammad Nawaz Sharif in letter and spirit. The meeting was attended by senior officials of the Ministry of Finance and the FBR, it added. – *Courtesy Business Recorder*

Stuck-up goods, vehicles at warehouses: delay in auction causing huge revenue loss

The delay in auction of stuck-up goods including vehicles at the state warehouses monitored by the Federal Board of Revenue (FBR) is causing huge revenue loss to the exchequer. Sources told here on Wednesday that the FBR has started an exercise to

ascertain the exact revenue involved in stuck-up goods at the state warehouses.

The value of goods and applicable duties and taxes would also be worked out by the customs department. State warehouses have to complete the legal formalities including adjudication of confiscated goods before auction to the public in a specific time period. If the delay occurs in the adjudication process, the FBR cannot timely recover duties and taxes from the goods to be auctioned. In this regard, the FBR has issued instructions to the field formations for compilation of data pertaining to stuck up amount on confiscated goods kept in state warehouses.

The FBR also wanted to know about the details of confiscated narcotics/liquor/arms and ammunitions as well as confiscated vehicles in the state warehouses. According to the FBR instructions to the Collectors of Customs Model Customs Collectorates issued on Wednesday, the following information is required regarding State Warehouses (SWH) working under jurisdiction of the respective MCC: Location - address of the SWH, area - covered area, whether government owned/ rented/other (specify), No of officers/staff deployed, approximate value of goods excluding vehicles available as on November 30, approximate value of vehicles (confiscated /seized) as on November 30, 2013, details of narcotics/ liquor/arms and ammunitions available as on November 30, 2013, value/duty, taxes collected during the last financial year (2012-13) as well as the current financial year (up to November 2013) and number of auctions conducted during the last financial year (2012-13) as well as the current financial year (up to November 2013). The FBR is also compiling data of the state warehouses maintained by other agencies, the FBR instructions added. – *Courtesy Business Recorder*

2013 TRI 2023 (Trib. Ind.)

INCOME TAX APPELLATE TRIBUNAL
DELHI "D" BENCH, DELHI

R.P. Tolani, Judicial Member and T.S. Kapoor, Accountant Member

FACTS/HELD

CIT-DR's behaviour termed "totally irresponsible, contemptuous and malicious". Costs imposed & action for contempt of court to be initiated

1. In a rare and unfortunate incident of conflict between the Departmental Representatives and the Bench, the ITAT has passed severe strictures against the CIT-DR. Apparently he was not present in the court room when the matters were called out for hearing. Adjournment applications were also not filed. When he did appear, he was not prepared to argue the matter. When the Bench rejected his application for time and decided to hear the matter he alleged "in a malicious and contemptuous manner" that the "Bench is hurrying the justice and burying the justice". After the hearing, he barged into the Chamber of the Sr. Member without permission and threatened that the Bench has insulted him and that he is going to lodge a complaint against them. The Bench has stated that the unprovoked utterances from the CIT-DR has come as a shock to them and that it cannot be taken lightly. It stated that the CIT-DR is not aware of his responsibilities, court discipline, procedure and proper court mannerism. It has termed his accusation that the Bench was hurrying justice and burying the justice as being "totally irresponsible, contemptuous and malicious" and against the glaring facts and proceedings which happened in the open court. It has stated that the CIT-DR's behaviour deserves to be visited with appropriate action to "inculcate sense of judicial discipline and awareness of responsibilities of duties and further to protect the dignity of the court, which stands offended by the contemptuous conduct" It has directed the CIT-DR to pay costs of Rs 1000 which should be deducted from his salary. The Registry has been directed to forward a copy of the order to the CCIT and the CBDT Chairman for appropriate action. It has

also directed that separate and appropriate action for initiating contempt of court proceeding would be taken in due course.

Appeal allowed.

ITA No. 2555/Del/2012 (Assessment Year : 2006-07)

Decided on: 6th December, 2013.

Present at hearing: Ashwani Taneja, Advocate, for Appellant. D.K. Mishra CIT (DR), for Respondent.

JUDGMENT

Per R.P. Tolani:– (Judicial Member)

This is assessee's appeal against order dated 22-3-2012 passed by the Commissioner of Income-tax, Karnal u/s 263(1) of the Income Tax Act, 1961, relating to A.Y. 2006-07. Following grounds are raised:

> *"1. That having regard to facts & circumstances of the case, Ld. CIT has erred in law and on facts in assuming jurisdiction u/s 263 by holding that the penalty order dated 29-05-2009 was erroneous and prejudicial to the interest of revenue.*
>
> *2. That having regard to facts & circumstances of the case, Ld. CIT has erred in law and on facts in assuming jurisdiction u/s 263 and passing the order under that section, setting aside the penalty proceedings to the file of Ld. AO is bad in law and against the facts and circumstances of the case.*
>
> *3. That having regard to facts & circumstances of the case, Ld. CIT has erred in law and on facts in assuming jurisdiction u/s 263 is not sustainable on various legal and factual grounds.*
>
> *4. That the appellant craves the leave to add, amend, modify, delete any of the grounds of appeal before or at the time of hearing and all the above grounds are without prejudice to each other."*

2.1. Before we proceed with the adjudication of appeal, it is very crucial to dwell upon the unbecoming conduct of the 'D' Bench in-charge CIT (DR) Shri D.K. Mishra. When the Bench set for hearing at 10:30 AM on 20-11-2013, to our surprise, none of the DR was present in the courtroom. It may be worthwhile to mention that about 33 appeals were fixed for hearing. With the current pendency an adjournment takes about 4 to 5 months' period for fixation of any appeal for next hearing in normal course.

2.2. Thus the situation before us as it stood, neither any DR was present in the courtroom nor any application for adjournment from the revenue's side. We could not have allowed to crash the Bench, therefore, in public interest and interest of justice, Bench continued first with the

adjournment applications filed by the assessees and thereafter to proceed with further hearing of the remaining appeals.

2.3. After adjournment motion this matter was called out. Since none of the DRs including the in-charge of the Bench Shri D.K. Mishra CIT (DR) was present, the matter was passed it over and the Bench continued with proceedings of other cases.

2.4. At about 10.50 AM Shri D.K. Mishra CIT(DR) entered the courtroom in a huff and gave a vague reason for his absence that he was held up some where. Observing that Shri D.K. Mishra is now present, this 263 matter, which was to be argued by him was called out.

2.5. Ld. Counsel for the assessee contended that the issue in question is squarely covered by ITAT order in its own case for A.Y. 2005-06 wherein the ITAT vide its order dated 13-4-2012 rendered in ITA no. 5023/Del/2011 has deleted the penalty levied u/s 271(1)(c) of the Act on the same set of facts namely, in respect of claim of disputed rate of depreciation.

2.6. Shri D.K. Mishra straightway replied that he has not seen the file and not prepared the case. He was reminded that being CIT (DR), In-charge of the Bench it was not fair on his part to come late without intimation; don't read the file; not apply for the adjournment and make the whole process come to stand still. Shri Mishra then asked for more time to go through the file. In the interest of justice the Bench was kind enough to grant him time to go through the file. In the meanwhile the case of M/s Laksons Footwear P. Ltd. was also proceeded ex parte qua the department, as the Sr. DR was also not present and there was no adjournment application. It may be pertinent here to mention that vide order dated 20-11-2013 the Bench has expressed its displeasure towards the DR's of "D" Bench. After reading the file, Shri Mishra offered himself for the arguments.

2.7. The merits of the appeal will be dealt in subsequent paras. After the assessee completed the arguments Shri Mishra replied to it. However, he wanted to cite the case laws whose names or citations neither he remembered nor had the copies of the citation. He contended that they will be filed in a day or two.

2.8. It was pointed out to him that it is not fair on his part not to remember the cases, the exact citation and the proposition laid down by these judgments. It was not a fair way to argue that the case laws not remembered by him will be submitted subsequently. He was told that in this situation how the assessee's counsel will counter the case laws which are not being given, nor properly represented and cited. It will not be possible to allow him time to file list, gist and citations of case laws subsequent to hearing which are neither heard by us nor put up to assessee for reply thereon.

2.9. At this juncture Shri Mishra in a malicious and contemptuous manner alleged that the "Bench is hurrying the justice and burying the justice". Such type of unprovoked utterances from a Commissioner of Income Tax, who is the"D" Bench incharge officer from the Revenue's side came as a shock to the Bench and cannot be taken lightly. It appears that Mr. Mishra is not aware of his responsibilities, court discipline, procedure and proper court mannerism. His accusation on the Bench that it was hurrying justice and burying the justice is totally irresponsible, contemptuous and malicious allegation and totally against the glaring facts and proceedings which happened in the open court.

2.10. Out of 33 appeals that were listed, the Bench had granted adjournments in 31 cases mainly at the request of the ld. D.R., though the half heartedly written adjournments were filed by the department at about 11.30 AM on that day, which itself was against the prescriptions of ITAT Rules 1963. This demonstrates that Bench was kind and tolerant to the department despite these glaring irregularities. On one hand Bench tried to help and redeem the objectionable situation in which the department was put by Shri D.K. Mishra i.e. being not present in the court room, not filing any adjournment applications and least of all not putting any representative to explain all these anomalies. On the other hand to cover up his fallacies Shri Mishra ventured to pounce on the court by making such false, malicious and contemptuous allegations.

2.11. Shri Mishra was told that it was not the Bench which was hurrying or burying the justice but it was he who was obstructing the process of dispensation of justice. At the first instance he comes late in the Bench, does not come prepared with the case files, makes the entire court room and litigants wait without justification. The Bench showing kindness and in the interest of justice passes over the matter, after coming the CIT (DR) without remorse, says that he was held up and not studied the files, some time may be given, which was also given. Thereafter he was not in a position to cite the case laws and wanted to press his insistence that he will name, cite and give the proposition of case laws later on. He was clearly told that it is not the Bench which was hurrying or burying the justice but rash and contemptuous conduct of Shri Mishra which was obstructing the sacrosanct object of dispensation of justice. His contemptuous behaviour was proposed to reprimanded and fit to be visited with cost and appropriate consequential action.

2.12. In view of the foregoing facts and circumstances we find Shri Mishra's total behaviour as unfortunate, contemptuous and condemnable and deserves to be visited with appropriate action to inculcate sense of judicial discipline and awareness of responsibilities of duties and further to protect the dignity of the court, which stands offended by the contemptuous conduct of Shri D.K. Mishra.

2.13. Mr. Mishra was then reminded that his allegations are unbecoming and may be visited with costs. Mr. Mishra did not say anything in reply.

2.14. After the Bench rose and retired to the Chamber of Sr. Member for discussion of the heard cases and signing of the judicial proceedings, Shri Mishra barged into the Chamber of Sr. Member without asking permission and threatened that the Bench has insulted him and that he is going to lodge complaint.

2.15. In order to pacify, he was offered to sit and have a cup of tea which the Members of the Bench were sharing. He did not show any response to this kind gesture being extended by the Members of the Bench. Looking at his hostile demeanour he was told that it was not permitted to enter in the Chamber of the Judges without intimation and hurl such threats of complaint to intimidate the bench. In our view his over all actions, behaviour and utterances amount to contempt of court. Any party to the litigation has no authority to enter the Judge's room without permissions and endeavour to intimidate and put up such threats.

2.16. In view of the entirety of facts and circumstances we have no hesitation but to impose costs of Rs. One thousand on the delinquent CIT (DR) Shri D.K. Mishra which should be deducted from his salary. The Registry is directed to forward the copies of this order to CIT(DR)-I, CCIT In-charge; Chairman CBDT for record purpose and take appropriate action including placing the observations in his service record at their end.

2.17. Separate and appropriate action for initiating contempt of court proceeding will be taken in due course after giving Mr. D.K. Mishra CIT(DR) adequate opportunity of being heard.

2.18. It may be further mentioned that despite Bench's direction that no cognizance of case laws being filed by the ld. CIT(DR) subsequent to the hearing will be considered, the audacious Mr. D.K. Mishra vide letter dated 21-11-2013 without permission has filed the case laws with the Bench Clerk. Same will not be considered as being in the defiance of the court's direction coupled with the fact that the assessee could not be heard on the same post closure of hearing.

3. Now adverting to the appeal, brief facts are: In assessment year 2005-06 i.e. preceding assessment year assessee hospital purchased a C.T. scan system and claimed 40% depreciation thereon under a belief that it amounts magnetic resonance imagine system, which was eligible for 40% depreciation. During the course of assessment for A.Y. 2005-06 the assessing officer held that assessee was eligible to depreciation @ 15% and accordingly the depreciation was partly disallowed. Assessing officer initiated penalty proceeding qua the excess claim of depreciation and imposed the same. In first appeal it was confirmed by CIT(A). Aggrieved,

assessee preferred appeal second appeal, ITAT vide order dated 13-4-2012 in ITA no. 5023/Del/2011 deleted the penalty, inter alia, observing as under:

> *"17. In view of the foregoing, we are of the opinion that mere erroneous claim in the absence of any concealment or furnishing of inaccurate particulars, is no ground for levying penalty, especially when there is nothing on record to show that the explanation offered by the assessee was not bona fide or any material particular were concealed or furnished inaccurate. In these circumstances, we have no hesitation in observing that no penalty is exigible in relation to claim for deduction of excess depreciation and interest on amount borrowed for building which was incomplete. Therefore, we hold that penalty is not imposable in this case and action of authorities below in imposing/ confirming the penalty u/s 271(1)(c) of the Act is neither proper nor justified. As such, while accepting the plea of the assessee, we direct to delete the impugned penalty imposed/ confirmed."*

3.1. Following the earlier claim of depreciation in A.Y. 2006-07 also, assessee claimed the same rate which was disallowed by assessing officer. The assessing officer disallowed the same following A.Y. 2005-06 and initiated the penalty proceedings in AY 2006-07 also. The assessee filed reply to the penalty proceedings in response to show cause notice dated 11-5-2009, pleading that depreciation @ 40% was claimed under bona fide belief that C.T. scan machine amounted to magnetic imagining system. The bona fide belief was based on its interpretation of the equipment and its professional use which were purely medico technical terms. The assessee's reply was supported by various case laws which are mentioned therein. Copy of the reply is placed at pages 7-9 of the paper book. Assessing officer in AY 2006-07 dropped the penalty proceeding by a short order which is as under:

> *"Penalty proceedings initiated u/s 271(1)(c) are hereby dropped."*

3.2. CIT invoked power u/s 263 of the Act and was of the view that order was erroneous and prejudicial to the interests of revenue. Assessee filed detailed reply to 263 notice, rejecting the same and relying on Delhi High Court judgment in the case of *CIT vs. Toyota Motor Corporation* 306 ITR 49 to the effect that the proceedings before the AO are quasi judicial proceedings and his order must be supported by reasons. The CIT observed that assessing officer has passed a cryptic order dropping penalty proceedings u/s 271(1)(c), which was erroneous and prejudicial to the interests of revenue. Accordingly, acting u/s 263 the CIT set aside the penalty order, restored it back to the file of assessing officer. Aggrieved, assessee is before us, challenging the 263 jurisdiction.

4. Ld. Counsel for the assessee contends that:

(i) After claim of depreciation in the preceding year i.e. A.Y. 2005-06 the C.T. Scan machine became part of the block of assets and assessee had no choice but to follow what was followed in earlier year. Therefore in this year assessee having followed the earlier method it cannot be imputed that assessee's claim was not bona fide.

(ii) Assessee's reply to show cause notice clearly show that assessing officer had called the assessee for hearing, considered his reply and chose to pass a short order which is not in the hands of the assessee. Thus, the necessary process for initiation, hearing and completion of penalty proceedings i.e. statutory process has been duly followed by the assessing officer.

(iii) The CIT has held the order of the assessing officer to be erroneous and prejudicial to the interests of revenue on following counts:

(a) The preceding year's assessment had become final about the claim of depreciation;

(b) The action of assessing officer was not in consonance with Hon'ble Supreme Court judgment in *Union of India vs. Dharmendra Textile Processors & others* 306 ITR 277;

(c) Ratio of decision of Hon'ble Supreme Court in the case of *CIT vs. Reliance Petro Products (P) Ltd.* 230 CTR 320 was not applicable.

(d) Cryptic one line order passed by assessing officer dropping the penalty proceedings u/s 271(1)(c) was not sustainable.

(iv) Penalty is to be considered on peculiar facts and circumstances of each case and each year. It is evident that in this case the bona fide belief sustained by assessee in first year was continued in second year. Therefore, as far as second year was concerned the assessee had a bona fide belief of following earlier practice.

(v) Merely because penalty proceedings in particular facts of case was imposed in preceding year will not suggest that automatically the penalty will be levied in succeeding year as the penalty is not automatic and depends upon the facts and satisfaction of the assessing officer in that year.

(vi) Reliance is placed on following judgment for the proposition that merely because the order was not elaborate it cannot be held that the same was erroneous or was passed without application of mind:

– *CIT v. Design & Automation Engineers (Bombay) (P) Ltd.* [2008] 323 ITR 632 (Bom.)(HC);

– *Manish Kumar v. CIT* (2012) 134 ITD 27 (Indore) (Trib)

(vii) It is evident that assessing officer passed the penalty order after perusing the assessee's explanation and completing the statutory process in this behalf. Therefore, it cannot be held that there was lack of inquiry. Consequently, the order passed by the assessing officer cannot be held to be erroneous and prejudicial to the interest of revenue resorting to sec. 263 as held by *CIT vs. Sunbeam Auto Ltd.* (2009) 289 Taxman 436 (Del)(HC); and *Vodafone Essar South Ltd. vs. CIT* (2011) 141 TTJ 84 (del.)(Trib.).

(viii) It cannot be assumed that there was lack of inquiry by assessing officer and assuming even if it is so as long order was passed after considering assessee's explanation was considered, it cannot be held to be a case of total lack of inquiry and cannot be revised u/s 263 – *CIT v. Vikas Polymers* (2010) 194 Taxman 57 (Del.)(HC).

(ix) CIT's observation that the order of assessing officer dropping penalty proceedings is unsustainable because it is cryptic, is not tenable as it does not make the order of assessing officer erroneous and prejudicial to the interests of revenue in view of Delhi High Court judgments cited abvoe.

(x) CIT has held that the order was erroneous and prejudicial to the interest of revenue in view of the decision of Hon'ble Supreme Court in the case of Dharmendra Textile Processors (supra). A perusal of the written reply filed by the assessee to the penalty proceedings will demonstrate that the assessee itself has relied on Dharmendra Textile Processors (supra) and the assessing officer has dropped the penalty proceedings after considering the reply.

4.1. It is further pleaded that in case of *Master Vijay Oswal vs. ITO* 87 ITD 98, Rajkot Bench of the ITAT has held that even non-initiation of penalty proceedings u/s 271(1)(c) cannot be held to be erroneous and prejudicial to the interest of revenue.. Assessing officer's impugned order in any case is in consonance with the previous year's ITAT order which has held the assessee's explanation to be bona fide. It is not binding on him to necessarily follow the preceding year's penalty order in peculiar facts of the case in second year. In the second year the said goods merged in the block of assets and assessee under bona fide belief claimed the same rate of depreciation @ 40%

4.2. In the case of Toyta Motor Corporation (supra), relied on by the CIT, the assessing officer passed a cryptic order without carrying out necessary investigation and ITAT from its own side gave a finding that assessee was under bona fide and reasonable belief. In these particular facts it was held that the order was erroneous and prejudicial. The facts

are distinguishable as in this case the assessing officer carried out inquiries by calling explanation and dropped the penalty proceedings after considering the reply of the assessee.

4.3. Assessing officer's order dropping the penalty proceedings is a possible, plausible and reasonable view, merely because CIT holds another view on the same facts, cannot make Assessing officer's order as erroneous and prejudicial as held by Hon'ble Supreme Court in *Malabar Industrial Co.* 243 ITR 83.

5. Ld. CIT (DR) supported the order of the CIT and contends that:

(i) The cryptic order passed by the assessing officer is unsustainable

(ii) Having held the excess claim of depreciation in preceding year as liable for penalty u/s 271(1)(c) itself shows lack of application of mind by assessing officer in dropping the penalty proceedings in this year. Reliance is placed on Toyta Motor Corporation (supra) and Allahabad High Court judgment in the case of *CIT vs. Braj Bhushan Cold Storage* 275 ITR 360.

(iii) Necessary inquiries were not carried out by assessing officer.

6. As already mentioned, ld. CIT (DR) did not give further case laws and the Bench gave a ruling that any case law filed by the CIT(DR) after the hearing is over, will not be considered. The case laws filed on 21-11-2013 in defiance of Bench order, we are unable to consider them in view of our oral order pronounced in the court.

7. We have heard rival contentions and gone through the relevant material available on record. It is undisputed that the ITAT in preceding year has deleted the penalty levied u/s 271(1)(c), which was the first year of purchase of C.T. scan machine which was held to be magnetic imagine machine by the assessee. The bona fide belief of the assessee has been upheld by the ITAT.

7.1. Apropos this year, looking from any angle there is no choice but to follow the coordinate Bench judgment in assessee's own case deleting the penalty on the same machine, as the bona fide belief is a final finding of fact by co-ordinate bench, which we have to respectfully follow. In this year the facts are stronger as assessee followed the preceding year's practice which by itself constitute a bona fide belief. Superimposing the ITAT in preceding year has already held the assessee's belief in claiming depreciation @ 40%to be bona fide.

7.2. Apropos cryptic order, as mentioned above, demonstrate that a cryptic order per se cannot be held to be erroneous. In the case of Toyta Motor Corporation (supra), the cryptic order was held to be unsustainable as assessing officer did not carry out necessary inquiries and the ITAT from its own side assumed that there was bona fide belief. In juxtaposition, in this case the penalty notice was issued, the assessee

duly filed a detailed reply citing detailed reasons, explanation, case laws including Dharmendra Textile Processors (supra). Ld. CIT has erroneously assumed that it was not considered by assessing officer. In our considered view once the assessee has filed the written reply and attended the proceedings it cannot be held that necessary inquiries were not carried out.

7.3. In view of the facts mentioned above looking from any angle there is no escape from the conclusion that assessee cannot be visited with penalty u/s 271(1)(c). In our view the penalty order dropping penalty proceedings u/s 271(1)(c), merely because it is cryptic order cannot be held to be erroneous or prejudicial to the interest of revenue. It amounts to multiplicity of proceedings on hyper technical issues. In view of the foregoing, we quash the 263 order.

8. In the result, assessee's appeal is allowed.

Order pronounced in open court on 06-12-2013.

INCOME TAX APPELLATE TRIBUNAL
DELHI "D" BENCH, DELHI

R.P. Tolani, Judicial Member and T.S. Kapoor, Accountant Member

Order accordingly.

ITA Nos. 2547 & 2548/Del/2012 (Assessment Years : 2005-06 & 2008-09) & ITA No. 2204/Del/2012 (Assessment Year : 2008-09)

Decided on: 28th November, 2013.

Present at hearing: None, for Appellant. M.K. Madan, CA, for Respondent in ITA Nos. 2547 & 2548/Del/2012. M.K. Madan, CA, for Appellant. None, for Respondent in ITA No. 2204/Del/2012.

JUDGMENT

Per R.P. Tolani:– (Judicial Member)

This is a set of three appeals in the case of same assessee containing two revenue's appeal for A.Y. 2005-06 and 2008-09 and assessee's appeal for A.Y. 2008-09. All the three appeals are disposed of by this common order for the sake of convenience.

2. When the Bench set for hearing at 10.30AM on 20-11-2013, to our surprise, none of the DR was present in the courtroom. It may be worthwhile to mention that about 33 appeals were fixed for hearing with the current pendency it takes about 4 to 5 months' period for fixation of any appeal for hearing in normal course.

2.1. It may be pointed out that there was neither any DR present in the courtroom nor any application for adjournment from the revenue's

side. In public interest and interest of justice, Bench continued with the adjournment applications filed by the assessees and thereafter with the hearing of the remaining appeals.

2.2. This set of appeals, which comprises of two revenue appeals and one assessee's appeal, was called out. Ld. Counsel for the assessee contended that the issues involved were covered by ITAT judgments in assessee's own case and it has been adjourned several times, therefore, it may be heard. As no DR was present, matter was passed over.

2.3. At about 10.50 AM Shri D.K. Mishra CIT(DR) entered the courtroom in a huff and gave a vague reason for his absence that he was held up some where. Since Shri D.K. Mishra made the appearance, this passed over matter was called out. It may be mentioned that Shri D.K. Mishra CIT(DR) is the Commissioner In-charge of the "D" Bench and it is his duty to ensure that the court is properly assisted to discharge its function of hearing and decide appeals. On the calling out of this matter for hearing, Shri D.K. Mishra replied that he will not argue these appeals as they are not assigned to him and other DR who is absent, also was held up in traffic jam.

2.4. It was clearly pointed out to him that there are two revenue's appeals and it is its duty of the revenue to ensure that their own appeals are represented. In these circumstances, the Bench will be left with no choice but to proceed with the matter ex parte qua revenue. Shri D.K. Mishra contended that the Bench may take a view it likes.

2.5. These developments and circumstances leave an impression on the Bench that Revenue is not taking the court proceedings with responsibility, which is deserved by judicial proceedings and cause consternation in our mind. As the issues are pleaded by assessee to be covered by ITAT order in it's own case and on several earlier occasions the appeals have been adjourned. The 'D' Bench DR's attitude is of recalcitrance and noncooperation, in the public interest and interest of justice we are of the view that further adjournment of a seemingly covered matter will cause hardship to assessee and amount to obstruction to dispensation of justice. Under these circumstances, we are left with no choice but to proceed with the hearing of these appeals ex parte qua the department.

2.6. After this hearing was over, at about 11.30AM a bunch of hastily written adjournment applications by the department was moved with scribbling "DR is not available". We have adjourned all the other matters on these revenue's applications. Though the cause of the adjournments sought by revenue is non specific and does not invoke any judicial conscience. Nevertheless to emphasize that the ITAT Benches consider "Revenue" with due regards and esteem, these belatedly and hastily moved adjournment applications were allowed except the heard appeals.

2.7. From the above proceedings it becomes crystal clear that the actions of "D" Bench DRs has caused obstruction of justice and lack of due respect to the judicial discipline and set norms of ITAT proceedings. We may also mention that on earlier date i.e. 18-11-2013 about 40 cases were fixed and on 19-11-2013 29 cases were fixed and a huge number of cases were compelled to be adjourned as the revenue moved applications with scribbling "DR is not available". The Bench has been more than fair to the department in allowing such adjournments. The 'D' bench DRs failed even to extend minimum courtesy of applying adjournment in advance and inform the opposite parties who come prepared from various out stations.

2.8. On 2.30 PM Mr. Bhatia, Sr. DR 'D' Bench, explained his absence as being busy with the marriage ceremony of his nephew at Lucknow and he got delayed which resulted in non-appearance. He was reminded that marriage ceremonies are fixed well in advance and due intimation should be given if the DRproceeds on a planned leave. The above facts are being narrated in detail to make the department aware of the situation of some of the DRS whose recalcitrant way of working is leading to un-anticipated adjournments and obstruction of justice, which deserves to be improved.

3. To promote public interest and dispensation of justice, as a symbolic gesture, the Bench deems it fit and in the interest of justice to impose a token cost of Rs. 500/- on the absentee DR Mr. Bhatia which should be deducted from his salary. This order should be duly forwarded by Registry to CIT(DR)-I, Chief Commissioner In-charge of Delhi Bench, the learned Chairman CBDT for record purposes.

4. Now we proceed to decide these appeals. We have heard ld. AR of the assessee and perused the material available on record and we proceed to decide the appeals as under:

Assessment year 2005-06 (Revenue's appeal):

5. Sole effective ground raised is as under:

> *"On the facts and in the circumstances of the case, the Ld. CIT(A) has erred on facts and in law in deleting the addition of Rs. 23,18,590/- made by the Assessing officer u/s 36(1)(iii) of the Income Tax Act, 1961 on account of interest on investment in shares in the light of following judgments:*
>
> *(i) Jurisdictional Punjab & Haryana High Court in the case of CIT Vs. Abhishek Industries (186 ITR 1);*
>
> *(ii) Hon'ble Madras High Court in the case of K. Somasundaram & Bros. Vs. CIT 238 ITR 939; and*
>
> *(iii) CIT Vs. Smt. Leena Ramchandran 339 ITR 296 (Ker)."*

6. Ld. Counsel for the assessee contends that the issue in question is covered by ITAT's consolidated order dated 30-3-2012 in assessee's own

case in ITA nos. 3361 & 3362/Del/2010 for A.Y. 2003-04 & 2004-05, inter alia, observing as under:

> *"8. …….. The assessee has business relationship with all persons with whom trading is made. Business relationship can be said to exist even with the persons from whom funds are borrowed. Hence the principle of commercial exigency cannot be blindly applied in the case of persons with whom the assessee has some business relationship. The assessee ahs to demonstrate the purpose for which he was making the investment in the shares of associate concern; whether it is for getting distributorship or earning dividend income or for controlling interests. The assessee had borrowed money for its own purpose but has been investing it in shares. Prima facie it appears to be diversion of funds for acquisition of share. It is not a case of deposit of money with Lakhani India for the purpose of securing business of distributorship. What was the position in the very first year when business of distributorship was assigned to assessee is not known. If there was no condition in the very first year or in subsequent years, the amounts invested in various years in shares of Lakhani India Ltd. cannot be treated as assessee's compulsion to make investment in shares within the meaning of Commercial expediency. The learned CIT(A) /A.O. has not examined this aspect of the case also. Since the issue has not been examined either by the Assessing officer or the learned CIT(A), we feel it proper to set aside the matter to the file of the Assessing officer with the directions to examine the issue in the light of our aforesaid observations and decide it afresh after affording the assessee a reasonable opportunity of being heard."*

6.1. Since the issue in question has been set aside, restored back to the file of assessing officer, the matter may be accordingly set aside back to the file of assessing officer with similar directions.

7. We have heard ld. AR of the assessee and gone through the relevant material available on record. The issue has been set aside by the ITAT in earlier years (supra) to decide the issue in the light of observations made by in the ITAT order. Respectfully following the same, we set aside the issues back to the file of assessing officer with similar directions. The appeal of the revenue is allowed for statistical purposes only.

A.Y. 2008-09 – Cross appeals:

8. Sole effective ground raised by the Revenue is as under:

> *"On the facts and in the circumstances of the case, the Ld. CIT(A) has erred on facts and in law in deleting the addition of Rs. 15,81,991/- out of total addition of Rs. 18,84,991/- made by the Assessing officer on account of various expenses even though*

these expenses were incurred on exempted incomes, therefore not allowable in view of section 14A of the Income Tax Act, 1961 and in the light of following judgments:

(i) Jurisdictional Punjab & Haryana High Court in the case of CIT Vs. Abhishek Industries (186 ITR 1);

(ii) Hon'ble Madras High Court in the case of K. Somasundaram & Bros. Vs. CIT 238 ITR 939;

(iii) Hon'ble Calcutta High Court in the case of Dhanuka and Sons vs. CIT (Cal) 339 ITR 319;and

(iv) CIT v. Smt. Leena Ramachandran 339 ITR 296 (Ker.)"

Assessee's appeal:

9. Following grounds are raised:

1. (a) That the order passed by Ld. CIT(A) is bad in law and on facts.

(b) That the Ld. CIT(A) has erred in confirming disallowance of interest of Rs. 49,87,440/- u/s 40(a)(ia) of the Income Tax Act, 1961.

2. That the Ld. CIT(A) has wrongly confirmed the disallowance of administrative expenses of Rs. 3,03,000/- u/s 14A of the Income Tax Act read with clause (iii) of Rule 8D (2) of the Income Tax Rules."

10. The sole effective ground of revenue's appeal and ground no. 2 of assessee's appeal are common. Here also ld. Counsel for the assessee contends that similar issue arose in A.Y. 2006-07 and 2007-08 and ITAT vide consolidated order dated 22-3-2012 in ITA nos. 2117 and 2118/Del/2011, referred to the following judgments:

- *Godrej & Boyce Mfg. Co. Ltd. vs. DCIT & another* 328 ITR 81 (Bom.);
- *Maxopp vs. CIT* (Hon'ble Delhi High Court ITA no. 667/2009 dated 18-11-2009);
- *CIT vs. Winsome Textile Industries Ltd.* 319 ITR 204 (P&H) – Jurisdictional High court in assessee's case.

11. The ITAT referring to the Jurisdictional High Court judgment (supra) and various other judgments and considering the arguments and on perusal of the record set aside the issue, restored back to the file of assessing officer by following observations:

"8.3. In the light of the aforementioned peculiar facts and circumstances, we are of the view that it is appropriate to restore the issue back to the file of the A.O. as it is seen that on facts no material has been brought on record by the CIT(A) to conclude that facts qua the group concern namely Lakhani Marketing

Incorporation in 2000-2001 A.Y are exactly identical to the facts of the assessee in A.Y. 2006-07. It is seen that no such exercise has been done by the A.O. Accordingly, the applicability of the facts pertaining to commercial expediency as considered in the facts of group concern needs to be seen and brought on record. The A.O. shall in the light of the judgments of the Apex Court and jurisdictional High Court shall examine and discuss each and every time funds were advanced by the assessee to Lakhani India Ltd. in context of 'nexus' and 'commercial expediency' as has been laid down by the Apex Court in the case of S.A. Builders 288 ITR 1 (SC) and Munjal Sales Corporation 298 ITR 298 (SC). Thus not only the facts qua the Lakhani Marketing Incorporation stated to be identical to assessee's case in the context of 'commercial expediency' need to be taken into consideration but also the finding in assessee's own case in 2003-04 and 2004-05 A.Ys is also relevant as the issue in the earlier years in the case of assessee has been restored to the A.O. vide order dt. 16-4-2009 in ITA 2233 and 4545/Del/2007. Accordingly after marshalling the facts, the case law can be applied.

8.4. Accordingly for the detailed reasons given hereinabove the issue is restored to the file of the A.O. for both the years with the direction to decide the same in accordance with law by way of speaking order. Needless to say that t he assessee shall be afforded a reasonable opportunity of being heard."

12. It is pleaded that both the grounds in case of assessee and revenue's appeal should be set aside on the issue of disallowance u/s 14A.

13. Apropos ground no. 1 of assessee's appeal, brief facts are that disallowance u/s 40(a)(ia) was made on the ground that assessee had not deducted TDS on interest amounting to Rs. 49,87,440/- paid to the bank through the account of Nitin Miglani. Since TDS was not deducted by the assessee while making the payment to Nitin Miglani the assessing officer purposed to disallow the interest for want of compliance to sec. 40(a)(ia). The assessee pleaded as under:

"De-facto the loan was taken from the bank and interest was also paid to the bank and in such a situation there is no need of deduction of tax u/s 194A of the Income Tax Act, 1961. It is not a case of the revenue that money was borrowed from the saving bank of Mr. Nitin Miglani Nor is the case that money/ interest was paid to Nitin Miglani. There are no two independent transactions that is company with Mr. Nitin Miglani and Mr. Nitin Miglani with the bank. This is rather one transaction in which Mr. Nitin Miglani was a conduit to circumvent the problem faced due to cessation of Board and to prevent the closure of business. From the conduit loan directly come to

appellant, interest was paid to the bank by the group company/it's MD. It is respectfully submitted that the provision of section 40(a)(ia) are introduced to protect the evasion of taxes. There is no such case. The bank is a nationalized bank and ahs paid the taxes on the interest earned in its assessment. It is held by the Hon'ble Supreme Court that in case the tax is paid by the payee no disallowance can be made u/s 40(a)(ia). Assessee relies upon the judgment of the Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverage Pvt. Ltd. vs. CIT (293 ITR 226).

14. CIT(A) however, upheld the disallowance by relying on ITAT Mumbai Bench in the case of *Mahesh Enterprises vs. ITO* 42 SOT 125; ITAT Bangalore Bench in the case of Gaonkar Mines vs. Addl. CIT (9 Taxmann.com33) and upheld the action of assessing officer by further following observations:

"The ITAT, Delhi Bench 'H' Delhi in the case of DCIT vs. Umang Dairies Ltd. [36 SOT 383], after examining the objects stated for bringing such provisions on statute and memorandum explaining the provisions relating to direct taxes, has held that the expenditure claimed by the assessee could be allowed only if the assessee had paid TDS thereon. The decision of Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverage Pvt. Ltd. vs. CIT 9293 ITR 226), relied upon by the appellant, is in the context of provisions of section 201(1) and not in the context of section 40(a)(ia) of the Act, which are separate and distinct provisions meant for ensuring compliance to the provisions of Chapter XVII of the Act. Keeping in view the provisions of law and the decision of Jurisdictional ITAT in Umang Dairies Ltd. (supra), the A.O was fully justified in disallowing the interest of Rs. 49,87,440/- under section 40(a)(ia) of the Act since no TDS at all was made. Hence, the addition made by the A.O is upheld and this ground of appeal is dismissed."

Aggrieved, assessee is before us.

15. Ld. Counsel for the assessee relied on ITAT Visakhapatnam Special Bench judgment in the case of Merilyn Shipping & Transports vs. Addl. CIT (2012) 136 ITD 23 (Visakhapatnam) (SB), holding that what can be disallowed u/s 40(a)(ia) is only the outstanding balance as on 31st March of the year and cannot be invoked against payment made prior to 31st March of every year.

16. Ld. Counsel though pleaded that the Special Bench judgment has been reversed by the Hon'ble Calcutta and Madras High Courts. Hon'ble Allahabad High Court has taken a view in favour of Merilyn Shipping & Transports.

17. Since the issue in question has become debatable in view of Special Bench judgment and contrary judgments of High Courts, in the

interest of substantial justice we set aside this issue back to the file of assessing officer to verify whether the TDS has been deducted in the subsequent year and to decide the same in accordance with law keeping in view the latest legal position.

18. In the result, all the three appeals stand allowed for statistical purposes only.

Order pronounced in open court on 28-11-2013.
