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TAX REVIEW INTERNATIONAL

(Weekly Tax Journal)

Editor-in-Chief
Dr. Ikramul Haq
Editor
Mrs. Huzaima Bukhari

Case Laws

CIT, Delhi-III
v.
M/s. Orient Instrument P. Ltd.

ITA No. 37/HYD/2012
(Assessment Year: 2008-09)
ITA No. 1482/HYD/2012
(Assessment Year: 2009-10)

CIT
v.
Oriental Structural Engineers Pvt. Ltd.

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

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Tax News

Kind regards

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United States

CBPP: US 'Tax Extenders' Extension should be funded

With pressure growing on the United States Congress to agree to the annual renewal of the group of federal tax provisions requiring frequent annual renewal (the "tax extenders"), the Center on Budget and Policy Priorities (CBPP) has advised that, given current fiscal deficits, policymakers should make a firm commitment to provide funding for any extension of these provisions.

There are said to be some 64 tax provisions expiring on December 31 this year, some of more significance than others. However, the CBPP confirms that "paying for those tax extenders that Congress continues would have a significant impact on long-term deficits."

For businesses, the tax extenders available until end-2013 include increased expensing under Section 179 (full deduction on cost of qualifying equipment), the 50 percent bonus depreciation; the work opportunity tax credit; and the credit for research and development expenses. For individuals, they include mortgage tax relief, the deduction for state and local sales taxes, education tax deductions, and tax-free distributions from individual retirement accounts for charitable purposes.

US public debt amounts to 75 percent of gross domestic product (GDP) in 2013 and, assuming the tax extenders are continued but not paid for, the CBPP projects that it will climb under current policies to 99 percent of GDP in 2040. If policymakers were to offset the roughly USD50bn annual cost of continuing the tax extenders, it forecasts that the debt-to-GDP ratio would rise about 8 percent less, reaching 91 percent in 2040 and eliminating about one-third of the projected rise in the debt ratio by 2040 under current policies.

In addition, the CBPP feels that having to pay for the extension of any tax extenders would also improve tax policy decision-making. "Imposing the same type of fiscal discipline on the extenders that we impose on other budgetary measures would apply needed scrutiny," it says. "In addition, the need to pay for continuing those extenders that withstand scrutiny should provide a vehicle to pare some highly inefficient tax subsidies."

It is advised that "Congress should adhere to this 'pay-for' norm on tax extenders, whether it extends them in a stand-alone bill or as part of broader tax reform."

"While the primary reason to require offsets for the tax extenders is fiscal responsibility, such a move also should improve tax policy by subjecting these provisions to needed (and, in some cases, long overdue) scrutiny," the CBPP concludes. "Policymakers may decide that some extenders are not worth maintaining. And a commitment to paying for the extenders would nudge policymakers to address some weaknesses in the tax code as they searched for other revenues to offset the extenders." – *Courtesy tax-news.com*

Netherlands

Netherlands, Curaçao Seal Double Tax Deal

Dutch State Secretary for Finance Frans Weekers and Curaçao's Finance Minister José Jardim have reached an agreement on new bilateral arrangements, aimed at preventing double taxation between the Netherlands and Curaçao.

Both Ministers aim to submit a law to the Dutch Council of Ministers at the beginning of next year, and have therefore signed a letter of intent to this effect. Furthermore, Ministers Weekers and Jardim agreed that the Netherlands will support Curaçao in exchanging information, in accordance with the international standard developed by the OECD and the European Union.

According to the Dutch Finance Ministry, the arrangements provide for a new distribution of taxing rights in respect of pension income. On the basis of the new provisions, the Netherlands will be able to impose withholding tax on payments of pensions built up in the Netherlands, although received in Curaçao, upon emigration. Moreover, the Netherlands will be able to levy inheritance and gift tax for a period of up to five years, following emigration from the Netherlands to Curaçao.

In return, and of significant benefit for Curaçao, withholding tax will be waived for participation dividends. However, to prevent abuse of the regulation, additional requirements will be placed on shareholders in receipt of dividends.

Commenting, Curaçao's Finance Minister Jardim made clear that the deal offers stability and future prospects for Curaçao's financial sector. Further, it is important for the International Financial Sector in Curaçao that the new provisions maintain the link with the international market, Jardim emphasized.

Weekers welcomed in particular the fact that Curaçao has agreed to participate in automatic information exchange.

The new accord, which replaces the existing agreement between the two countries dating from 1964, is expected to enter into force on January 1, 2015. The Netherlands now aims to prepare new fiscal arrangements with Aruba and St Maarten. – *Courtesy tax-news.com*

United States

IRPAC report highlights US Tax Admin Recommendations

The Information Reporting Program Advisory Committee (IRPAC) has released its annual report for 2013, including numerous recommendations to the United States Commissioner of Internal Revenue on new and existing issues in tax administration.

IRPAC is a federal advisory committee that provides an organized public forum for discussion of tax administration issues. "In their report, IRPAC members provide valuable feedback to the IRS on a wide range of information reporting issues," the Internal Revenue Service (IRS) Acting Commissioner Danny Werfel said. "The IRS will carefully consider their recommendations."

For example, in the 2013 report, IRPAC recommends that the IRS should extend truncation of taxpayer identification numbers (TINs) to employer identification numbers, so as to protect further against identity theft and the misappropriation of sensitive personal information; and expand the TIN matching program to permit matching on a greater number of return types.

It also points out that the IRS could improve instructions to assist small businesses and reduce errors on the miscellaneous income Form 1099-MISC; and provide additional guidance with regard to merchant card reporting on the informational Form 1099-K.

IRPAC recommends again that the IRS adopt a USD50 de minimis dollar threshold for corrections to original information returns in an effort to reduce overall burden to information return filers, taxpayers and the IRS.

In addition, the committee has continued its request for more time and IRS guidance related to cost basis reporting that now must also take into consideration various taxpayer elections. In particular, it requires communication regarding cost basis reporting for debt instruments, specifically addressing

requirements, practices and capabilities for reporting market premium and discount. – *Courtesy tax-news.com*

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Netherlands

The Hague Lowers "User" Property Tax Rates in 2014

The Confederation of Netherlands Industry and Employers (VNO-NCW) has revealed that the Dutch city of The Hague is the only large municipality in the Netherlands to lower the property tax (*onroerende-zaakbelastingen – OZB*) rate imposed on users of non-residential property, or business premises, in 2014.

As part of efforts to support and attract entrepreneurs, The Hague has lowered its rate for users of office space and shop buildings to the tune of around 30 percent next year. Consequently, the tariff will drop from 0.17290 currently to 0.11930 next year (-31 percent).

Citing figures from a recent "Forum study" into 2014 property tax rates in the 11 largest municipalities in the Netherlands, the confederation noted that The Hague is the exception to the rule in terms of its decision to lower user OZB rates. Indeed, the Dutch municipalities of Rotterdam, Eindhoven, and Apeldoorn have all elected to increase their user OZB rates next year, above the so-called "macro-norm" central Government limit of 2.45 percent in 2014.

Rotterdam will increase its user OZB rate from 0.22670 in 2013 to 0.25290 in 2014, marking a rise of 11.6 percent, while Eindhoven will raise its user OZB tariff from 0.14028 in 2013 to 0.15200 in 2014 (up 8.4 percent), and Apeldoorn will increase its rate from 0.23010 in 2013 to 0.24610 in 2014, representing an on-year rise of 7 percent.

Concluding, VNO-NCW emphasized the correlation between high municipal debt levels and high OZB rates. Unsurprisingly, Rotterdam and Apeldoorn both have a high debt level per inhabitant, while The Hague is the only municipality with low municipal debt.

Municipal tax departments levy OZB property tax on all real estate (*onroerende zaken*), such as residential property and business premises. The tax departments base the tax assessment on the property value (*WOZ-waarde*) as at January 1 of each tax year. The owner or user then receives their tax assessment.

The tax departments differentiate between two types of property tax, namely residential property and non-residential property, for example, business premises, sheds, or garages. Only the owner of residential property is liable for the property tax. However, both users and owners have to pay the property tax for a non-residential property. – *Courtesy tax-news.com*

Taiwan

Taiwan approves Pilot Free Economic zone plans

President Ma Ying-jeou has given his approval to the second stage of the pilot free economic zones (FEZs) that are being established in Taiwan as part of its strategy to open up the island's economy through regulatory easing and open market access.

Taiwan's target in establishing its FEZs is to liberalize its trade, and upgrade its industrial structure, as an initial stage towards the bilateral and regional free trade treaties which are the Government's ultimate goal. The first phase earlier this year started with five free trade port zones – at Keelung, Taipei, Kaohsiung, Taichung and Suao Harbors.

High valued-added industries, such as international health care, education, financial services, agricultural processing and logistics, are the types of business activity to be promoted now within the FEZs. The FEZs will relax tax regulations on the duty-free imports and exports of raw materials, goods and services, and have fewer controls and limits on foreign investment into their areas.

According to President Ma, Taiwan remains 10 years adrift of its major trade competitors in terms of trade liberalization, and the FEZs are aimed at rectifying that situation in the shortest possible time. The second stage of their development will require

parliamentary approval, the bill for which is expected to be finalized shortly, with approval early next year.

Under the second stage, apart from more regulatory relaxation, Taiwanese companies will be exempt from taxes on net profits from their operations in the FEZs for a three-year period if they continue to invest in the zones, and foreign firms that operate warehouses or process goods in the zones will be exempt from business income tax on all exports and 10 percent of their imports, also for three years.

In addition, during the first three-year period, it has been agreed to provide income tax breaks for employees from overseas, including foreign professionals, working for companies operating in the FEZs. Those employees, and Taiwanese companies investing in the FEZs with earnings from overseas operations, will also be exempted from tax on their dividend income.

With regard to the liberalization aspects of the FEZs, Ma has reiterated that Taiwan has an urgent need to boost its efforts to take part in the current movements towards regional integration. He is expecting that all preparatory work for Taiwan's joining of the Trans-Pacific Partnership and the Regional Comprehensive Economic Partnership will have been completed by February 2014, so that the Government can press for its inclusion in on-going negotiations. – *Courtesy tax-news.com*

Switzerland

Switzerland to modify Income Withholding Tax Regime

The Swiss Federal Council has launched a consultation on plans to revise the levying of withholding tax at source on income derived from "lucrative" activity. As a result, the number of taxpayers currently taxed at source, and then subject to a subsequent ordinary tax assessment, is due to increase significantly.

Plans to revise the federal laws governing the withholding of tax at source are intended to eliminate existing inequalities vis-à-vis the tax treatment of individuals taxed at source and those subject to ordinary taxation, as well as to ensure compliance with international treaties.

Currently, the income from the lucrative activity of foreign workers living in Switzerland although without a permanent residence permit C (residents), and the income from the lucrative activity of persons neither domiciled nor resident in Switzerland (quasi-residents), are subject to withholding tax at source, with the

fiscal amount deducted directly by the employer. Non-residents working internationally are also subjected to withholding tax.

In January 2010, the Swiss Federal Court ruled that although the withholding tax regime is "justified," the provisions nevertheless contravene the agreement on the free circulation of persons, concluded with the European Union. Specifically, the Court insisted that individuals taxed at source and not domiciled in Switzerland, although who realize most of their global income in the Confederation (quasi-residents), are entitled to the same tax deductions as those subject to ordinary taxation in Switzerland. The Federal Council deemed that modifications to Swiss federal law are therefore necessary.

Consequently, the Federal Council has proposed significantly lowering the gross income threshold above which resident taxpayers taxed at source are required to submit a subsequent ordinary tax assessment. The current threshold for direct federal tax and for cantonal and communal tax (with the exception of the canton of Geneva) is CHF120,000 (USD135,287) a year.

In addition, residents taxed at source and whose gross revenue is below the future fixed threshold will also be able to request a subsequent ordinary tax assessment.

Similarly, foreign employees not residing or domiciled in Switzerland will be able to request a subsequent ordinary tax assessment under the plans, provided that most of their universal income is generated in Switzerland (quasi-residents).

Withholding tax at source is nevertheless maintained for all categories of persons concerned. For non-residents, it replaces individual income tax.

By guaranteeing that both residents and quasi-residents are able to request a subsequent ordinary tax assessment, the Federal Council believes that this will guarantee entitlement to the same deductions as those already subject to ordinary taxation.

The consultation is due to end on March 27, 2014. – *Courtesy tax-news.com*

Belgium

Belgium paves way for 'Additional Regional Tax'

On the recommendation of Belgian Finance Minister Koen Geens, the Council of Ministers has approved a bill modifying the

country's income tax code (CIR 92), to allow the imposition of an additional regional tax on individual income tax, from 2015.

The additional regional tax is provided for under III/I of the special law from January 16, 1989, relating to the financing of Belgium's Communities and Regions.

Belgium's Special Finance Act for the Communities and Regions has been reformed, expanding the fiscal autonomy of the Regions. Consequently, the Regions will be able to levy additional taxes on a portion of individual income tax, accord tax reductions, apply tax increases and tax reductions, and grant reimbursable tax credits.

Furthermore, the Regions will be given exclusive competencies for certain tax breaks.

The fiscal autonomy granted to the Regions amounts to a quarter of all personal income tax revenues, boosting the share of regionally-determined tax revenues from an average of below 50 percent, to an average of 70 percent, with the highest share in the Flemish Region.

The bill has now been submitted to the State Council for its examination. – *Courtesy tax-news.com*

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*

Switzerland

Switzerland adopts EU aavings tax mandate

The Swiss Federal Council has adopted the mandate for negotiations regarding a revision of the taxation of savings agreement with the European Union (EU). The competent parliamentary committees and the cantons were consulted on the draft mandate beforehand.

In May 2013, the ECOFIN Council (Council of EU finance ministers) instructed the European Commission to initiate negotiations on the revision of the existing taxation of savings agreement with Switzerland.

The EU's aim is to ensure that the amendment of this agreement is in line with the planned revision of the European Union Savings Directive. The revision is designed to close loopholes in order to prevent the taxation of interest income from being circumvented by using intermediary companies or certain financial instruments.

Commenting, the Swiss Federal Department of Finance (FDF) said that: "Switzerland has been willing to discuss a revision of the agreement since 2009. However, an amendment of the accord should be agreed only if, within the framework of the EU's MiFID regulatory project, a satisfactory solution is found with respect to how the regulation of third country regimes is structured for the provision of cross-border financial services."

The FDF explained: "In terms of content, the taxation of savings agreement is to be amended from a technical viewpoint, based on the existing coexistence model, i.e. retention tax with voluntary disclosure as an alternative. The precise content of the negotiation mandate is confidential."

Negotiations between the Confederation and the European Commission are due to commence at the start of 2014. – *Courtesy tax-news.com*

Mexico

Mexican Tax Reforms Gazetted

Mexico's much-anticipated tax reform bill, which includes measures affecting the direct and indirect taxation of corporate taxpayers, has been published in the country's Official Gazette, completing the enactment procedures.

The reforms, passed by Congress in October 2013, cancel a phased cut in corporate income tax, enacted under previous legislation. This would have cut corporate tax by 1 percent to 29 percent in 2014 and by a further 1 percent to 28 percent in 2015. However, as a result of the new bill, corporate tax will remain at 30 percent in 2014 and subsequent years. A 10 percent tax will also apply dividend payments made by Mexican resident companies to non-treaty countries and capital gains realized from the sale of shares listed on the Mexican stock exchange from next year. However, the 17.5 percent alternative minimum tax, also known as the "flat tax," or IETU, has been abolished.

Many of the Government's VAT reform proposals failed to make the final draft. The most significant change that withstood parliamentary debate is to the VAT rate levied in border provinces, which is to rise from 11 percent to equal the headline VAT rate levied in the remainder of the country, 16 percent, from January 1, 2014.

Important changes are also made to Mexico's maquiladora tax regime. Maquiladoras are Mexican companies that process, transform, assemble or repair imported materials, parts and components into finished goods that are subsequently exported out of the country. So long as they meet certain requirements, these companies have been permitted to import the goods needed to carry out their production activities free of customs duty or import value-added tax and pay lower rates of corporate tax. They are also exempt from Mexico's permanent establishment rules.

The changes gazetted this month tighten the qualification criteria for a company to avail of the maquiladora regime. As originally proposed, the tax reform bill would have required that maquiladoras derive 90 percent of their turnover from exports to qualify for the permanent establishment exemption. This was amended in the legislative process to require that a maquiladora's income associated with "productive activities" be derived solely from its maquila activities for the maquiladora to qualify for the permanent establishment exemption, and not include sales of products directly to Mexican customers. There is some uncertainty as to the precise definition of "productive activities," although the Government intends to issue guidance on this change in due course. Additionally, only two transfer pricing methods are available for maquiladoras–a safe harbor method and a possibility of an advance pricing agreement (APA) from the tax administration.

In a last-minute u-turn, it was agreed that goods produced within maquiladoras that are sold to non-residents would remain exempt from VAT. Temporary imports to maquiladoras, used by companies to make taxable supplies, will newly incur input VAT. However, this input VAT will be fully and immediately refunded through a 100 percent tax credit. It had previously been proposed that input VAT be recoverable only after the relevant consignment is exported. Instead, the Government has committed to up oversight of companies based in maquilas.

Proposals to add food and medicines to the VAT base were earlier abandoned. However the Government confirmed that it would proceed with the introduction of VAT on sugary drinks, pet food and chewing gum. A greater number of entertainment services and international transporation services will also be added to the VAT base.

In some other key tax changes affecting businesses: the current consolidation regime will be abolished and replaced by a new version; a new foreign tax credit system will be introduced; foreign residents claiming treaty benefits will have to appoint a Mexican tax resident; there will be no deduction allowed for related-party payments abroad if the payments are subject to an effective rate of less than 75 percent of the Mexican corporation tax rate; the immediate expensing of certain investment will be disallowed, while certain other deductions will also be restricted.

The tax reform package also introduces changes to the mining tax regime, most notably an increase in the mining royalty to 7.5 percent (8 percent for miners of precious metals), and a new 10 percent per year depreciation schedule, which replaces the 100 percent first-year deduction for pre-mining expenses previously in place. – *Courtesy tax-news.com*

Unites States

Baucus Presents US energy tax reform proposals

Senate Finance Committee Chairman Max Baucus (D – Montana) has issued a fourth United States tax reform discussion draft, containing a package of proposals that focuses on streamlining energy tax incentives so they are "more predictable, rational and technology-neutral."

"It is time to bring our energy tax policy into the 21st century," Baucus said. "Our current set of energy tax incentives is overly complex and picks winners and losers with no clear policy rationale. We need a system of energy incentives … to increase our energy security and ensure a clean and healthy environment for future generations."

The discussion draft concentrates on reforming the current set of energy related US tax preferences. Under current law, it is said that there are 42 different energy tax incentives, including more than a dozen preferences for fossil fuels, ten different incentives for renewable fuels and alternative vehicles, and six different credits for clean electricity.

Of the 42 different energy incentives, 25 are temporary and the credits for clean electricity alone have been adjusted 14 times since 1978. If US Congress were to continue to extend all of the current energy incentives, the total revenue cost would be nearly USD150bn over the next 10 years.

To address these issues, Baucus' discussion draft proposes "a smaller number of targeted and simple energy incentives that are flexible enough to accommodate advances among fuels and technologies of any type – whether renewable, fossil, or anything in between. The proposals are intended to promote domestic energy production and reduce pollution."

Specifically, the suggested measures would be to establish two new, technology-neutral tax credits for the domestic production of clean electricity and for the domestic production of clean transportation fuel; and to consolidate almost all of the existing energy tax incentives into these two new credits, with appropriate transition relief.

The tax credit for the domestic production of clean electricity would be based on the principle that "the cleaner the facility, the larger the credit." Any facility producing electricity that is about 25 percent cleaner than the average for all electricity producing facilities would receive a tax credit. It would be open to all types of energy resources and available as either a production tax credit of up to 2.3 cents/kwh or an investment tax credit of up to 20 percent.

The tax credit for the domestic production of clean transportation fuel would again be based on the same principle and be open to all types of energy resources. It would be available either as a production tax credit of up to USD1/gallon or an investment tax credit of up to 20 percent.

Businesses and investors would be provided with more certainty by making the new incentives long enough to be effective, but phasing them out over four years once the greenhouse gas intensity of each market has declined by 25 percent.

As with his other tax reform discussion drafts, Baucus asked for additional feedback from members of Congress, key stakeholders and the general public on the discussion draft, by January 31, 2014. – *Courtesy tax-news.com*

2013 TRI 2009 (H.C. Del.)

HIGH COURT OF NEW DELHI

S. Ravindra Bhat and Najmi Waziri, JJ.

CIT, Delhi-III
v.
M/s. Orient Instrument P. Ltd.

FACTS/HELD

Loss from shares dealing cannot be deemed to be from "speculation" under Explanation to section 73 if company is not engaged in the "business" of shares dealing

1. The assessee, engaged in the business of trading of crafts paper etc claimed a loss of Rs. 5.53 lakhs arising on account of a transaction whereby it purchased and sold shares. The AO held that under the Explanation to s. 73, the said loss was deemed to be arising from a speculation business and could not be set off against other business profits. However, the CIT(A) and Tribunal allowed the assessee's claim on the basis that the assessee was not engaged in the "business of purchase and sale of shares" so as to fall into the mischief of the Explanation to s. 73. In appeal before the High Court, the department relied on Bhikam Chand Jankilal 131 ITR 554 (MP) and argued that even a single transaction of sale or purchase of shares might amount to a "business". HELD by the High Court dismissing the appeal:

   > The assessee was engaged in the business of trading of crafts paper, installation, job work, consultancy and commission. By all means, the transaction whereby it purchased the shares and incurred loss on account of the fall in the value of the share was a solitary one. The findings of the Tribunal that the transaction did not constitute the business carried on by the company, cannot be termed as perverse or unreasonable. No substantial question of law arises (Standipack 350 ITR 251 (Cal) noted)

   Appeal dismissed.

ITA No. 112 of 2000.

Decided on: 20th November, 2013.

Present at hearing: Sanjeev Sabharwal, Sr. Standing Counsel, for Appellant. Dr. Rakesh Gupta with Rishabh Kapoor, Advocates, for Respondent.

JUDGMENT

S. Ravindra Bhat, J.–

1. The following substantial question of law was framed at the time of admission of this appeal:–

> *"Whether the Tribunal was justified in its interpretation of the explanation to Section 73 of the Income-tax Act 1961?"*

2. The assessee in the present case at the relevant time was engaged in the business of trading of crafts paper, installation, job work, consultancy and commission etc. It reported Rs. 5,53,500/- as loss for the relevant period AY 1991-92 on account of a transaction whereby it purchased and sold shares. The Assessing Officer was of the opinion that this amounted to a speculative transaction and consequently the loss could not be set off against the assessee's profits earned from other businesses. The disallowance was carried in appeal unsuccessfully by the assessee. The Appellate Commissioner returned the findings that the assessee was not engaged inter alia in the business of purchase and sale of shares so as the fall into the mischievous transaction under Section 73. The Appellate Commissioner took into consideration the Resolution of the company made at the relevant time on 30.10.1990 and also the fact that it was engaged in other business. The Appellate Commissioner dismissed the assessee's appeal and the matter was carried in further appeal to the ITAT which accepted the assessee's appeal.

3. Mr. Sanjeev Sabharwal, Sr. Standing Counsel for the Revenue urges that the transaction in question was a speculative one falling within the Explanation to Section 73(4). He placed reliance upon the decision of Madhya Pradesh High Court reported as *Commissioner of Income Tax v. bhikam Chand Jankilal*, 131 (1981) ITR 554 to say that even a single transaction of sale or purchase of shares might amount to business. Counsel for the assessee Dr. Rakesh Gupta, on the other hand, relied upon the decision of the Calcutta High Court reported as *Standipack Pvt. Ltd v. Commissioner of Income Tax* (2013) 350 ITR 251 (Cal.) in support of this submission.

4. In the present case, the facts are that the assessee was engaged in the business of trading of crafts paper, installation, job work, consultancy and commission. By all means, the transaction whereby it purchased the shares and incurred loss on account of the fall in the value of the share was a solitary one. The findings of the Tribunal that the transaction did

not constitute the business carried on by the company, cannot be termed as perverse or unreasonable. In the circumstances, the Court is satisfied that no substantial question of law arises.

5. The appeal is accordingly dismissed.

2013 TRI 2011 (Trib. Ind.)

INCOME TAX APPELLATE TRIBUNAL
HYDERABAD "B" BENCH, HYDERABAD

Chandra Poojari, Accountant Member and Asha Vijayaraghavan, Judicial Member

FACTS/HELD

Section 32(1)(ii): Any right (including leasehold rights) which enables carrying on business effectively and profitably is an "intangible asset" & eligible for depreciation

1. The assessee paid a sum of Rs. 60 lakhs to acquire leasehold rights to premises. The assessee claimed that the said leasehold rights were an "intangible asset" and eligible for depreciation u/s 32(1)(ii). The AO & CIT(A) rejected the claim of the assessee. On appeal by the assessee to the Tribunal HELD allowing the appeal:

   S. 32(1)(ii) allows depreciation on "business or commercial rights" The expression "business or commercial rights" means rights obtained for effectively carrying on business or commerce. Commerce is a wider term which encompasses business in its fold. Therefore, any right which is obtained for carrying on business effectively and profitably has to fall within the meaning of the term "intangible asset" (Kotak Forex Brokerage Ltd 33 SOT 237(Mum) & Smifs Securities Ltd 348 ITR 302 (SC) followed)

Order accordingly.

ITA No. 37/HYD/2012 (Assessment Year: 2008-09) ITA No. 1482/HYD/2012 (Assessment Year: 2009-10)

Heard on: 18th June, 2013.

Decided on: 28th June, 2013.

Present at hearing: B. Satyanarayana Murthy, for Appellant. Amisha S. Gupt, for Respondent in ITA No. 37/HYD/2012. Amisha S. Gupt, for Appellant. B. Satyanarayana Murthy, for Respondent in ITA No. 1482/HYD/2012.

JUDGMENT

Per Asha Vijayaraghavan:– (Judicial Member)

The appeal being ITA No. 37/H/12 by the assessee and appeal being ITA No. 1482/Hyd/12 by the revenue are directed against separate orders of CIT(A) for the assessment years 2008-09 and 2009-10 respectively.

ITA No. 37/Hyd/12 – appeal by the assessee

2. Briefly the facts of the case are that the assessee is a company engaged in the business of retail trading in electronic goods and home appliances. For the AY 2008-09, it filed return of income on 30/12/2008, showing income of Rs. 3,75,45,760/-. During the course of assessment proceedings, the AO found that the assessee had debited a sum of Rs. 15.00 lakhs to the profit and loss account, showing as goodwill amortized. On the query raised by the AO for justifying such claim of deduction, the assessee had submitted that the said amount was paid to one M/s Krishna Electronics, Vijayawada, towards transfer of leasehold rights of premises to the assessee. It was stated that total amount of Rs. 60,00,000/- was paid by them for transfer of leasehold rights for Vijayawada Branch and since the benefit of such payment is over a period of time, the company decided to defer recognizing such expenditure over a period of four years and, hence, Rs. 15 lakhs was written off during the current year. The learned AR of the submitted that the expenditure was wholly and exclusively for the purpose of business of the company and, hence, the same is deductible u/s 37 of the Act, and the same also falls under intangible asset as per the provisions of section 32(1)(ii) and is eligible for depreciation @ 25%. The assessee had requested the AO to allow the depreciation as the company had not claimed depreciation due to inadvertence. The AO, however, rejected the claim of the assessee and observed that the Act does not recognize goodwill as intangible asset. The AO, however, pointed out that the assessee had not shown such expenditure under fixed assets, but had shown the goodwill in the balance sheet as miscellaneous expenditure and, hence, the assessee has not recognized the same as asset. The AO did not allow deduction u/s 37 of the Act towards the same and added the amount of Rs. 15 lakhs to the income of the assessee.

3. On appeal, the CIT(A) held that in the absence of any documentary evidence including copy of agreement from the assessee, it is difficult to believe that the said amount had been paid for transfer of leasehold rights of such premises. The CIT(A) concurred with the view taken by the AO. The CIT(A) observed that the assessee has however

separately shown such payment under miscellaneous expenditure in the balance sheet and, therefore, cannot be allowed as deduction u/s 32(1)(ii) of the Act, the same cannot be treated as intangible asset. Accordingly, the CIT(A) confirmed the order of the AO in making the addition of Rs. 15 lakhs towards income of the assessee.

4. Aggrieved the assessee is in appeal before us.

5. Ground No. 1 is general in nature. Ground Nos. 4 & 5 regarding the addition of Rs. 8,46,440/- and disallowance of amount of Rs. 2,33,000/- have not pressed by the learned counsel for the assessee, therefore, the same are dismissed as not pressed.

6. The substantive grounds to adjudicate are ground Nos. 2 & 3 wherein it was stated that the amount of Rs. 15 lakhs qualifies for inclusion under the head intangible asset as provided u/s 32(1)(ii) of the Act and has entitled to depreciation @ 25% on Rs. 60.00 lakhs.

7. We have heard the arguments of both the parties, perused the record and have gone through the orders of the authorities below. We find that the issue in dispute is squarely covered by the decision of the Tribunal, Mumbai in the case of *Kotak Forex Brokerage Ltd. vs ACIT* (33 SOT 237)(Mum.). In this case, the assessee paid an amount of Rs. 1.88 crore towards the use of the name 'Kotak' and claimed depreciation thereon terming it as depreciation on goodwill. The Tribunal held that business or commercial rights are rights obtained for effectively carrying on the business or commerce. Commerce is a wider term, which ncompasses business in its fold. Therefore, any right which is obtained for carrying on the business effectively and profitably has to fall within the meaning of intangible asset. The Tribunal held that goodwill was similar to the specified assets and accordingly the assessee was allowed depreciation. The Hon'ble Supreme Court in the case of *CIT vs. Smifts Securties Ltd.* held that goodwill is an intangible asset eligible for depreciation u/s 32 of the Act. In these circumstances, we remit the issue to the file of the AO to decide the issue in the light of the said decisions to consider the allowability of depreciation on intangible assets after getting bifurcation of payment of Rs. 75 lakhs and to allow depreciation on the goodwill @ 25%.

8. In the result, appeal being ITA No. 37/Hyd/12 is partly allowed for statistical purposes.

ITA NO. 1482/Hyd/12 – appeal by the revenue

9. In this case, the CIT(A) has held that the assessee had taken the transfer of lease hold rights of M/s Krishna Electronics, Vijayawada, which is running its business along with equipments, interiors and good will, and in turn paid Rs. 75,00,000/- as consideration. Accordingly, the assessee amortized Rs. 15,00,000/- by showing only Rs. 60,00,000/- as

consideration and the assessee had claimed depreciation at 25%. The CIT(A) held that the assessee has taken possession of premises along with plant and machinery, furniture & fittings, and also lease rent paid, which is not disputed by the AO. Therefore, running business of the assessee at Vijayawada premises in which M/s Krishna Electronics is running the same business of electronic goods and handed over as it is, 'as is where is' basis. In turn the assessee has paid an amount of Rs. 75 lakhs as per the agreement. The CIT(A) held that this amount includes certain plant & machinery like, air conditioners, computers and furniture & fittings and goodwill. Therefore, the CIT(A) categorized the entire amount of Rs. 75 lakhs in the least of block of assets as furnitures & fittings and allowed depreciation @ 10% on the amount of Rs. 75 lakhs.

10. Aggrieved, the revenue is in appeal before us raising a ground that the CIT(A) has wrongly given 10% depreciation on the amount of Rs. 75 lakhs.

11. In the grounds of appeal before the CIT(A) at ground No. 3 the assessee himself has submitted that the learned AO should have appreciated that during the previous year relevant to the AY 2008-09 the amount of Rs. 60 lakhs paid by the assessee company for deduction of Rs. 15 lakhs in question qualifies for inclusion under the head 'intangible asset' as provided u/s 32(1)(ii) and is entitled to a depreciation @ 25% on intangible assets. Hence, we direct the AO to allow depreciation on goodwill at 25% on the intangible assets and with respect to furniture and fittings depreciation to be allowed at 10% since they fall under block of assets as furniture and fittings. The assessee is directed to give bifurcation of good will and furniture and fittings.

12. In the result, appeal of the revenue being ITA No. 1482/Hyd/12 is partly allowed.

13. To sum up, the appeal being ITA No. 37/Hyd/12 is partly allowed for statistical purposes and the appeal being ITA No. 1482/Hyd/12 is partly allowed.

Pronounced in the open court on 28/06/2013.

———————

2013 TRI 2015 (H.C. Del.)

HIGH COURT OF NEW DELHI

Badar Durrez Ahmed and R.V. Easwar, JJ.

CIT
v.
Oriental Structural Engineers Pvt. Ltd.

FACTS/HELD

Section 14A & Rule 8D: Expenditure on acquiring shares out of "commercial expediency" & to earn taxable income cannot be disallowed

1. The assessee borrowed funds and invested Rs 6 crore in shares of subsidiary companies. It claimed that the said subsidiaries were Special Purpose Vehicles (SPVs) formed out of "commercial expediency" in order to obtain contracts from the NHAI and that the SPVs so formed engaged the assessee as contractor to execute the works awarded to them (i.e. SPVs) by the NHAI. It was pointed that the turnover from the execution of the contracts was shown in the P&L A/c. It was claimed that the interest attributable to the investments made by the assessee in the SPVs could not be disallowed u/s 14A read with Rule 8D because it could not be termed as expense /interest incurred for earning exempted income. The CIT(A) and Tribunal (order attached) upheld that assessee's claim and held that as the investments in the shares were made out of "commercial expediency" the expenditure incurred for that purpose could not be disallowed u/s 14A and Rule 8D. On appeal by the department to the High Court HELD dismissing the appeal:

   > This is merely a question of fact and does not involve any question of law much less a substantial question of law, as the Tribunal held that the expenses which have been claimed by the assessee were not towards the exempted income

Appeal dismissed.

ITA No. 605 of 2012.

Decided on: 15th January, 2013.

Present at hearing: Sanjeev Sabharwal, Sr. Standing Counsel, for Appellant. Rajat Navet with Prachi V. Sharma, Advocates, for Respondent.

JUDGMENT

This appeal has been preferred by the revenue against the order dated 02.12.2011 passed by the Income Tax Appellate Tribunal, New Delhi in ITA No.4245/Del/2011 in respect of the assessment year 2008-09. The issue before the Tribunal, which is also an issue before us, was whether in the facts and circumstances of the case the Commissioner of Income Tax (Appeals) had erred in restricting the disallowance under section 14A of the Income Tax Act, 1961 to 2% of dividend income of Rs. 20,27,812/-.

It was the contention of the revenue that Rule 8D of the Income Tax Rules, 1962 had not been applied properly in respect of the assessment year 2008-09. This aspect has been considered by the Tribunal in detail and it has observed as under:–

> '6.3 We have carefully considered the submissions and perused the records. We find that Ld. Commissioner of Income Tax (Appeals) has given a finding that only interest of Rs 2,96,731/- was paid on funds utilized for making investments on which exempted income was receivable. Further, Ld. Commissioner of Income Tax (Appeals) has observed that in respect of investment of Rs 6,07,775,000/- made in subsidiary companies as per documents produced before him, they are attributable to commercial expediency, because as per submission made by the assessee, it had to form Special Purpose Vehicles (SPV) in order to obtain contracts from the NHAI and the SPVs so formed engaged the assessee company as contract to execute the works awarded to them (i.e. SPVs) by the NHAI. In its profit and loss account for the year, the assessee has shown the turnover from execution of these contracts and therefore no expense and interest attributable to the investments made by the appellant in the PSVs can be disallowed u/s 14A r.w. Rule 8D because it cannot be termed as expense/interest incurred for earning exempted income. Under the circumstances, Ld. Commissioner of Income Tax (Appeals) is correct in holding that disallowance of a further sum Rs 40,556/- calculated @ 2% of the dividend earned is sufficient. Under the circumstances, we do not find any infirmity in the order of the Ld. Commissioner of Income Tax (Appeals), hence we uphold the same.'

On going through the above observations we are of the view that this is merely a question of fact and does not involve any question of law much less a substantial question of law, as the Tribunal held that the expenses

which have been claimed by the assessee were not towards the exempted income. The disallowance, therefore, was rightly limited to a sum of Rs 40,556/-. The question of interpreting Rule 8-D is not in dispute and the only dispute is with regard to facts which have been settled by the Tribunal.

The appeal is dismissed.

INCOME TAX APPELLATE TRIBUNAL
DELHI "E" BENCH, DELHI

A.D. Jain, Judicial Member and Shamim Yahya, Accountant Member

Appeal dismissed.

I.T.A. No. 4245/Del/2011 (Assessment Year : 2008-09)

Decided on: 2nd December, 2011.

Present at hearing: R.S. Negi, Sr. D.R., for Appellant. K.V.S.R. Krishna, CA, for Respondent.

JUDGMENT

Per Shamim Yahya:– (Accountant Member)

This appeal by the Revenue is directed against the order of the Ld. Commissioner of Income Tax (Appeals) dated 30.5.2011 pertaining to assessment year 2008-09.

2. The grounds raised read as under:–

"1. That on the facts and circumstances of the case and in law the Ld. Commissioner of Income Tax (Appeals) has erred in restricting the disallowance u/s 14A to Rs. 40,556/- (@2% of dividend income) and not applying Ruled 8D of the Income Tax Rules which is mandatory from A.Y. 2008-09.

2. That on the facts and circumstances of the case and in law the Ld. Commissioner of Income Tax (Appeals) has erred by ignoring the ratio decided in case of Godrej and Boyce Manufacturing Co. Ltd. DCIT (2010) 234 (Bom.).

3. That on the facts and circumstances of the case and in law the Ld. Commissioner of Income Tax (Appeals) has erred in deleting the disallowance made by the Assessing Officer on account of Director's Travelling without considering whether any identifiable benefit accrued to the business.

4. That on the facts and circumstances of the case and in law the Ld. Commissioner of Income Tax (Appeals) has erred by

ignoring the fact that the assessee did not provide any material to support that the expenditure is a business expense.

5. That on the facts and circumstances of the case and in law the Ld. Commissioner of Income Tax (Appeals) has erred in deleting the disallowance on account of VAT not paid before the due date of filing of the return of income and by ignoring the provisions of section 43B of the IT Act, 1961.

6. That the appellant craves to be allowed to add any fresh grounds of appeal and / or delete or demand any of the grounds of appeal."

3. Apropos disallowance u/s 14A

In this case return of income had filed on 30.9.2008 declaring an income of Rs. 67,14,94,245/-. The assessment was framed u/s 143(3) of the IT Act at an income of Rs. 68,05,79,170/-. In the assessment order Assessing Officer disallowed the expenses related to exempt income u/s 14A r.w. Rule 8D amounting to Rs. 35,85,121/-.

4. Upon assessee's appeal Ld. Commissioner of Income Tax (Appeals) considered the issue and held as under:–

> "I have considered the submission of the appellant and also gone through the observations of the Assessing Officer as contained in the assessment order, as well as the judicial pronouncements on the issue.
>
> It is seen that during the year under consideration even though the appellant company has made borrowings from banks and financial institutions on which it had paid interest, investments in Mutual Funds and Short Term Funds were made out of surplus funds available with the appellant from time to time as per the Bank Statements produced. Only the interest of Rs. 2,96,731/- was paid on funds utilized for making investments on which exempted income was receivable (as admitted by the appellant during the course of appellate proceedings) and hence the same is treated as expense attributable to exempt income.
>
> In respect of investments of Rs. 6,07,775,000/- made in subsidiary companies as per documents produced before me, they are attributable to commercial expediency, because as per submission made by the appellant, it had to form Special Purpose Vehicles (SPVs) in order to obtain contracts from the NHAI and the SPVs so formed engaged the appellant company as contract to execute the works awarded to them (i.e. SPVs) by the NHAI. In its profit and loss account for the year, the appellant has shown the turnover from execution of these contracts and therefore no expense and interest attributable to the investments made by the appellant in the SPVs can be

disallowed u/s 14A r.w. Rule 8D because it cannot be termed as expense /interest incurred for earning exempted income.

In view of the facts mentioned above:–

(i) Interest expenses amounting to Rs. 2,96,731/- have been directly found to be incurred for earning exempt income and hence disallowed u/s 14A.

(ii) Further, the company has earned dividend in respect of investments made and some administrative expenses like management's salary, telephone, stationery, postage expenses, etc. must have been incurred thereon. Keeping in view the aforesaid, I am of the opinion that addition of Rs. 40,556/- calculated @ 2% of the dividend earned has to be made i.e. 2% of Rs. 2,027,812/-. Hence, addition made by the Assessing Officer is upheld to the extent of Rs. 3,37,287/- (Rs. 2,96,731/- + Rs. 40,556/-.) This ground of appeal is partly allowed.

5. Against the above order the Revenue is in appeal before us.

6. We have heard the rival contentions in light of the material produced and precedent relied upon.

6.1 Ld. Departmental Representative relied upon the order of the Assessing Officer.

6.2 Ld. counsel of the assessee supported the order of the Ld. Commissioner of Income Tax (Appeals). He placed reliance upon the Hon'ble Jurisdictional High Court decision in the case of *Maxopp Investment Ltd. vs. C.I.T.* in ITA NBo. 687/2009 wherein vide order dated 18.11.2011 the Hon'ble Jurisdictional High Court has expounded that determination of the amount of expenditure in relation to exempt income under Rule 8D would only come into play when the Assessing Officer rejects the claim of the assessee in this regard. It is further expounded that condition precedent for the Assessing Officer to himself determine the amount of expenditure is that he must record his dissatisfaction with the correctness of the claim of expenditure made by the assessee or with the correctness of the claim made by the assessee that no expenditure has been incurred. It is only when this condition precedent is satisfied that the Assessing Officer is required to determine the amount of expenditure in relation to income not includable in total income in the manner indicated in sub-rule (2) of Rule 8D of the said Rules.

6.3 We have carefully considered the submissions and perused the records. We find that Ld. Commissioner of Income Tax (Appeals) has given a finding that only interest of Rs. 2,96,731/- was paid on funds utilized for making investments on which exempted income was receivable. Further, Ld. Commissioner of Income Tax (Appeals) has observed that in respect of investment of Rs. of Rs. 6,07,775,000/- made in

subsidiary companies as per documents produced before him, they are attributable to commercial expediency, because as per submission made by the assessee, it had to form Special Purpose Vehicles (SPVs) in order to obtain contracts from the NHAI and the SPVs so formed engaged the assessee company as contract to execute the works awarded to them (i.e. SPVs) by the NHAI. In its profit and loss account for the year, the assessee has shown the turnover from execution of these contracts and therefore no expense and interest attributable to the investments made by the appellant in the SPVs can be disallowed u/s 14A r.w. Rule 8D because it cannot be termed as expense /interest incurred for earning exempted income. Under the circumstances, Ld. Commissioner of Income Tax (Appeals) is correct in holding that disallowance of a further sum Rs. 40,556/- calculated @2% of the dividend earned is sufficient. Under the circumstances, we do not find any infirmity in the order of the Ld. Commissioner of Income Tax (Appeals), hence, we uphold the same.

7. Apropos next issue Director's Travelling

Assessing Officer on this issue noted that assessee has claimed Director's Travelling of Rs. 21,24,882/-. Assessing Officer observed that from the examination of the details it was observed that for following visits made no correspondence or material has been submitted to the support the expenditure is a business expense.

S.No.	Visits	Expenditure incurred
1.	Mr. K.S. Bakshi, Managing Director Visited London/USA during May/June, 2007	Rs. 2,95,292/-
2.	Mr. K.S. Bakshi, Managing Director Visited USA in June, 2007.	Rs. 41,748/-
	Total	Rs. 3,37,040/

Assessing Officer held that in the absence of proper supporting document for this expenditure, the amount of Rs. 3,37,040/- is disallowed.

8. Before the Ld. Commissioner of Income Tax (Appeals) assessee submitted as under:–

> "In our submission dated 10.8.2010 to Assessing Officer, we have submitted detailed chart in which all relevant information regarding Director's travelling i.e. Name of the Directors, Destination, Purpose of Travelling, Name of the Airways, Bill No., Date and amount were mentioned. All the above details were duly supported by the travelling bills.
>
> Assessing Officer in his order has mentioned that, "…. no correspondence or material has been submitted to support that the expenditure is business expenditure."

> Assessing Officer is wrong in stating that no correspondence or material has been submitted. Probably Assessing Officer has not gone through all the details and supporting properly.
>
> The supporting in regard to Foreign travel expenses disallowed are already submitted in our previous submission dated 17.3.2011."
>
> "The purpose of visit was to attend meeting with senior officials of Leighton Contractors Mauritius for discussions on progress of work in regard to Agra and Indore SPV's."

9. Considering the above Ld. Commissioner of Income Tax (Appeals) held that the foreign travel expenses disallowed by the Assessing Officer was incurred for the purpose of business of the assessee and he has explained both in assessment and appellate stages and the disallowance made by the Assessing Officer was not satisfied and the same was deleted.

10. Against the above order the Revenue is in appeal before us.

11. We have heard both the counsel and perused the records. We find that assessee has given sufficient details regarding the foreign travel expenditure. The disallowance in this regard cannot be sustained. Hence, we do not find any infirmity in the order of the Ld. Commissioner of Income Tax (Appeals) and uphold the same.

12. Apropos next issue disallowance on account of VAT

On this issue Assessing Officer noted as per the Tax Audit Report VAT liability of Rs. 1,51,200/- has not been paid by the assessee company stating that there is refund due to the assessee as per the legal opinion. Assessing Officer held that as the liability has not been paid before the due date of filing of the return the same has to be added to the income of the assessee.

13. Upon assessee's appeal Ld. Commissioner of Income Tax (Appeals) noted the submissions of the assessee as under:–

> "As per Tax Audit Report VAT liability of Rs. 1,51,200/- has not been paid by the assessee. As stated by Assessing Officer in the order, assessee has stated that there is refund due to assessee as per legal opinion and therefore there was no liability outstanding in actual. This liability is in respect of sale of equipment amounting to Rs. 37,80,000/- for which liability was debited to party as recoverable and not debited in P&L A/c. This is to bring to your kind notice that the liability outstanding was regarding A.Y. 2006-07, the details of the case are as follows:-
>
> – Assessee company had received a sum of Rs. 3,04,19,803/- on account of work contract executed and on account of sale of

earth moving equipment worth Rs. 37,80,000/- (on which VAT @4% i.e. 1,51,200/- has not been deposited).

– Assessee company had entered into a contract agreement with M/s Simplex Infrastructure Ltd. for executing the construction and development work at Central Park II in the capacity of principal contractor and sub-contractor.

– As per agreement and assignment deed M/s Simplex Infrastructure Ltd. was liable to perform the said agreement.

– It was contended by assessee that, as during the execution of the works property in goods has been transferred only once i.e. at the time of execution of works at the hands of sub contractor i.e. M/s Simplex Infrastructure, hence if the sub contractor has discharged his tax liability in respect of work executed, no tax was payable by the main contractor i.e. assessee company.

– This is to inform you that stand of assessee has been considered and order dated 31.3.2010 u/s. 15(3) of the HVAT has been issued by Excise and Taxation Officer cum Assessing Authority, Gurgaon (East). As per the assessment order issued there was refund due to assessee instead of VAT payable.

– Keeping in view above facts, the disallowance of Rs. 1,51,200/- on account of VAT liability outstanding is erroneous and needs to be deleted."

14. Considering the above, Ld. Commissioner of Income Tax (Appeals) observed that after the order of the Excise and Taxation Officer cum Assessing Authority, there was refund to the assessee in stead of VAT payable. Hence, Ld. Commissioner of Income Tax (Appeals) accepted the contention of the assessee that no disallowance in this regard was called for. Ld. Commissioner of Income Tax (Appeals) also accepted the contention of the assessee that this amount was not claimed in the P&L account. On that account a,lso the disallowance was not called for. Accordingly, Ld. Commissioner of Income Tax (Appeals) deleted the addition.

15. Against the above order the Revenue is in appeal before us.

16. We have heard both the counsel and perused the records. We find that Ld. Commissioner of Income Tax (Appeals) has given a finding that as per order of the Excise and Taxation Officer cum Assessing Authority, there was refund to the assessee instead of VAT payable. Hence, Ld. Commissioner of Income Tax (Appeals) has rightly held that no disallowance in this regard is called for. Accordingly, we do not find any infirmity in the order of the Ld. Commissioner of Income Tax (Appeals) and uphold the same.

17. In the result, the appeal filed by the Revenue stands dismissed.

Order pronounced in the open court on 02/12/2011.

2013 TRI 2023 (Trib. Ind.)

INCOME TAX APPELLATE TRIBUNAL
DELHI "D" BENCH, DELHI

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

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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.