(2011) 12 MP CK 0008

In the Madhya Pradesh High Court

Case No : IT Appeal No. 88 of 2009

CIT	APPELLANT
Vs	
Kailash Chandra Dhanuka	RESPONDENT

Date of Decision : 15-12-2011

Acts Referred:
Income Tax Act, 1961 — Section 144A, 260A, 94, 94(7)

Citation : (2012) 208 TAXMAN 97

Hon'ble Judges : Shantanu Kemkar, J;Prakash Shrivastava, J

Bench : Division Bench

Advocate : R.L. Jain and Ms. Veena Mandlik, for the Appellant;

Final Decision : Dismissed

Judgement

1. This appeal u/s 260-A of the Income Tax Act, 1961 has been filed by the department against the order dt. 15-5-2009 passed by the ITAT in ITA No. 323/Ind/2007 for the assessment year 2004-05. In brief, the assessee is engaged in the business of trading in shares and securities, mutual fund units and derivative trading. In addition to this the respondent assessee has salary income as also house property income. The assessee had claimed before the assessing officer that for certain transactions done by the assessee, as reproduced in paragraph 5 of the order of the ITAT, the provisions of section 94(7) of the Income Tax Act (for short ''the Act'') can not be attracted since the conditions contained in clauses (a), (b) & (c) of section 94(7) of the Act are not cumulatively satisfied. The assessing officer rejected the said contention of the assessee by observing that in respect of the given securities of Sundaram Mutual Fund, Sundaram Mutual Fund (Midcap), Tata Mutual Fund, Birla Midcap Fund-A and ILFS-Index-Nifty, the provisions of section 94(7) of the Act are attracted. In appeal, Commissioner (Appeals) took the view that in respect of the said units, section 94(7) of the Act is not attracted since the conditions of the said section are not cumulatively satisfied. The said view of the Commissioner (Appeals) has been affirmed by the ITAT.

2. Learned counsel appearing for the appellant submitted that the Commissioner (Appeals) as well as ITAT have committed an error in taking the view that the three conditions of section 94 (7) of the Act are to be cumulatively satisfied, whereas the said section is attracted even if one of the conditions mentioned therein is satisfied.

3. We have heard the learned counsel for the appellant at length.

4. The section 94(7) of the Act which has been noted by the Tribunal reads as under :--

(7) Where--

(a) any person buys or acquires any securities or unit within a period of three months prior to the record date;

(b) such person sells or transfers such securities or unit within a period of three months after such date;

(c) the dividend or income on such securities or unit received or receivable by such person is exempt. then, the loss, if any, arising to him on account of such purchase and sale of securities or unit, to the extent such loss does not exceed the amount of dividend or income received or receivable on such securities or unit, shall be ignored for the purpose of computing his income chargeable to tax.

5. The Commissioner (Appeals) has taken the view that the three conditions of section 94(7) of the Act are to be cumulatively satisfied for attracting the said provision by observing thus :--

4.3 Now to decide the first and main controversy involved, it will be necessary to appreciate the provision of section 94(7) as there is no dispute to the fact that such mutual fund units were sold beyond the period of 3 months from the record date except in respect of Sundaram S05 Midcap and Tata Mutual Fund Units discussed in para E & F of the assessment order. The provisions have been reproduced as above, being part of the order of assessing officer as well as in the written submission of the appellant and hence are not being reproduced once again. The provisions of section 94(7) have 3 limbs. First limb talks of purchase of securities or units within a period of 3 months prior to the record date; 2nd limb talks of sale of same again within a period of 3 months after such date; and 3rd limb lays down that if dividend or income on such securities and unit was exempt and then the loss, if any, arising on account of such sale and purchase transaction to the extent of such exempt income, shall be ignored. A bare reading makes it very clear that all the 2 conditions are to be cumulatively satisfied. It will be necessary to examine the settled position of law about the interpretation of ''Deeming provisions'' as section 94(7) creates a ''Deeming fiction'' to the effect that loss even if so actually arising shall be ignored if the conditions specified in the section are attracted/satisfied.

6. The Tribunal while considering the said aspect of the matter has examined the

CBDT Circular No. 14 of 2001 and the Boards clarificatory circular dt. 23-2-2001 as also the order of the ITAT, Delhi Bench in the case of (2008) 115 ITD 337 and the judgment of the Bombay High Court in the case of Commissioner of Income Tax Vs. Walfort Share and Stock Brokers (P) Ltd., , found that the three conditions of section 94(7) of the Act is to be cumulatively satisfied for attracting the said provision by observing thus :--

20. Considering the facts of the case in the light of the order of Tribunal in the case of Shambhu Mercantile Ltd. (supra) and Board circular, it is clear that all the three conditions mentioned in clauses (a), (b) & (c) must be cumulatively satisfied for invoking provisions of section 94(7) of the Income Tax Act. The learned DR cited several decisions in support of the contention that Income Tax Act being taxing statute, the provisions should be interpreted strictly. These decisions would not support the case of the revenue because if the strict interpretation of section 94(7) is applied, it would lead to irresistible conclusion that all the three conditions above shall have to be satisfied cumulatively as is held by Delhi Bench in the above case. None of the above decision therefore would support the contention of the learned DR. We find that units were not purchased prior to three months from the record date but they were sold after three months from the record date. Wherever the units were sold prior to three months, learned counsel for assessee demonstrated from the details filed in the paper book that the assessee himself has disallowed his claim. The learned Commissioner (Appeals) was, therefore, justified in holding that the assessing officer was bound to apply the law as stood and as applicable for the assessment year under appeal and once assessee has sold such mutual fund units clearly beyond the period of three months after the record date, provisions of section 94(7) could not have been attracted in the above case. Hon''ble Bombay High Court in the case of CIT v. Walfort Shares and Stock Brokers (supra) considering the decision of Hon''ble Supreme Court in the case of Mcdowell and Co. Ltd. (supra) and decision of Hon''ble P & H High Court in the case of Vineet Jain (supra) decided the issue in favour of the assessee by confirming the order of ITAT, Special Bench, Mumbai in the case of Walfort Shares and Brokers P. Ltd. In the case of the assessee, the assessing officer has not brought any evidence on record any motive of the assessee in indulging the transactions to earn loss. The assessing officer has merely followed the directions u/s 144A of the Income Tax Act. Learned Counsel for assessee has demonstrated that assessee is duly qualified and was dealing the business of shares and units. The assessing officer has not brought any material on record that the transaction between mutual fund and the assessee was against the ordinary course of the business of assessee. The assessing officer without bringing any material on record followed the directions of the Addl. CIT and rejected the claim of the assessee. Considering the facts and circumstances above, we are of the view that issue is squarely covered in favour of the assessee by the order of Delhi Bench in the case of Shambhu Mercantile Ltd. and decision of Bombay High Court in the case of CIT v. Walfort Shares and Stock Brokers P. Ltd. (supra). We, therefore, do not find any

infirmity in the order of the learned Commissioner (Appeals) in deciding the issue in favour of the assessee. The departmental appeal on ground no. 1 has no merit. The same is accordingly dismissed.

7. The decision of the Tribunal in the matter of Shambhu Mercantile Ltd., which has been relied upon above, has been affirmed by the Division Bench of the Delhi High Court in the matter of Commissioner of Income Tax Vs. Shambhu Mercantile Ltd., The Delhi High Court has also found that the three conditions of section 94(7) of the Act are to be cumulatively satisfied for attracting the said provision by observing thus :--

8. A plain reading of the provision indicates that the conditions are cumulative. The reason being that clauses (a) and (b) of sub-section (7) of section 94 provides for a statutory period both prior to and after the record date in respect of securities or units [as provided in clause (c)] the dividend or income of which whether received or receivable is exempt under the Act. It is only in a case where a transaction has all three components as prescribed in clauses (a), (b) and (c) of subsection (7) of section 94 and if a loss is occasioned on purchase and sale of such security or unit then to the extent of such loss does not exceed the amount of dividend or income received or receivable it is to be ignored for the purposes of computing the income of the assessee chargeable to tax....

8. We have also independently examined the language of section 94(7) of the Act and a bare reading of the said provision reflects that the three conditions mentioned in section 94(7) of the Act are to be cumulatively satisfied for attracting the said provision. Thus, we find that the present appeal does not involve any substantial question of law requiring consideration by this Court. No other point has been urged. The appeal is accordingly dismissed.