(2009) 09 DEL CK 0287

In the Delhi High Court

Case No : IT Appeal No. 1300 of 2008

Commissioner of Income Tax APPELLANT

Vs

Samtel Electron Devices Ltd. RESPONDENT

Date of Decision : 25-09-2009

Acts Referred:

Evidence Act, 1872 — Section 114
Income Tax Act, 1961 — Section 143(3), 254, 36(1), 37(1), 80M

Citation : (2010) 236 CTR 268 : (2010) 191 TAXMAN 20

Hon'ble Judges : Valmiki J Mehta, J;A.K. Sikri, J

Bench : Division Bench

Advocate : Prem Lata Bansal, Paras Chaudhary and Anshul Sharma, for the Appellant; Ajay Vohra and Kavita Jha, for the Respondent

Final Decision : Disposed Off

Judgement

A.K. Sikri, J.—While admitting this appeal on 31-8-2009, the matter was also finally heard with the consent of the counsel for the parties. The following question of law was framed for determination:

Whether the ITAT was correct in law in deleting the addition of Rs. 23,31,841 made by the assessing officer by disallowing proportionate interest on the ground that the interest bearing loan were utilized by the Assessee for nonbusiness purposes?

2. The factual background under which this question of law has arisen, is as under:

The Respondent/Assessee filed its return for the assessment year 1989-90 declaring its income at Rs. 19,82,010. During the assessment proceedings, the Respondent Assessee had claimed deduction of Rs. 36,09,782 being interest expenditure paid on the aforesaid loan u/s 36(1)(iii) of the Act. The assessing officer noticed that the Assessee had taken term loan of Rs. 99,00,000 from Standard Chartered Bank. Out of this amount, the Assessee had used Rs. 65.23

lakhs for plant and machinery and the balance amount was utilized for investment in shares of its sister concern, viz., M/s. Samtel India Ltd. In his opinion, since the loan was not utilized for the purpose for which it was obtained, viz., for the purchase of plant and machinery, entire interest paid thereupon was not allowable as deduction. He, accordingly, disallowed proportionate interest of Rs. 23,31,841 and added it to the income of the Assessee. The assessing officer relied on the order for assessment year 1988-89 to sustain the disallowance of interest. The Commissioner (Appeals) deleted the disallowance concluding that shares of M/s. Samtel India Ltd. were acquired out of internal accruals and own funds of the Respondent Assessee and there was no question of diversion of borrowed funds for that purpose. The Tribunal, vide order dated 23-5-2001 in ITA No. 7162/Delhi/1992 set aside the order of the Commissioner (Appeals) and restored the matter to the file of the assessing officer to verify the averments made by the Respondent Assessee and accepted by the Commissioner (Appeals). In the order passed by the assessing officer u/s 143(3)/254 of the Income Tax Act (hereinafter referred to as the Act), the assessing officer repeated the disallowance on the ground that the Respondent Assessee had not produced the bank statements and other relevant records to show that there was no diversion of borrowed funds towards investment in shares of Samtel India Ltd. The Commissioner (Appeals) sustained the disallowance on the said ground. On appeal, the Tribunal following its own orders in the case of the Respondent Assessee for the assessment years 1989-90 and 1991-92 deleted the disallowance.

3. Learned Counsel for the revenue submitted that in the first round of litigation when the Income Tax Appellate Tribunal (hereinafter referred to as the Tribunal) had remanded the case back to the Commissioner (Appeals) because of the reason that the Commissioner (Appeals), at that time, had deleted the impugned additions without giving opportunity to the assessing officer for verification of contentions made before the Commissioner (Appeals). The Tribunal also found that the Commissioner (Appeals) had gone entirely by the submissions of the Assessee before him without himself verifying the facts. Her submission was that when this was the reason for remand, the second round of litigation the Tribunal failed to appreciate that even after remand, records were not produced before the assessing officer or the Commissioner (Appeals). Thus, while passing the impugned order in the second round of litigation and deleting the disallowance, the Tribunal went against its own observations made in the first round of litigation.

4. We find substance in the aforesaid submissions of the learned Counsel for the revenue. In the first round of litigation, while remanding the case back, the learned Tribunal had observed as under.

We have considered the rival submissions and the materials on the file. We are of the view that the Learned Commissioner (Appeals) was not justified in deleting the impugned addition without giving opportunity to the assessing officer for verification of the contentions made before the Learned Commissioner (Appeals). It is noted from the observations and findings of the Learned Commissioner (Appeals) as reproduced above that he had gone entirely by the submissions of the Assessee before him without even himself verifying the facts. Again from the facts submitted by the learned Counsel before us it is found that the total capital of Rs. 99 lakhs were Rs. 93,48,652. These facts also required verification by the assessing officer and the difference between the total loan of Rs. 99 lakhs and the total expenditure of Rs. 93,48,652 also had to be explained. From the materials on our file, we find that me facts and the details regarding utilization of the aforesaid loans had not been brought on record, it was incumbent on the utilization of the total loan for the business purpose in order to justify the claim of interest on loan. The amount of loans and interest thereon being substantial such kind of verification and satisfaction was essential for admissibility of the claim. As this exercise was not done by the Assessee either before the assessing officer or before the Learned Commissioner (Appeals) and the Learned Commissioner (Appeals) did not insist for such exercise for deleting the impugned addition, we are of the view that in the interest of justice the matter should be set aside and restored to the assessing officer for proper verification and fresh order. The assessing officer should given reasonable opportunity to the Assessee and the Assessee should furnish all the required details for the purposes.

It is evident from die above that the learned Commissioner (Appeals) had not gone into the details of the matter. The Learned Counsels submission that the shares were purchased before the bank loans were sanctioned and thus the shares were not purchased out of bank loans and also required verification by the assessing officer. This ground is linked with ground No. 1 as mentioned above. The Ld. Counsel submitted that the issue was covered in favour of the Assessee by the ITAT decision in the assessment year 1988-89 referred to above. But principle judicata does not apply in the Income Tax proceedings. The sources of investment made during the previous year relevant to the assessment year 1989-90 covered under the present appeal have to be verified independently the case of assessment year 1988-89. It is only after verifying the sources of investments in shares in the assessment year 1989-90 that it can be said that the loans were not utilised for purchase of shares. A finding without such verification in this regard will be premature. In the interest of justice, therefore, the matter is set aside and restored to the assessing officer who is directed to pass fresh order after allowing reasonable opportunity to the Assessee after considering the relevant details."

5. It is clear from the above that the Tribunal wanted proper verification of the facts as claimed by the Assessee including the fact that shares were purchased before the bank loans were sanctioned and these were not purchased out of the bank loans. Furthermore, specific submission of the Assessee that the issue was covered in its favour by the Tribunals decision in the assessment year 1988-89 was repelled by the Tribunal observing that the principles of res judicata would

not apply in the Income Tax proceedings. Thus, proper verification of the facts as pleaded by the Assessee was needed. Question is, as to whether it was done by the Assessee? order of the assessing officer on remand as well as order passed by the Commissioner (Appeals) in the second round of litigation, does not reflect so.

6. The assessing officer, while framing the fresh assessment order, has specifically stated that the evidence was not produced for proper verification. Fresh order passed by the assessing officer reflects that after the remand of the case, he had directed the Assessee to produce cash credits, O.D. and unsecured loan on which interest had been paid to the Profit and Loss accounts during the year under consideration and also furnished bank statement. He categorically stated that in case such fund is not produced, it would be presumed that the Assessee-company had nothing to add. However, as the documents, as required by the Assessee, were not produced, he disallowed the proportionate deduction of interest. The Commissioner (Appeals) while affirming the assessment order passed by the assessing officer vide its order dated 10-11-2004, noted as under:

Even before me, no bank statements or cash book and other relevant documents have been produced. A simple cash flow statement for the period 1-7-1987 to 30-6-1988 has been filed but specific dates and years are lacking. Also it is not known to have been made in December 1987 out of surplus fund generated from operations is not supported by the bank statement, cash book and other related documents. In the case of M/s. Motor General Finance Ltd. (cited by the assessing officer in his assessment order), the Hon''ble Delhi High Court held that the nexus between the amount paid to the sister concern and the fund available at the relevant point of time should be verified and the onus is on the Assessee to prove that no interest free/advance/loan has been given out of interest bearing borrowed fund. It was held by the Hon''ble Delhi High Court that "as the Assessee could not produce any document in this regard, an adverse inference in terms of Section 114 of the Evidence Act should be drawn to the effect that had those documents been produced, the same would have gone against the interest of the Assessee". Under the given facts and circumstances of the case, since the Appellant has failed to produce the necessary details required as directed by the ITAT. I see no reason to interfere with the order of the assessing officer on this issue of disallowance of interest is sustained.

Next ground relates to deduction u/s 80M. As has been rightly observed by the Hon''ble ITAT that this matter is linked to ground Nos. 1 and 2, this ground is also dismissed for the same reasons.

In the result, the appeal is dismissed.

7. Even before us, the learned Counsel for the Assessee submitted that the investment in shares of Samtel India Ltd. had been made out of internal accruals and not out of borrowed funds. It was submitted that the Assessee had substantial profits from business, which were adequate to cover the investment

made. In fact, the Assessee was maintaining mixed pool of funds. According to him, the profits of business far exceeded the investment made in the shares of Samtel India Ltd. In such circumstances, the presumption is that the investment was made out of profits of business and not out of borrowed funds. The alternate plea was that even if it is assumed for the same of arguments that borrowed funds were utilized for investment in shares in Samtel India Ltd., as such an investment was for the purpose of business, the interest attributable to such investment was allowable deduction in terms of Section 37(1)(iii) of the Act. In this behalf, he referred to the judgment of Supreme Court in the case of S.A. Builders Ltd. Vs. Commissioner of Income Tax (Appeals), Chandigarh and Another, .

8. However, these were the arguments not raised before the Authorities below. Fact remains that the Assessee did not produce the relevant records either before the assessing officer or the Commissioner (Appeals). No doubt, the Assessee could demonstrate before the assessing officer that it was maintaining mixed pool of funds and its profits from business far exceeded from investment made out in the shares of Samtel India Ltd. Likewise, it was open to the Assessee to take alternate plea that investment in the share was for business purposes. However, these pleas are taken for the first time before us. Thus, having regard to the aforesaid background, we are of the opinion that the order of the Tribunal cannot be sustained, which is contrary to its own approach taken in the order passed in first round of litigation.

9. In the interest of justice, we are of the opinion that the matter be remanded back to the assessing officer once again with liberty to the Assessee to produce the relevant records and on that basis, make the aforesaid submissions advanced before us. On the basis thereof, assessing officer would take afresh decision as to whether the entire interest claimed by the Assessee is admissible as deduction or not.

10. The question is answered in the aforesaid terms.. This appeal is disposed of accordingly with no order as to costs.