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IN THE HIGH COURT OF DELHI AT NEW DELHI

ITA No. 62 of 2002

Date of Decision: May 31, 2002

Commissioner of Income Tax, Delhi-II .. Appellant

through
Mr. Sanjiv Khanna,
Advocate.

versus

M/s Modi Spinning & Weaving Mills Co. Ltd.. Respondent.

through
None.

CORAM :

HON'BLE MR. JUSTICE DALVEER BHANDARI.
HON'BLE MR. JUSTICE VIKRAMAJIT SEN

1. Whether the Reporters of local papers may be allowed to see the judgment? *yes*

2. To be referred to the Reporter or not? *yes*

DALVEER BHANDARI, J.

1. The Commissioner of Income Tax has filed this appeal under Section 260A of the Income Tax Act, 1961 (for short "the Act") against the order passed by the Income Tax Appellate Tribunal (for short "the ITAT") dated 15.5.2001.
2. Brief facts which are necessary to dispose of the appeal are recapitulated as under.



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3. In this appeal the revenue has challenged the order of the ITAT relating to the assessment year 1990-91 on the issue of disallowance of Rs.15,84,216/- made under Section 43B of the Act while processing the return under Section 143(1)(a) of the Act.
4. Mr.Sanjiv Khanna, the learned senior counsel for the appellant submitted that the ITAT without giving any reason decided the appeal in favour of the assessee.
5. It is also submitted by Mr. Khanna that the ITAT has erroneously placed reliance on the decision of the Gauhati High Court reported in India Carbon Ltd. vs. Inspecting Asstt. Commissioner of Income Tax reported in 200 ITR 759. The case has no direct relevance on the facts of this case.
6. The assessee filed its return of income on 31.12.1990 declaring net loss of Rs. 8,56,21,193/- for the assessment year 1990-91. The return filed by the assessee was examined under Section 143(1)(a) of the Act and an addition of Rs. 15,84,216/- was made as the assessee had not filed and furnished any evidence in support of deduction claimed under Section 43B of the Act. The assessee aggrieved by that order filed an



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application on 21.3.1995 under Section 154 of the Act for rectification which was also dismissed. Thereafter, the assessee preferred an appeal before the Commissioner of Income Tax. In the appeal the learned Commissioner of Income Tax after examining the facts in detail remanded the matter to the Assessing Officer to obtain proof of payment, examine it and allow deduction if permissible under the provision of law.

7. The petitioner assessee filed further appeal before the ITAT. The ITAT allowed the assessee's appeal. The ITAT relied on the decision of the Gauhati High Court reported in India Carbon Ltd. vs. Inspecting Asstt. Commissioner of Income Tax (supra) wherein it was held that the amount as sales tax appearing on the liability side of the balance sheet was neither claimed as deduction nor charged to profit and loss account of the assessee and the same could not be added to the income of the assessee. It was also submitted that no disallowance on this account has been made by the Assessing Officer while computing income under Section 43B of the Income Tax Act. Consequently the adjustment ought to have been deleted from the intimation under Section 143(1)(a) of the Act.



8. The Commissioner of Income-tax aggrieved by the order of the ITAT has filed this appeal under Section 260A of the Income Tax Act. It may be pertinent to mention that a similar issue came up for consideration before a Division Bench of the High Court of Delhi consisting of Hon'ble Mr. Justice B.N. Kirpal and Hon'ble Mr. Justice Arun Kumar in S.R.F. Charitable Trust vs. Union of India and Others (193 ITR 65). In somewhat similar circumstances this Court observed the adjustments were made for the reason that, in support of the claim, the petitioner assessee had not furnished the proof. The stage of furnishing of the proof is reached as and when proof is demanded by the Income-tax Officer on a notice under section 143(2) being issued. If no proof in support of the claim was available with the Income-tax Officer, he could have issued a notice under section 143(2) but he could not have unilaterally made this disallowance by seeking to invoke the first proviso to section 143(1) because the said proviso was not applicable in the present case.
9. We deem it appropriate to extract Section 143 of the Act for the ready reference. Section 143 of



the Act reads as under:-

"143(1)(a) Where a return has been made under section 139, or in response to a notice under sub-section (1) of section 142.--

(i) if any tax or interest is found due on the basis of such return, after adjustment of any tax deducted at source, any advance tax paid and any amount paid otherwise by way of tax or interest, then, without prejudice to the provision of sub-section (2), an intimation shall be sent to the assessee specifying the sum so payable, and such intimation shall be deemed to be a notice of demand issued under section 156 and all the provisions of this Act shall apply accordingly; and

(ii) if any refund is due on the basis of such return, it shall be granted to the assessee;

Provided that in computing the tax or interest payable by, or refundable to, the assessee, the following adjustments shall be made in the income or loss declared in the return, namely :-

(i) any arithmetical errors in the return, accounts or documents accompanying it shall be rectified;

(ii) any loss carried forward, deduction, allowance or relief, which, on the basis of the information available in such return, accounts or documents, is prima facie admissible but which is not claimed in the return, shall be allowed;

(iii) any loss carried forward, deduction, allowance or relief claimed in the return, which, on the basis of the information available in such return, accounts or documents, is prima facie inadmissible, shall be disallowed."

10. We also deem it appropriate to set out the relevant part of Circular No. 549 published in

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[1990] 182 ITR (St.) 1 at page 21 issued by the Central Board of Direct Taxes wherein examples have been given of adjustments which can be carried out:-

"The prima facie adjustments mentioned at (ii) above can be made only on the basis of information available in the return or the accompanying accounts or documents and not on the basis of the past records of the assessee. Some examples of such prima facie admissibles or inadmissibles in respect of which adjustments can be made to the returned income or loss are:

(i) While computing income under the head 'Salaries', standard deduction under section 16(1) is not claimed, or claimed at a figure which is less than or in excess of the permissible limit.

(ii) While computing income under the head 'Income from house property', deduction for 1/6th for repairs or for a new unit under the proviso to section 23(1) is not claimed, or claimed at a figure which is less than or is in excess of the permissible amount.

(iii) While computing income under the head 'Profits and gains of business or profession', depreciation is claimed at rates lower or higher than those provided for in the Income-tax rules.

(iv) While computing capital gains, deduction of Rs.10,000 under section 48(2) is not claimed or claimed less or in excess of this amount.

(v) Carried forward speculation loss set off against income from business or against income under any other head.

(vi) Loss under any head, other than under the head 'Profits and gains of business or profession', carried forward and set off against the current income.



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(vii) Carried forward loss of business set off against income of the current year under other heads.

(viii) Old loss of more than eight assessment years set off against the current business income, if the information is available in the return or the accompanying documents.

(ix) Deduction under section 80C in respect of provident fund contributions or life insurance premia or N.S.C. VI or VII Issue not claimed, though the information is available in the documents accompanying the return, or claimed at a figure which is less than or is in excess of the permissible amount.

(x) Deduction under section 80L not claimed or claimed at a figure which is less than or is in excess of the permissible amount.

(xi) Deduction under section 80G not claimed, although allowable on the basis of the information available in the return or the accompanying documents or claimed at a figure which is less than or is in excess of the permissible limit.

(xii) Deduction under section 80M claimed at sixty per cent of gross dividend income instead of on net dividend income in violation of the provisions of section 80AA.

It may be mentioned that the above is not an exhaustive but only an illustrative list of prima facie admissibles or inadmissibles for which adjustments can be made to the returned income or loss."

11. SRF Charitable Trust's judgment of the Delhi High Court has been followed in a number of subsequent judgments. In Khatau Junkar Ltd. and Another vs. K.S. Pathania and Another (196 ITR 55) a Division Bench of the Bombay High Court in some what



similar circumstances held that the Income Tax Officer was not justified in unilaterally disallowing the assessee's claim without giving any hearing to the assessee. Their Lordships have placed reliance on the aforesaid judgment of the Delhi High Court.

12. Reliance has also been placed on the judgment of the Delhi High Court in the judgment of the Calcutta High Court in Modern Fibotex India Ltd and Another vs. Deputy Commissioner of Income Tax and Others reported in 212 ITR 496.
13. In the instant case when the information was available on record and payments were made in the prescribed form but no proof was furnished by the assessee, then the only course left with the Assessing Officer was to call for the information by issuing a notice to the assessee. This is imperative in consonance with the principles of natural justice. This opportunity could have been given to the assessee even at the time of disposing of the application under Section 154.
14. We are in respectful agreement with the judgment of SRF Charitable Trust (supra) in which their Lordships have held that the stage of furnishing of proof is reached as and when the proof is



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demanded by the Income Tax Officer on a notice under Section 143(2) being issued. If no proof in support of the claim was available with the Income Tax Officer, he could have issued a notice under Section 143 (2), but he could not have unilaterally made this disallowance by seeking to invoke the provisions of first proviso to Section 143(1).

15. We have carefully perused the impugned judgment of the Tribunal. In our considered opinion, no interference is called for. Consequently, the appeal is accordingly dismissed. The parties are directed to bear their own costs

Dalveer Bhandari
(DALVEER BHANDARI)
JUDGE

Vikramajit Sen
(VIKARAMAJIT SEN)
JUDGE

MAY 31 , 2002.
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