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%.10.07.2009

Present: Ms. Rashmi Chopra, Advocate for the appellant.
Mr. Salil Kapoor, Mr. Sachin Aggarwal, Advocates for the respondent.

+ ITA 448/209.

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Assessee filed a return of income declaring a loss of Rs.1,13,20,160/- for the assessment year 2001-02. In the return assessee had also claimed rent charges of Rs.55,20,545.68/- and extra bed charges, laundry etc. at Rs.12,24,480/-. The assessing officer disallowed the interest on advances. He also disallowed the amount of Rs.11,82,399.80/- on sundry creditors on assessee's failure to reconcile the balance and the disallowances. After disallowing the aforesaid charges, the income was assessed at a loss of Rs.87,96,942/- thus instead of the loss of Rs. 1,13,20,160/- declared by the assessee the loss was assessed at Rs. 87,96,942/-. The net effect in any case was that no tax was payable. CIT (A) on assessee's appeal particularly sustained the additions on advances while deleting/restricting certain amounts. The revenue went in appeal against the order of the CIT (A). Cross objections were filed by the assessee in the said appeal and one of the objection to the maintainability of the appeal was taken by the assessee on the ground that this appeal was liable to be dismissed as non-maintainable



on account of no tax effect on account of CBDT circulars and instructions which according to the assessee were binding by the department. As per the CBDT Instruction No.1979 dated 27.3.2000 and Instruction No.2 of 2005 dated 24.10.2005, the appeals before the ITAT are not maintainable if the tax effect is below Rs. 2 lacs. As per the aforesaid instructions as tax effect was nil in the present case, the appeals were non maintainable. The ITAT accepted this plea of the assessee and dismissed the appeal of the department as non-maintainable. While doing so it relied upon the following judgments

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- “ (1) CIT Vs. Pradeep Kumar Gupta (2007) 207 CTR (Del) 115;
- (2) ACIT Vs. Satish Chand Jain (2006) 10 SOT 383 (Del);
- (3) ACIT Vs. Doon Valley Motors (2006) 10 SOT 525 (Del);
- (4) JCIT Vs. Dev Raj Agarwal (2005) 92 TTJ (Lucknow) 436;
- (5) ITA No.3839/D/04 & C.O. 28/Del/07-ITO Vs. M/s M.J.Ware Housing (P) Ltd. & vice versa dated 31.8.2007.”

Learned counsel for the appellant submits that the CBDT has issued OM dated 15.5.2008 which is instruction No.5 of 2008 and as per these instructions, in loss cases, notional tax effect is to be taken into account. The learned counsel, however, conceded that these instructions are applicable in respect of those appeals preferred after the issuance of these instructions. In fact It is specifically provided in para 11 of the said instruction as under “this instruction will apply to appeals filed on or after



15.5.2008. However, the cases where appeals have been before 15.5.2008 will be governed by the earlier instructions on this subject, operative at the time when such appeal was filed". In the present case appeal was filed in the year 2005 before the ITAT and it was dismissed on 30.11.2007 as not maintainable. These instructions came much thereafter, and in view of para 11 thereof, has no applicability to the case. The ITAT therefore rightly dismissed the appeal as non-maintainable. The present appeal preferred thus clearly is a misuse of the process of law and in spite of the aforesaid clear instructions of the CBDT itself, we fail to understand as to why this appeal is preferred when the appeal before the ITAT itself was not maintainable. In these circumstances, we dismiss the appeal with costs quantified at Rs.10,000/- to be paid to Delhi High Court Mediation and Conciliation Centre.

A.K.SIKRI, J

VALMIKI J.MEHTA, J

July 10, 2009

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