* IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Decided on :August 06, 2009.*

ITA No. 295/2009

Penwell Traders Ltd. . . . Appellant
through : Mr.O.P. Sapra, Advocate.

VERSUS

Commissioner of Income Tax . . . Respondent
through: Ms.Sonia Mathur, Advocate.

CORAM :-
THE HON'BLE MR. JUSTICE A.K. SIKRI
THE HON'BLE MR. JUSTICE VALMIKI J. MEHTA

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?

2. To be referred to the Reporter or not?

3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J. (ORAL)

For orders, see ITA No. 480/2009.

A.K.SIKRI, J

VALMIKI J.MEHTA, J

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1. These two appeals have been preferred by the assessee against a common order dated 11.9.2008 passed by the Tribunal dismissing both the appeals preferred by the appellant. First appeal relates to the block assessment and the second appeal is in respect of penalty orders passed under Section 158BFA(2) of the Income Tax Act.

ITA No. 480/2009

2. A search was carried out in the premises of the appellant company and on that basis notice was issued to the appellant for block assessment. The appellant assessee filed return showing its income as "NIL." However, the A.O. assesses

1. Interest received on loan of Rs.60 lakhs but not shown in the books of accounts Rs.3,73,479/-
2. Unexplained investment of Rs.49400/- shares held by the assessee in J.P. Industries Ltd. for Rs.4,96,470/-.
3. Unexplained investment of 178300 shares in M/s Yogi Pharmacy Rs.10,16,310/-

3. In the appeal preferred by the assessee against the aforesaid assessment so far as the interest amount is concerned, it was reduced by the CIT from Rs.3,73,479/- to Rs.3,31,397/-. Other two additions in respect of unexplained investment in shares in the aforesaid two companies were maintained by the CIT (Appeals) and the appeal of the assessee was dismissed. In further appeal preferred by the assessee before the Income Tax Appellate Tribunal (ITAT), the appellant remained unsuccessful as by means of decision dated 11.9.2008 appeal of the appellant has been dismissed. In these circumstances challenging that order appellant has filed the instant appeal under Section 260A of Income Tax Act.

4. First submission of learned counsel for the appellant is that appellant was not given proper opportunity to argue his case before the Tribunal. In this behalf he pointed out that specific application was made before the Tribunal for adjournment when the case was fixed before the Tribunal on 3.9.2008. In that application it was stated that Mr. Nikhil Kohli who was looking after the business has been divorced and being under a mental shock cannot appear before the court. However, a perusal of the order of the Tribunal shows that this application was

(ii) Assessee had already been granted a number of adjournments and on 13.3.2007 while adjourning the case final opportunity was granted to the assessee by the Tribunal. It was observed at that time that no further adjournment shall be granted in any circumstances whatsoever.

(iii) Notwithstanding the aforesaid recording in the order dated 13.3.2007 the Tribunal had granted four more adjournments to the appellant and again on 13.3.2008 the last opportunity was allowed to the assessee.

5. It was in these circumstances when the case came up before the Tribunal on 3.9.2008 and request for adjournment was made the Tribunal rejected the said application observing that the intention of the assessee was only to delay the conclusion of the appeal. We are of the opinion that the approach adopted by the Tribunal in the aforesaid circumstances is without blemish and does not call for any interference.

6. It is not in dispute that the appellant was represented by a counsel and appeal was pending for last five years. Therefore, one can legitimately presume that the counsel had complete knowledge about the said matter and he could have argued the matter even in the absence of Mr. Nikhil Kohli. Facts pointed out by the Tribunal in its order clearly demonstrate that the appellant was not diligent in pursuing the said appeal and was getting the same adjourned on one pretext or the other. There is limit to which indulgence can be given to such a litigant. The appellant did not even take the orders of the Tribunal seriously when it was specifically stipulated in the order that last opportunity was given to appellant and he was cautioned time and again to get ready and argue the matter. Therefore, we

the appellant had moved an application for raising additional ground but the Tribunal in the impugned order has not dealt with that ground at all. No doubt such an application was made by the appellant. However, on 3.9.2008 when the matter came up for hearing there was nobody to press this application. On this ground alone the contention of the appellant merits rejection. In any case, we have gone through the said application and find that the additional ground taken is that against the undisclosed income the assessed losses forming part of the block period was not set off by the A.O. Concededly this was neither raised before the assessing officer nor CIT (Appeal). This ground involves a mixed question of fact and law and, therefore, it was necessary for the appellant to have raised the issue before the lower authorities and not before the ITAT for the first time. Therefore, in any case such an application merited rejection.

8. Coming to the three additions of three kinds affirmed by the ITAT we find that all these are questions of facts. Insofar as additions of interest on the loan of Rs.60 lakhs is concerned it is an admitted case that the assessee had advanced a loan of Rs.60 lakhs to M/s Asian Capital Services Ltd. against promissory note and this promissory note clearly indicated that the said loan was carrying an interest @28% per annum. Even when this loan was received back in the period in question the interest which worked out to Rs.3,31,397/- had not been disclosed as interest income. It was under these circumstances that this addition was made and we do not find any fault in making such an addition.

9. Regarding purchase of 49400 shares of J.P. Industries, again the finding of fact is recorded that there was no dispute that these shares were

shares of J.P. Industries in the year 1996-97 and these were sold on 11.8.1997 and thereafter after a series of sale transaction they were purchased by M/s Essel Securities Ltd., a sister concern of the appellant on 14.8.1997. Thus the explanation was that when the search of the premises of the assessee took place and the aforesaid shares receipts were seized they did not belong to the appellant but belong to M/s Essel Securities Ltd., a sister concern of the appellant. This contention of the appellant was rejected by CIT(Appeal) and confirmed by ITAT by observing that when the shares were sold by the assessee on 11.8.1997, then how could these shares be registered in its name on 31.1.1998 i.e. after about six months of sale and at a time when assessee did not own them. On this basis the contention of the assessee was rejected by the CIT (Appeal) observing that the explanation that these were the same shares which were bought by M/s Essel Securities Ltd. did not stand to test, moreover the assessee had not been able to provide distinct numbers of the share of M/s J.P. Industries and so far as distinctive numbers of shares stated to have been purchased by M/s Essel Securities to prove that shares found at the time of search were the same as purchased by M/s Essel Securities Ltd. The same is the position qua the purchase of 29,200 shares of Yogi Pharmacy. In this behalf it is found that these shares were registered in the name of assessee on 25.9.1997 whereas the shares number explained the shares were stated to have been purchased from M/s Hari Om Trading Company and Ms. Shiela Singh on 2.10.1997 and 27.11.1997 respectively i.e. subsequently to the date of registration in the name of the assessee

10. As stated above these are pure finding of facts and no substantial

officer had added undisclosed income under three heads. While doing so, the assessing officer simultaneously initiated penalty proceedings under Section 158 BFA(2) of the Act as well and imposed the penalty. The appellant preferred appeal before the CIT (Appeals) which was dismissed. His further appeal to the ITAT has also been dismissed . Before the CIT (Appeals) as well as before the ITAT the assessee did not challenge the imposition of the penalty of Rs.11,06,507/- on merits. His challenge was on the ground that he was not given proper opportunity by the assessing officer before imposing the penalty and no penalty could be levied till the order of ITAT regarding the quantum of addition sustained by the CIT. As far as second argument is concerned as noted above not only ITAT ultimately affirm the additions made by the CIT (Appeals), the order of the ITAT has been upheld by us while dismissing the ITA No.480/2009. Therefore this ground does not survive. As far as argument that proper opportunity was not given we find from orders of the CIT (Appeals) as well as the orders of the Tribunal that the appellant was not able to substantiate this ground at all. We, thus find no merit in this appeal either. It is also dismissed.

A.K.SIKRI, J

VALMIKI J.MEHTA, J

August 06, 2009
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