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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of Decision : 20th March, 2012.**

+ ITA 558/2010

COMMISSIONER OF INCOME TAX DELHI II

..... Appellant

Through Mr. N P Sahni, sr. standing counsel

versus

LEO FINANCIAL SERVICES LTD.

..... Respondent

Through Mr. S. Krishnan, Adv.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.V. EASWAR

SANJIV KHANNA,J: (ORAL)

CM 5230/2010 (Delay)

This is an application for condonation of delay in refiling. Delay is of 760 days but the reason given is that the case was assigned to Late Mr. R D Jolly, the then Sr. Standing Counsel. He subsequently fell ill and expired. Ld. counsel for the respondent



states that delay is substantial but he would not like to oppose the same. In view of the statement made we condone the delay in refiling.

ITA 558/2010

Having heard the counsel for the parties, we have frame the following substantial question of law:

“Whether the Income Tax Appellate Tribunal was right in setting aside the order of the Commissioner of Income Tax under Section 263 of the Income Tax Act, 1961?”

2. During the course of hearing it is stated that after the Commissioner of Income Tax had passed the order dated 21.2.2005 under Section 263 of the Income Tax Act, 1961 (“Act”, for short), which has been set aside by the impugned order passed by the Income Tax Appellate Tribunal (“Tribunal”, for short) on 28.2.2007, only two additions were made by the Assessing Officer. We will only record that this assessment order dated 28.02.2006 was passed before the impugned order was passed by the Tribunal. Ld. counsel



for the parties agree that we are required to, therefore, examine only these two additions and the reasons given by the Commissioner of Income Tax in the order dated 21.2.2005 in respect of these two additions.

3. The first aspect relates to dividend stripping. The Commissioner of Income Tax noticed that in two transactions, the respondent-assessee had purchased units of mutual funds before the record date and sold them on the next day. Dividend received on them being tax free was claimed and treated as income on which no tax was payable. Further, the assessee had claimed a loss on the sale of units being the difference between the purchase price and the sale price. The Commissioner of Income Tax noticed that the two transactions were accepted by the Assessing Officer without verification about the genuineness, nature and purpose of the transaction and without obtaining necessary details. The Tribunal in the impugned order has recorded that the entire claim of the assessee was legally allowable as per the case law discussed and therefore the order passed by the



Assessing Officer was not erroneous.

4. The assessment year in question is 2001-02. Provision of Section 94(7) of the Act dealing with dividend stripping were brought into statute book and are applicable from the assessment year 2002-03 onwards. There are two decisions of this Court in *Commissioner of Income Tax Vs. Vikram Aditya and Associates P. Ltd.* (2006) 287 ITR 268 and *Commissioner of Income Tax Vs. Vimgi Investment P. Ltd.* (2007) 290 ITR 505 directly on the issue. In these two cases, it has been held that order of the Assessing Officer cannot be treated as erroneous and therefore revisable under Section 263 of the Act, as Section 94(7) relating to dividend stripping became a part of the statute and is applicable from Assessment Year 2002-03 onwards and is not applicable to earlier assessment years. It would be appropriate to reproduce the observations of this Court in *Vimgi Investment P. Ltd.* (supra) wherein the order under Section 263 was set aside after noticing that the assessee therein had received dividend of about Rs.3.72 crores



and the units were sold at a loss of Rs.4.45 crores. The assessee had claimed and had adjusted said loss against business profit. The Division Bench after referring to *Malabar Industrial Co. Ltd. Vs. CIT* (2000) 243 ITR 83, had observed as under:

*“We find that in so far as the present case is concerned, only one view is possible and that was taken by the Assessing Officer and that view was valid with reference to the assessment year 2001-02. Therefore, there was no occasion for the Commissioner to exercise his powers under Section 263 of the Act to revise the order passed by the Assessing Officer and tax the Assessee on the ground that the transaction was an attempt to avoid tax. The purchase and sale of units by the Assessee was undoubtedly bona fide and this was accepted by the Assessing Officer. Under these circumstances, the question of the Commissioner invoking his powers under Section 263 of the Act would not arise. Following the decision of this Court in *Vikram Aditya and Associates Pvt. Ltd.*, we find no substance on the merits of the case.*

*In any event, in view of the decision of the Supreme Court in *M/s. Malabar Industrial Co. Ltd.*, the exercise of power by the Commissioner under Section 263 of the Act is not warranted, if it is assumed that two views are possible on the issue.”*

In view of the aforesaid decision we do not think the



Commissioner of Income Tax was justified in invoking his revisionary power under Section 263 of the Act on the issue/question of dividend stripping.

5. The second aspect relates to failure of the Assessing Officer to invoke Section 40A (2)(b) in respect of Rs.2,37,500/- paid to Rajesh Mehta, CA, who is also a director of the respondent-assessee. The Commissioner of Income Tax in the order under Section 263 held that the Assessing Officer had not made any enquiry. The precise and only observation recorded by the Commissioner of Income Tax is that the payment was allowed without any examination.

6. The Tribunal, on the other hand, has given a factual finding and have held as under:

“So far as point ‘C’- relating to payments made to Shri Mehta is concerned, the assessee had written letter dated 2-3-2000 which is available at page 13 of the paper book. Shri Mehta was assessed to tax as is evident from acknowledgement for filing the return and copy of computation filed at page 15 of the paper book. In the income expenditure account filed at page 16 of the paper book, the professional Tax of Rs.2,37,500/- has been



shown. All these documents were before the Assessing Officer. If on being satisfied with these documents, the Assessing Officer did not make any further enquiry, then his order cannot be treated to be erroneous.”

7. The Tribunal, therefore, has observed and held that the Commissioner of Income Tax had recorded an entirely incorrect finding. It is not pointed out and shown to us how and why the finding recorded by the Tribunal is factually incorrect or perverse. Even the question of law framed does not specifically require us to go into the said factual aspect.

8. In view of the aforesaid position, question of law mentioned above is answered in affirmative i.e. in favour of the assessee and against the Revenue. Appeal is dismissed. No order as to costs.

SANJIV KHANNA, J.

R.V.EASWAR, J.

March 20, 2012

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