



REPORTABLE

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

+ **ITA No.666 of 2009**

% RESERVED ON: JANUARY 10, 2011.
PRONOUNCED ON: FEBRUARY 18, 2011.

COMMISSIONER OF INCOME TAX . . . Appellant

through : Ms. Prem Lata Bansal, Sr.
 Standing Counsel.

VERSUS

VIRGIN SECURITIES & CREDITS PVT. LTD. . . .Respondent

through: Mr. Ajay Vohra with Ms. Kavita
 Jha and Mr. Somnath Shukla,
 Advocates.

CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. 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.

1. Following two additions, *inter alia*, were made by the Assessing Officer (AO) while completing the assessment of the respondent assessee herein, which pertains to the Assessment Year 2002-03:

- (i) Addition of ₹55,56,620 by disallowing the loss claimed by the assessee on account of sale of shares of M/s. Doogar & Associates (Pvt.) Ltd. (hereinafter referred to as 'Doogar'); and
- (ii) Addition of ₹9,13,081 on account of expenses debited to Profit and Loss account under Section 41(1) of the Income Tax Act ('the Act' for brevity).



2. Insofar as first addition is concerned, the assessee had shown Profit & Loss account the decrease/increase in stock of shares ₹2,02,19,778. It was explained by the assessee before the AO that opening share stocks of Doogar was 20,35,000 and purchased the same @ ₹10 per share and the same was sold @ ₹2.23 per share on 30.03.2002. The assessee filed a copy of HDFC bank's depository services statement to support the sale of shares. The AO found that the said bank statement showed the sale rate of the shares @ ₹3.35 instead of ₹2.23 paise per share as disclosed by the assessee. On being asked to give explanation about the discrepancies, the assessee vide letter dated 14.02.2005 had explained that the said 20,35,000 shares were sold @ ₹2.23 paise per share, which was as per the prevailing rate in Bombay Stock Exchange (BSE) on the date of transaction, i.e. 22.03.2002. It was also explained that the rate of ₹3.35 per share mentioned in the bank statement was the rate as per the DEMAT statement of HDFC bank, which takes the transaction rate of that particular script prevailing at the end of the month in which transaction took place. Since no other documents were furnished in support of this plea, the AO adopted the sale rate of ₹3.35 paise per share and on that basis concluded the loss thereby allowing the loss for sale of shares @ ₹1,58,13,028 instead of ₹2,02,19,778 claimed by the assessee and disallowing the balance of ₹55,56,628.

3. Insofar as disallowing of the expenses are concerned, the Assessing Officer was of the view that the expenses claimed were excessive in nature. The expenses were on account of travelling



wages, staff welfare, advertisement, miscellaneous expenses a printing & stationery. The Assessing Officer noted that these expenses were incurred by M/s. Goyal M.G. Gases Pvt. Ltd. and the entry was transferred to the assessee's head. The Assessing Officer sought explanation for such debit to the assessee. The assessee furnished the comparative expenses with previous year and also stated that these expenses were incurred by the other group concern, viz., M/s. Goyal M.G. Gases Pvt. Ltd. on behalf of the assessee in connection with the generation and promotion of ICD and share business of the assessee. The assessee was also asked to explain as to why PPF and ESI bonus, etc. were not deducted/paid to the employees. According to the AO, the assessee did not submit any explanation or produced salary register and other ledger accounts. For this, the Assessing Officer concluded that no employee was on the pay role of the assessee company and the expenses were debited in the assessee's account, but incurred by M/s Goyal M.G. Gases Pvt. Ltd. He allowed the expenses of ₹277701 which were the expenses under these heads in the last year as against the expenses of ₹9,40,782 claimed by the assessee and thus made disallowance of ₹9,13,081/-.

4. Before the CIT (A), the assessee had produced requisite material, though for the first time justifying both the claims. The CIT (A) called for remand report from the AO and thereafter deleted the addition, *inter alia*, observing that the AO, in his remand report, has not specifically commented upon the additional evidence submitted by the assessee. The additional evidence which was



PNR Securities Ltd., which clearly showed that 20,35,000 shares Doogar were sold @ ₹2.23 per share and the net price credited to the party works out to ₹2.23 per share. The evidence regarding sale price as on 20.03.2002 was confirmed by the BSE. The bank statement of the assessee in current account was also produced which showed the sale proceeds on 30.03.2002 confirming the rate claimed by the assessee. The CIT (A), thus, held that there was sufficient documentary evidence to prove that the assessee sold the shares @ ₹2.23 per share and not @ ₹3.35 which was taken into account by the AO.

5. Insofar as the claim of expenses of ₹9,40,782, the CIT (A) was of the opinion that there was no bar in outsourcing a part of administrative work to a sister concern and reimbursing the said concern with the expended amount. Since the employees were in the pay rolls of the service provider, the liability to pay PF and other dues rests squarely on the provider, viz., M/s Goyal M.G. Gases Pvt. Ltd. and therefore, the AO was not right in disallowing the expenses on extraneous ground that the assessee had not produced employees register or had not shown that the TDS was not deducted.
6. The Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal') dismissed the appeal of the Revenue preferred against the order of the CIT (A). This is how the Revenue is in appeal before us under Section 260A of the Act.
7. Insofar as the issue relating to the extent of losses for the sales of



in admitting additional evidence in contravention of Rule 46A the Income Tax Rules. Even no opportunity was given to the Department to make inquiry as to when sale took place. Therefore, the Tribunal either *suo motu* or through AO (by remanding the matter back) should have made inquiry, which had not been done and therefore, order passed by the Tribunal is perverse on facts. It was contented that the Allahabad High Court in the case of **Ram Prasad Sharma Vs. Commissioner of Income Tax [119 ITR 867]** has held that under Rule 46A, the assessee shall not be entitled to produce before the AAC (first appellate authority) any evidence, whether oral or documentary, which was not produced in the course of proceeding before the Income Tax Officer except in specified circumstances. Where repeated opportunities were given by the ITO to produce evidence but no evidence was given by the assessee, fresh evidence cannot be admitted by CIT (A).

8. The aforesaid contention appears to be devoid of any merit. It is a matter of record that before admitting the additional evidence, the CIT (A) had obtained remand report from the AO. While submitting his report, the AO had not objected to the admission of the additional evidence, but had merely reiterated the contentions in the assessment orders. It is only after considering the remand report, the CIT (A) had admitted the additional evidence. It cannot be disputed that this additional evidence was crucial to the disposal of the appeal and had a direct bearing on the quantum of claim made by the assessee. Plea of the assessee which was taken before the AO remains the same. The AO had taken



support the plea and it was in these circumstances, the additional evidence was submitted before the CIT (A). It cannot be said not is it the case of the Revenue that additional evidence is not permissible at all before the first appellate authority. On the contrary, Rule 46A of the Act permits the CIT (A) to admit additional evidence if he finds that the same is crucial for disposal of the appeal. In the facts of this case, therefore, we are of the opinion that on this aspect, no substantial question of law arises.

9. We may also note at this stage that Ms. Prem Lata Bansal, learned counsel appearing for the Revenue, had sought to contend that the sale of shares in fact had taken place on 22.03.2002, which was stated by the assessee itself before the AO. However, as per the additional evidence filed by the assessee, the date of sale of share was shown as 20.03.2002. This anomaly was not thrashed out by the CIT (A) or by the Tribunal, was the contention of the learned counsel which, according to her, amounted to an error of orders. We are not inclined to accept this submission as well.
10. Before the CIT (A) it was submitted that the shares sold by the assessee were identifiable, i.e., shares which were held in DEMAT form and, therefore, the gain/loss had to be worked out with reference to the sale of such shares only. It was pointed out that the shares were sold on 20.03.2002 at the price ruling on the stock exchange on that date, i.e., @ ₹2.23 per share. Once the shares are identifiable, the date of sale of which is 20.03.2002, merely because by mistake the assessee mentioning the date of 22.03.2002, would not mean that the assessee was precluded



clearly reflected that the shares were sold on 20.03.2002. This a finding of fact by the CIT (A) and confirmed by the Tribunal. This Court, in the case of **Commissioner of Income Tax Vs. Ranbaxy Holdings Co.** (in ITA No.675 of 2010), held that where the shares sold are identifiable, there is no question of averaging the cost. In computing the capital gains/loss on sale of such identifiable shares, the cost of acquisition of such shares has to be taken into account, instead of average cost of acquisition.

11. Therefore, no question of law arises in this regard as well.
12. Coming to the second issue relating to allowing the expenses of ₹9,40,782 debited by the assessee to the Profit and Loss Account incurred by M/s. Goyal M.G. Gases Pvt. Ltd., again we find that the finding of fact is recorded that the work was outsourced to the sister concern and the expenses for undertaking that the work was allocated, in proportionate to the assessee. The only contention raised by the learned counsel for the appellant is that the assessee had not offered any explanation as to on which basis this expenditure had been allocated and the burden was on the assessee to prove the same and further that the assessee had not explained as to what services had been rendered by M/s. Goyal M.G. Gases Pvt. Ltd. We find from the order of the CIT (A) that the assessee had furnished an explanation, which was found to be satisfactory by the CIT (A) and the same is as under:

- (1) No comparison could be made with the expenses of last year as in the last year, there was no case of



However, during the year in question, the assessee was engaged in regular business activity on whole time business. To corroborate this submission, the assessee had given the particulars of income of two years which showed NIL income on account of interest receipt, bill discounting charges and sale of shares, which was ₹2.48 Crores, ₹2.30 Crores and ₹47.49 lacs respectively in the year under reference.

- (2) Since it was the first year of business activity and the assessee had no infrastructure, this was the compelling reason for the assessee to outsource various concerns including M/s. Goyal M.G. Gases Pvt. Ltd. On that basis, debit notes were received from the said company in respect of expenses pertaining to the assessee company. Thus, the expenses were duly provided in the audited balance sheet.
- (3) When there was a business at large scale of the aforesaid magnitude, it could not be disputed that the expenses would have been incurred by the assessee. Therefore, allowing to the extent of expenses which was incurred in the previous years when there was no comparison in the two years, was arbitrary decision on the part of the AO.
- (4) Reasons for the AO went by the irrelevant extraneous consideration, viz., PPF, etc. were not produced by the assessee. This could not be paid as the work was not done by the assessee himself, but by the staff of M/s. Goyal M.G. Gases Pvt. Ltd., for the assessee, for the



Goyal M.G. Gases Pvt. Ltd. to pay salary to employee and they would be maintaining such ledgers.

13. The CIT (A) as well as the Tribunal were not persuaded by the aforesaid explanation and accepting the same recorded finding of fact. Hence, no question of law arises. This appeal is bereft of any merit. We accordingly dismiss this appeal.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

FEBRUARY 18, 2011
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