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% 09.02.2011

Present: Ms. Rashmi Chopra, Advocate for the appellant/Revenue.

+ ITA 222/2011

The assessee had purchased a land for the purpose of their business from M/s Vatika Ltd. which was valued at ₹ 50.5 crores. The said seller namely M/s Vatika Ltd., chose to adjust some consideration by subscribing to the share capital in the assessee company to the extent of ₹ 50 crores during the assessment year 2006-07 and ₹ 50 Lacs in the subsequent assessment year. The Assessing Officer treated it as contravention of Section 269 SS of the Income Tax Act (hereinafter referred to as the 'Act'), on the premise that the payment of more than ₹ 20,000/- should not be in cash and had to necessarily be made by means of cheque. On this premise, the Assessing Officer issued notice under Section 271 D of the Act proposing to impose penalty upon the respondent/assessee and levied a penalty of ₹ 50 crores on the assessee in respect of assessment year 2006-07. The Tribunal has deleted this penalty and set aside the order holding that such a transaction would not be hit by the provisions of Section 269 SS of the Act as those provisions were not attracted at all. A bare reading of the said provision would demonstrate that the opinion of the Tribunal is perfectly justified and there is no error in the same.

Since we are in agreement with the order of the Tribunal we reproduce the relevant discussion contained in the said order:-

> "We have considered the facts of the case submissions made before us. From the rival submissions, it becomes clear to us that the assessee had a running account with Vatika Ltd. This account was credited by a sum of ₹ 50.50 crore for purchase of land on 28.4.2004. There were other credits and debits, the import of which is not clear from the copy of account filed with us. However, it is clear to us that the account was debited by a sum of ₹ 50.00 crore on 31.3.2006 for share application money and also on 30.6.2006 by a sum of ₹ 50.00 lakh in respect of share application money. Thus, there is a direct relation between the land cost and share application money as the aggregate of two debits is the same as the land cost. In financial year 2005-06, the account was debited by a sum of ₹ 50.00 crore by way of share application money. Thus, the debit had a direct co relation with the credit made on 28.4.2004. The penalty was levied in respect of this amount. As mentioned earlier, the amount was not received by way of cash although it can be said that it was also not received by way of account payee cheques or drafts. However, the credit was given to partly discharge the outstanding liability and it was not loan or deposit made by Vatika Ltd.

5.1 Coming to the statutory provisions, clause (iii) of the Explanation to section 269 SS defines "loan or deposit" to mean loan or deposit of money. The credit in the account on 28.04.2004 was not receipt of money but for purchase of land and the liability was partly discharge by taking ₹ 50.00 crore as share application money. Therefore, we are of the view that it cannot be said that the share application was received in cash. The case of the ld. DR was that the assessee also received other amounts from Vatika Ltd. on different occasions as mentioned by the ld. CIT (Appeals). However, to our mind, the penalty was not levied by the AO in respect of such receipt of about ₹ 19.07 crore. The case of the ld. Counsel was that such receipts were also through banking channels. However, on the basis of this statement, we cannot come to an conclusion that the money was received by way of account payee cheque or draft. But, that is not the question before us. The question before us is in regard to receipt of share application money which can be said to be part of purchase consideration of the land payable by the assessee. While the revenue will be entitled to examine the receipt of other amounts in the context of the statutory provision, it is clear that allotment of shares was in lieu of land purchased from Vatika Ltd. In the case of Bhalotia Engineering Works (P) Ltd. (supra), the facts were that the assessee company accepted amounts of ₹ 20,000/- and more in cash from 10 persons and entered them in the books of account. It was

explained that the amounts were received as share application money and subsequently shares were allotted to these persons. Therefore, the amounts were not loans or deposits. The Hon'ble Court came to the conclusion that there was an obligation on the company to return the money in case shares were not allotted to them. Therefore, the amounts partook the character of deposit till final decision and the deposit in cash attracted the provision contained in Section 269 SS. If we apply the analogy of this case, if the shares had not been allotted to Vatika Ltd., the purchase price of the land would have been paid by the assessee. There would have been no occasion to receive the money, which could not be termed as loan or deposit.

5.2 In a nutshell, it is held that the assessee did not receive any loan or deposit of money and the debt by way of unpaid purchase price was partly satisfied by allotment of shares to Vatika Ltd. Accordingly, it is also held that the Ld. CIT (Appeals) erred in sustaining the levy of the penalty. "

We thus hold that no question of law arises. This appeal is accordingly dismissed.

A.K. SIKRI, J.

INDERMEET KAUR, J.

FEBRUARY 9, 2011
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