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%16.08.2011

Present: Mr. Rajat Navet, Adv. for the assessee.
Mr. N.P. Sahni, Sr. Standing Counsel for the Revenue.

+**ITA No.870/2011**
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Admit.

The following substantial question of law is framed for adjudication:

> "Whether in the facts and circumstances of the case, the Tribunal was correct in law in remanding the matter back to the file of the Assessing Officer with a direction to decide the issue of additions under Section 68 of the Income Tax Act, *de novo*?"

With the consent of learned counsel for the parties, we have finally heard the matter.

To recapitulate the facts in brief, it may be pointed out that the case relates to the Assessment Year 2005-06. While carrying out the assessment, the Assessing Officer (AO) found that the assessee had taken a tune of total amount of ₹21,70,34,294/- on account of advance money towards booking of flats from 447 parties. The AO, out of these 447 parties, randomly picked up 38 parties on the basis of scrutiny. Notices were sent to these parties. Twelve parties gave confirmation directly and nine persons gave the confirmation to the appellant stating that they had booked the flats and paid the advance. The AO was, however, not satisfied with the explanation, as according to the AO, source of those funds,

creditworthiness of the persons etc. on account of advances received against booking of flats/space were not furnished by the party. He accordingly made additions of entire amount of ₹21,70,34,294/- to the income of the assessee in respect of all 447 parties, as the appellant-assessee had failed to discharge its onus under Section 68 of the Income Tax Act (hereinafter referred to as 'the Act').

The appellant-assessee filed appeal against the order of the AO before the CIT (A). The CIT (A) called remand report from the AO. The AO, in his remand report, accepted that the confirmations were received. However, the copies of the bank accounts of the applicants who had booked the flats and purportedly paid the advances were not filed and on this basis, the AO stated in his remand report that the confirmations given by those persons could not be cross-tallied. The CIT (A), however, on the basis of said confirmation and after recording that the records of the assessee in the form of bank accounts, etc. disclosed that the payments were received through banking channels, deleted the additions made by the AO stating that the assessee was able to discharge his onus by showing the identity of the persons who had booked the flats as well as creditworthiness in the form of addresses, particulars of payments, PAN numbers as well as confirmation.

The Revenue preferred appeal against this order of the CIT (A) before the Income Tax Appellate Tribunal ('ITAT' for brevity). The

Tribunal vide impugned order had remanded the case back to the AO for further investigation. According to the Tribunal, the CIT (A) has given a negative finding whereas in test check, the AO had noted that the persons who had been shown as booked the flats had not responded to the enquiry. The Tribunal has, *inter alia*, observed as under:

(1) It is not clear whether the amount was received through account payee cheque or by bank drafts.

(2) The assessee has to prove the identity of persons from whom the amounts had been received as well as creditworthiness from whom the credit has been received.

The assessee had given some addresses to the AO on the AO issued letters, which remained un-complied with and the assessee failed to produce full particulars before the AO. Booking of 447 flats was shown and the AO had selected only 30 flats for test check and the assessee had not discharged the onus completely even in respect of these 30 persons.

On the aforesaid basis, the matter was remitted back for fresh adjudication observing that no prejudice would be caused to the either side. In view of this matter and in the interest of justice and equity, the issue should be decided *de novo*.

Challenging this order, the present appeal is filed by the assessee. The neat contention raised by the learned counsel for the assessee is that the entire material was before the Tribunal, which was placed even before the CIT (A) on the basis of which the CIT (A) recorded positive findings and not negative findings as stated by the Tribunal. He has drawn our attention towards various observations made by the CIT (A) in this behalf discussing the matter at length on the basis of material submitted before the CIT (A) on which remand report was called for. Learned counsel also referred to the said remand report. He has categorically pointed out that there is a clear finding recorded by the CIT (A) that the payment was received by account payee cheque and not by bank drafts. To support this, the assessee had filed the bank statements of its own account.

We find force in the aforesaid submissions of the learned counsel for the assessee. In fact, the Tribunal has discussed the matter on the basis of the exercise done by the AO while carrying out the assessment. What is not appreciated by the Tribunal is that before the CIT (A), documents were filed on which remand report was obtained, this related to all 447 flats and not in respect of 37 persons. Therefore, the position had completely changed, insofar as material on record is concerned, at the appellate stage before the CIT (A). The Tribunal is not correct while holding that the CIT (A) deleted the addition by negative finding. We are not commenting upon the order

of the CIT (A) is sustainable or nor, insofar as merits are concerned. What we emphasize is that it was not a case where the matter was required to be remitted back to the AO for fresh adjudication. The entire and complete material which was relied upon by the assessee was before the Tribunal. In the remand report, the AO had specifically stated that the confirmations given by the persons, who had purportedly booked the flats and the payments shown by the assessee in its account, could not be verified because of non-production of the bank statements of those applicants, who had booked the flats. Whether non-production of the bank statements of the said applicants would lead to any adverse inference, etc. is the matter which is to be judged by the Tribunal on merits.

Thus, we answer the question in favour of the assessee and against the Revenue setting aside the impugned order to this extent and remit the case back to the Tribunal to decide this issue on merits on the basis of material on records produced or whether the order of CIT (A) was sustainable on merits or not.

This appeal is disposed of in the aforesaid terms.

A.K. SIKRI, J.

M.L. MEHTA, J.

AUGUST 16, 2011/pmc