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

% **Date of Decision** : 29th February, 2012.

\+ ITA 401/2011

CIT ..... Appellant
Through Mr. Kamal Sawhney, sr. standing counsel with Mr. Amit Shrivastava, Adv.

versus

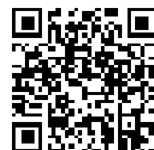
BHARTI OVERSEAS TRADING CO ..... Respondent
Through Mr. C S Aggarwal, Sr. Adv. with Mr. Prakash Kumar, Adv.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

SANJIV KHANNA,J: (ORAL)

CM No.3675/2011 (Delay)

This is an application for condonation of delay of 192 days in the refiling of the appeal. Ld. counsel for the respondent states that he has no objection in case the delay is condoned. The statement is taken on record and accepted. Delay in refiling of the appeal is condoned.



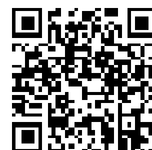
Application is disposed of.

ITA 401/2011

The present appeal filed by the Revenue under Section 260A of the Income Tax Act, 1961 (Act, for short) impugns the order dated 23.10.2009 passed by Income Tax Appellate Tribunal (Tribunal, for short) in the case of Bharti Overseas Trading Co., a partnership firm, respondent herein. The assessment year in question is 2004-05.

2. On 16.1.2012 following order was passed :

> "Two issues have been raised in the present appeal which pertains to the assessment year 2004-05 in the case of a partnership firm M/s. Bharti Overseas Trading Co. The said partnership firm consists of two partners who are also shareholders of Bharti Enterprises Pvt. Ltd.
>
> 2. The Assessing Officer held that Rs. 2,13,84,360/- received by the partnership firm from Bharti Enterprises Pvt. Ltd. should be treated as deemed dividend. It may be noted that the two partners hold more than 10% shares in Bharti Enterprises Pvt. Ltd.
>
> 3. The CIT (A) and Income Tax Appellate Tribunal have deleted the aforesaid addition under Section 2(22)(e) of the Act on the ground that the partnership firm was not the shareholder in Bharti Enterprises Pvt. Ltd. The aforesaid reasoning/ratio cannot be sustained and is contrary to the decision of this Court in **Commissioner of Income Tax v. National Travel Services**, [2011] 14 taxmann.com 14 (Delhi). This position is accepted by the respondent-assessee.



4. Accordingly, we are inclined to allow the present appeal to this extent, after framing substantial question of law.

5. At this stage, learned counsel for the respondent-assessee submits that the payment of Rs.2,13,84,360/- was not out of accumulated profits but this contention was not examined by the CIT (A) and Income Tax Appellate Tribunal as the respondent had succeeded on the other ground mentioned above. He submits that the matter should be remitted to the Tribunal for adjudication on the said aspect. The request/prayer made by the respondent-assessee is correct and deserves to be accepted in view of the observations made by the CIT (A) in paragraph 2.5.

6. The second issue which arises for consideration is the disallowance of long term capital loss of Rs.1,19,22,414/-. Learned counsel for the Revenue submits that the order passed by the Tribunal is perverse. He has drawn our attention to the assessment order which records that property No.D-819, New Friends Colony, New Delhi was originally owned by Deepika Mittal, wife of one of the partners. By the Agreement to Sell dated 25th February, 2000, the property was agreed to be sold to the partnership firm i.e. the respondent-assessee for Rs.3,15,00,000/-. Subsequently, vide an agreement dated 2nd May, 2003 the respondent-assessee sold the property in favour of M/s. Shitiz Metals Ltd. for consideration of Rs.2,40,00,000/-. The assessment order refers to certain factual aspects including the return filed by Deepika Mittal assessment year 2001-02 etc. It is submitted that Deepika Mittal had not shown and paid capital gains and the capital gains column had been left blank. It was simultaneously claimed that a note was enclosed with the return stating that long term capital gains on the sale of the property was exempt under Section 54, consequent upon her purchase of a residential house in Vasant Vihar for more than Rs.13 crores. The Assessing Officer expressed reservation/doubt about the exemption claim by Deepika Mittal under Section 54 after stating that only Rs.50 lacs was paid to

her and balance amount was payable on registration of the sale deed.

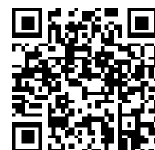
7. The CIT (A) in his order has however given a contra finding. Income Tax Appellate Tribunal has confirmed the deletion made by the CIT (A). Contention of the Revenue is that the findings of the CIT (A) and the Tribunal is perverse and factually incorrect.

8. We are repeatedly noticing that the Revenue does not file relevant documents and papers when the question of perversity on factual aspects is challenged before this Court. Without examining the relevant documents and papers we cannot adjudicate and examine the factual matrix raised by the Revenue. In the present case, a similar issue is raised but we cannot answer the issue without looking into the documents/evidence.

9. Accordingly, we permit the Revenue to file the documents/evidence relied upon by them within a period of 15 days subject to payment of costs of Rs.5,000/- to be paid to the Delhi High Court Bar Association Library fund. In case the documents/evidence are not filed, we may have no option but to dismiss the appeal on this ground for failure to produce the relevant documents/evidence.

10. List on 15th February, 2012."

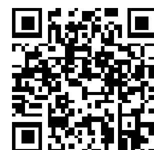
3. On 15.2.2012, we recorded the contentions of the parties on the second aspect. Mr. Kamal Sawhney, ld. senior standing counsel during the course of arguments had submitted that the respondent-assessee had paid Rs.50 lacs when the agreement to sell dated 25th February, 2000 was executed for purchase of the property No.D-819,



New Friends Colony, New Delhi from Smt. Deepika Mittal. He had submitted that the balance amount of sale consideration i.e. Rs.2.65 crores was never paid to Deepika Mittal by the respondent-assessee. He had drawn our attention to the fact that Deepika Mittal is the wife of one of the partners of the firm, Sh. Rakesh B. Mittal.

4. Ld. counsel for the respondent-assessee had submitted that Rs.2.65 crores was paid to Deepika Mittal in April, 2000 and the contention raised by the Revenue was false and incorrect. Ld. counsel for the respondent-assessee had submitted that the finding recorded by the Tribunal is factually correct and not false. He had further submitted that the CIT(Appeals) had also recorded a similar factual finding. He had argued that payment of Rs.2.65 crores was not disputed by the Assessing Officer. Ld. standing counsel for the Revenue had disputed the said statement and had referred to the assessment order.

5. In view of the aforesaid position, ld. counsel for the assessee had stated that he shall submit before us relevant details of payment



to Deepika Mittal.

6. Relevant details have been produced before us, which shows that payment of Rs.50 lacs was made to Deepika Mittal in March, 2000 and a further sum of Rs.2.65 crores was paid to Deepika Mittal by debit in the respondent-assessee's bank account on 18th April, 2000. Revenue has also produced before us the original assessment record. Notice under Section 133(6) of the Act was issued to Deepika Mittal. In response thereto vide letter dated 20th November, 2006, Deepika Mittal had enclosed her return of income with statement of income for assessment year 2001-02. The statement of income contained the computation of long term capital gain. In the said computation, it is specifically stated that the total sale consideration received in April, 2000 was Rs.3.15 crores.

7. It is clear from the aforesaid that the stand and contention of the Revenue that Rs.2.65 crores was not paid to the respondent-assessee to Deepika Mittal is factually wrong and incorrect. The Revenue should have examined and verified the records before

raising the said contention in this appeal.

8. We may record here that the Assessing Officer vide noting made on letter dated 20th November, 2006 had recorded :

> "Ld. AR of the assessee is required to establish how the sale consideration value was reached as well as to comment whether sale by firm was "a slump sale". Alternatively, it needs to be placed on record that purchase of property from Mrs. Deepika Mittal "ostensibly by way of an agreement to sale" was not sham and an arrangement for syphoning (sic) out profits without attendant payment of tax ---- by allowing a price over and above the market consideration. Adj. for 28/11/06 on Ld. Ar's request. Further, notional loss "as diminution of share value will not be allowed."

It is apparent that the Assessing Officer did not proceed further on the said aspects. We may note here that the respondent-assessee and Deepika Mittal had obtained permission under Chapter XXC of the Act from the appropriate authority. It is also apparent that the Assessing Officer did not ask for the valuation report from the appropriate authority. There are questions and doubts, which remain as the property purchased in February/April, 2000 for Rs.3.15 crores was sold in May, 2003 for Rs.2.40 crores, but in the absence of

enquiries and failure to uncover facts, we cannot proceed and hold that the order of the Tribunal is perverse. Several issues required in-depth examination and consideration but detailed enquiry which was necessary and required was not undertaken. The inquiry made at the assessment stage was incomplete. Accordingly, on the second aspect we cannot interfere in this appeal under Section 260A of the Act.

9. On the first issue of deemed dividend, we have in our order dated 16.1.2012 referred to the concession made by the counsel for the respondent-assessee in view of decision of this Court in ***Commissioner of Income Tax Vs. National Travel Services*** (2011) 14 Taxmann.com 14 (Delhi). In these circumstances, accordingly, we frame the following substantial question of law :

> "Whether the Income Tax Appellate Tribunal was right in holding that Section 2(22)(e) of the Income Tax Act, 1961 is not applicable on the ground that the partnership firm i.e. the respondent-assessee was not a shareholder in Bharti Enterprise Pvt. Ltd.?"

10. In view of the decision of this Court in National Travel Services (supra), the aforesaid question is answered in favour of the Revenue and against the respondent-assessee. We may note that the respondent-assessee had raised a contention that the payment of Rs.2,13,84,360/- was not out of accumulated profits but this aspect was not examined by the CIT(Appeals) and the Tribunal as the respondent-assessee had succeeded on the other ground mentioned above. Accordingly, the said aspects/contentions of the respondent/assessee will be examined by the Tribunal. Parties/authorized representative will appear before the Additional Registrar of the Tribunal on 30th March, 2012, when a date of hearing will be fixed.

The appeal is disposed of. No costs.

SANJIV KHANNA, J.

R.V.EASWAR, J.

February 29, 2012/vld