$~7

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

DECIDED ON: 20.07.2012

\+ ITA 788/2011

CIT ..... Appellant
Through: Mr. Deepak Chopra, Sr. Standing Counsel with Mr. Harpreet Singh Ajmani, Advocate.

versus

SARLA FABRICS PVT LTD ..... Respondent
Through: Mr. M.P. Rustogi with Mr. Deepak Malik and Mr. K.N. Ahuja, Advocates.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

%

1. The Revenue claims to be aggrieved by the order of the ITAT in ITA No.3735/DEL/2010 dated 22.10.2010.

2. The facts in this case are not in dispute. The assessment in the case was completed on 23.12.2005 when a loss of Rs.2,30,53,433/- was claimed. The assessee had claimed deduction under Section 80HHC to the extent of Rs.1,32,88,262/-. This amount was disallowed

and the assessee lost its case on merit before the CIT (A) as well as Tribunal. In this backdrop, the Revenue initiated proceedings under Section 271 (1) (c) contending that penalty was justifiably leviable. The CIT (A) allowed the assessee's appeal against the order of AO. The Revenue's appeal was rejected by the impugned order where it was held that: -

> *"The discussions in the impugned order show that the assessee maintained separate books of accounts for different units and, therefore, the claim in respect of deduction u/s 80HHC is allowable, without offsetting the loss from other unit. The CIT (Appeals) while dealing with the quantum addition, as well as the ITAT denied the claim of the assessee. When it came to the imposition of penalty, it was contended by the assessee that all particulars of the income have been disclosed and, therefore, there was bonafide claim of deduction u/s 80HHC. There were several orders of the Tribunal which were in favour of the assessee to claim the deduction. It was further claimed that it has raised a legal claim. If it is ultimately found to be legally unacceptable, it does not mean that the assessee has concealed the particulars of its income. Reliance was placed on the decision of the Supreme Court in the case of CIT VS. Reliance Petro products Pvt. Ltd.322 ITR 158 and also the decision of Dilip N. Shroff vs. Joint CIT 291 ITR 519. The Commissioner, based on the principle laid down by the aforesaid cases of the Apex Court, has deleted the penalty.*

3. We have carefully considered the submissions of the learned counsel for the Revenue. Recently in the context of another kind of disallowance i.e. under Section 269SS of the Income Tax Act, this Court was of the view that where there is a difference of opinion either

between the different Benches of the Tribunal or the High Courts, which is finally settled by the pending judgment of the Supreme Court and all the necessary facts have been disclosed by the assessee in its return, proceedings under Section-271D would not be warranted. This was so held in Commissioner of Income Tax, Delhi-IV v. I.P. India (P.) Ltd. [2012] 204 TAXMAN 368 in the following terms: -

> *"8. On a careful consideration of the matter, we find that the AO has relied on the judgment of the Jharkhand High Court (supra) and referred the issue of levying penalty to the Additional CIT. He did not examine whether the share application monies can be treated as "loan" or "deposit" within the meaning of Section 269SS. The Additional CIT has merely endorsed the view of the AO in passing the penalty order. The CIT(A) has found as a fact that the shares were subsequently allotted to the applicant companies as shown by the form filed before the Registrar of Companies. Neither the AO nor the Additional CIT has taken the trouble to examine this aspect while imposing the penalty. They have merely relied on the judgment of the Jharkhand High Court (supra). The reliance on this judgment appears to us to be misplaced. In Baidya Nath Plastic Industries (P) Ltd. and Ors vs K.L. Anand (1998) 230 ITR 522, a learned Single Judge of this court pointed out that the distinction between a loan and a deposit is that in the case of the former it is ordinarily the duty of the debtor to seek out the creditor and to repay the money according to the agreement while in the case of a deposit it is generally the duty of the depositor to go to the banker or to the depositee, as the case may be, and make a demand for it. This judgment was approvingly cited by a Division Bench of this court in Director of Income Tax (Exemption) vs ACME Educational Society (2010) 326 ITR 146 (Del). In this decision, it was held that a loan grants temporary use of money, or temporary accommodation, and that the essence of a deposit is that there must be a liability to return it to the party by whom or on whose behalf it has been made, on fulfillment of certain conditions. If*

these tests are applied to the facts of the case before us, it may be seen that the receipt of share application monies from the three private limited companies for allotment of shares in the assessee-company cannot be treated as receipt of loan or deposit. In any case, the Tribunal has rightly noticed the cleavage of judicial opinion on the point and held that in that situation there was reasonable cause u/S.273B, applying the judgment of the Supreme Court in Vegetable Products (supra).”

4. In the present case too as noticed by the Tribunal all the foundational facts which ultimately led to the disallowance were revealed by the assessee in the return. Furthermore, interpretation which ultimately prevailed was pronounced upon by the Supreme Court in the decision reported as *IPCA Laboratories v. DCIT*, 266 ITR 521. Previous to that various Benches of the Tribunal had interpreted the provision in favour of the assessee even though two High Courts i.e. Bombay and Madras High Court took contrary positions.

5. Having regard to these facts, this Court is of the opinion that the decision of the Tribunal impugned in this case does not suffer from any legal infirmity. No question of law is made out. The Appeal is accordingly dismissed.

S. RAVINDRA BHAT, J

R.V.EASWAR, J

JULY 20, 2012
/vks/