$~11

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

% **DECIDED ON: 16.04.2015**

\+ ITA 1136/2009

COMMISSIONER OF INCOME TAX DELHI IV ..... Appellant
Through: Mr. N.P. Sahni, Sr. Standing Counsel with Mr. Nitin Gulati, Jr. Standing Counsel.

versus

DLF UNIVERSAL LTD. ..... Respondent
Through: Ms. Kavita Jha with Mr. Vaibhav Kulkarni, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K. GAUBA

S.RAVINDRA BHAT, J. (OPEN COURT)

1. The following questions of law arise for consideration:

1. Whether the Income Tax Appellate Tribunal was correct in law in deleting the addition made by the Assessing Officer of ₹1,15,57,034/- on account of Hundi Discounting charges?

2. Whether the Income Tax Appellate Tribunal was correct in law in deleting the addition of ₹1,00,97,108 made by the Assessing Officer on account of net amount of current assets of the manufacturing division transferred to its subsidiary company?

3. Whether the ITAT erred in upholding the decision of Commissioner of Income Tax (Appeals) whereby the addition made by the Assessing Officer on account of notional interest amounting to ₹47,85,650/- was deleted?

4. Whether the ITAT erred in upholding the decision of Commissioner of Income Tax (Appeals) whereby the addition of ₹61,78,414/- made by the Assessing Officer on account of expenses on Brokerage and Commission was deleted?

Question No.1

2. The facts in respect of this question are that the assessee had claimed as revenue expenditure a sum of ₹1,15,57,034/- for AY 1993-94 in its returns. These were charges paid to the assessee's bank, American Express Ltd., towards *hundi* discounting facilities. In the course of its business operation, the contractors used to submit bills which were discounted on the facilities afforded by the banker. The AO was of the opinion that this was used to finance its construction work in Qutub Enclave Complex and consequently could not have been treated as revenue expenditure but had to be necessarily capitalised, since it went towards augmenting stock in trade. The CIT (Appeals) confirmed this decision. The ITAT in its order (para 45 and 45.1) was of the opinion that the view taken by the lower authorities was erroneous. In doing so, the ITAT was persuaded by the fact that for all previous years and subsequent years the *hundi* discounting charges were treated as a period cost and charged to revenue account on a year to year basis. The department had enabled this and allowed the matters to become final. The ITAT also noticed that '*hundi* discounting charges' was a different nomenclature of "interest paid" which is governed by Section 36(1)(iii) of the Act. The ITAT noted the definition of interest in Section 2(28A). The impugned order took note of the Supreme Court judgment in *Madhav*

Prasad Jatia V. CIT (118 ITR 200) to say that three conditions had to be satisfied to claim deduction in respect of interest on borrowed capital and that the expression 'for the purpose of business' under Section 36(1)(iii) and Section 37 is wider than the expression "for the purpose of earning income, profits and gains" under Section 57(iii). Therefore, it was held that interest paid for the purpose of or in the course of carrying on business is allowable in the year in which the liability arose. This Court is also of the opinion that given the dictates of consistency, the view adopted by the ITAT is fair and reasonable. Having regard to the reasoning adopted by the ITAT, this Court finds no cause to interfere with – as it is in conformity with the judgment of the Supreme Court in *Madhav Prasad Jatia's* case (supra). The question of law framed has to be answered in favour of the assessee and against the revenue.

Question No.2

3. During the assessment year, the assessee had transferred a part of its manufacturing unit to a sister concern and as a consideration allotted shares to the extent of the agreed value. The net fixed value of the assets (at book value) was ₹1,39,89,734/-. The net current assets were at ₹2,02,40,560/-. The total value of the assets thus was ₹3,42,30,294/-. As against these assets, a secured loan to the extent of ₹1,01,43,452/- existed in the assessee's books. The consideration, therefore, claimed from the sister concern - in lieu of which shares were allotted - was ₹2,40,86,842/-. The Assessing Officer after noticing these facts, took in to account the net current assets of the assessee (₹2,02,40,560/-) and also the balance sheets reflecting

current assets such as inventories, sundry debits, bank balance etc. He thereafter concluded that since the transaction was not brought into P&L Account, the net gain was at ₹1,00,97,108/- which was transferred to the sister concern. This amount was sought to be brought to tax. The CIT (A) confirmed this addition. The ITAT set aside the orders of the lower authorities on the basis of the following reasoning: -

> *"51. We have heard both the parties at length and perused the papers documents referred to. We have carefully perused the orders of the AO and CIT (A) and the papers on record. The transaction has been done at cost i.e. book value. Income or profit accrues only if anything over and above the book value i.e. the cost is paid by the transferor to the transferee. Mere realisation of the assets or changing the asset from one form to another form do not give rise to income or profit, unless something over and above the cost of such assets is realized, e.g., if the bank Fix Deposits are converted in cash or cash on hand is converted to acquire any asset, do not give rise to income. However, in this case, as noted above there being no payment in excess of cost being paid either in form of cash or shares by the transferee, a wholly owned subsidiary company, to the transferor i.e. assessee in this case, the question of brining anything to tax does not arise. There is no evidence of anything more having passed between the parties than the consideration allotted as shares to the assessee. Accordingly, we delete the addition of Rs.1,00,97,198/- made on this account."*

4. This Court has considered the submissions of the parties. What appears to have escaped the attention of the AO is that at the stage of valuation of the assets transferred itself, the book value of the fixed assets transferred was taken into consideration. Additionally, the

entire net current assets too were valued and transferred. It was the aggregate of the book value and the net current value which constituted the sale price of ₹2,02,40,560/-towards which shares were in fact allotted. Given these facts, the AO appears to have assumed that the other liabilities and assets too had been transferred - which was an inaccurate assumption. The CIT (A) too appears to have ignored this important feature. Given these factors, no fault can be found with the ITAT's conclusion that regardless of how the assessee treated the transaction, i.e., either reflecting in the P&L account or omitting to do so, in sum, no gain or income arises which can be brought to tax. The question of law is answered in favour of the assessee and against the Revenue.

Question No.3

5. The Assessing Officer added back the sum of ₹47,85,650/- during the assessment year on the ground that the assessee had not claimed any interest towards the advance of ₹2,65,86,781/- to its subsidiary companies. The AO had *inter alia* also considered certain amounts paid towards the income tax liabilities of such subsidiaries companies. The assessee's appeal was accepted by the CIT (A) who noticed that for all previous years commencing from AY 1984-85 to 1991-92, such advances had been accepted and additions not made. The CIT (A) also recorded as follows: -

> *"However, the appellant has placed before me copies of relevant bank accounts to show that these advances have not been made out of borrowed funds. There is no nexus between the borrowed funds on which the interest is being paid by the appellant and the moneys advanced to*

> *the subsidiaries. There cannot be any ground for charging and notional income to tax. However, the proportionate interest could be disallowed if the borrowed funds had been diverted for non-business purposes. This is not the case. The fact that even day-to-day expenses of these subsidiaries including their tax liabilities are me by the appellant company only shows the unity of control and management and interlacing of funds."*

The CIT (A)'s order was confirmed by the ITAT in the impugned order.

6. Learned counsel for the Revenue urges that no material was placed before the AO to support the contention that the advances were made from the assessee's own funds and that in these circumstances, the CIT (A) fell into error in considering fresh materials. The submissions appear to be attractive considering that the CIT (A) has stated that the appellant placed before him copies of the relevant bank accounts. However, this Court sitting in second appeal against the decision of the lower authorities has to be circumspect in such matters. This ground does not appear to have been urged before the ITAT articulating that the CIT (A) omitted to give any opportunity to it to re-examine such materials. Such ground also does not appear to have been urged during the hearing. Furthermore, this has not been raised as a ground of appeal before this Court. In the circumstances, we see no reason to depart from the rule of consistency which is also accepted in all the previous years.

7. The question of law is, therefore, answered in favour of the assessee and against the Revenue.

Question No.4

8. The assessee had claimed ₹61,78,414/- as expenditure towards brokerage and commission. The amount was paid to its brokers for booking and sale of certain properties during the assessment year. The Assessing Officer disallowed this expenditure on the ground that during the year the conveyance of the sale deeds were not executed. The CIT (A) and ITAT accepted the assessee's contentions and set aside the disallowance. At the outset, we notice that the assessee's explanation clearly stated is as follows: -

> *"In this connection it is submitted that brokerage and commission is not a direct expenses for acquiring to a specific property but it is in fact financial cost/selling expenses and is fully allowable in the year in which the same is incurred. The property brokers who have rendered their services to obtain advances on booking of properties are entitled to the payment of commission in terms of agreement entered into with them. Therefore, the expenses incurred on brokerage and commission on booking of properties being a finance/selling expenses are allowable in full. In this connection your attention is invited to the various orders of CIT (A) on this point where in the addition on account has been deleted. Your attention is also drawn to order dt. 20.7.1994 of Hon'ble ITAT, New Delhi for the assessment year 1983-84 of the Income-tax wherein an additional ground taken by the Deptt. for inclusion of the amount of brokerage and commission in the sales promotion expenses u/s 37(2)(a) have been dismissed. We understand that the Deptt. has not filed any reference application in the High Court against this order."*

9. It is not disputed by the Revenue that for the other years, the assessee's treatment of such expenses has been in his favour and the Revenue has not chosen to challenge it. Even otherwise, we are of

the opinion that such expenditure has to be allowed. The question of law is consequently answered in favour of the assessee and against the Revenue.

10. Since all the four questions have been answered against the Revenue, the appeal has to fail and is accordingly dismissed.

S. RAVINDRA BHAT
(JUDGE)

R.K. GAUBA
(JUDGE)

APRIL 16, 2015
/vikas/