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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 30.04.2015

W.P.(C) 6265/2013 and 6326/2013

M/S SHIVNANDAN BUILDCON PVT. LTD ..... Petitioner

versus

THE COMMISSIONER OF INCOME TAX & ANR ..... Respondents

AND

M/S OMSHIV BUILDTECH PVT. LTD. ..... Petitioner

versus

THE COMMISSIONER OF INCOME TAX & ANR ..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Parag Tipathi, Sr Advocate with Mr Kunal Bahri and Mr Ankit Verma, Advocates

For the Respondents : Mr N.P.Sahni, Advocates

CORAM:
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE SANJEEV SACHDEVA

J U D G M E N T

BADAR DURREZ AHMED, J (ORAL)

1. These two writ petitions raise a common issue and, therefore, are being taken up together. The facts of W.P.(C) No.6265/2013 shall be referred to.

2. The assessment year concerned in both the petitions is assessment year 2009-10. The present writ petitions are preferred against the orders passed by the Commissioner of Income Tax under Section 264 of the Income Tax Act, 1961. In W.P.(C) 6265/2013, the assessee had filed his return of income declaring a loss of income of Rs.32,934/- on 25.09.2009. The assessment under Section 143(3) was completed on 12.12.2011, by the Assessing Officer at an income of Rs.18,99,070/- as against the above mentioned loss. In the assessment order, the addition of Rs.19,32,000/- on account of notional interest earned on advances given to Smart Tourist Private Limited was made. The petitioner is aggrieved by the fact that the said addition did not have any factual basis and it is for this reason that the petition under Section 264 of the said Act was filed before the Commissioner seeking revision of the assessment order on account of the said addition.

3. The considerations and the findings of the Commissioner of Income Tax are as under:-

> "5.1 I have carefully considered the petition u/s 264, submissions of the assessee, comments of the Assessing Officer and assessment records of the assessee. In his petition reproduced ante, in clause (ii) and (iv) the appellant has raised objections on the addition of Rs.19,32,000/-, on account of notional income on advances. In clause (i), (iii), (v), (vi), (vii) and (viii) the assessee has raised general legal objections I observations which are not required to be separately addressed and will be considered while discussing factual issues.
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> 5.2 The only issue involved is on the addition of Rs.19,32,0001- on account of interest @ 2% on advances of Rs.1,61 ,00,0001· given to M/s Smart Tourist Pvt. Ltd. The assessee had given an advance of Rs.l,61,00,0001- to M/s Smart Tourist Pvt. Ltd on 09.04.2007(F.Y. 2007-08 and A.Y.

2008·09). This advance was reportedly given for purchase of land. This advance was shown as outstanding on
31.03.2009. The addition in A.Y. 2009-10 was made based on the assessment of preceding year. While making addition of interest @ 12% on these advances, the A.D. has stated as under in the assessment order for A.Y. 2008-09:

> *" The assessee has given Loan & Advances ofRs.1,61,00,000/- to M/s Smart Tourist Pvt. Ltd on 09.04.2007. There is no explanation why the assessee has given loan to the above concern out of its funds and no interest has been charged for this loan. In the absence of any explanation, evidence regarding identities of the parties and purpose of the loans, notional interest at 12% per annum is charged on the loan amount given. Sum of Rs. 19,32,000/- is added to the total income as notional interest on the loan/ advances given. Penalty proceedings u/s 271 (l) (c) for concealment of income and for furnishing inaccurate particulars of income are initiated separately. "*

5.4 The Assessing Officer has noted that agreement to sell evidencing such advance against land has not been filed. He has further noted that the identity of the parties has not been established. The addition in the assessment of 2009-10 has been made on the basis of findings given in the assessment of earlier year i.e. A.Y. 2008-09. The assessee's main contention is that since the assessment in 2009-10 on this issue is based on order for earlier assessment of A.Y. 2008-09, this assessment should also be set aside u/s 264 as the earlier assessments were set aside u/s 264. In this connection, I have carefully perused the order u/s 264 dated 16.03.2012 of my Ld. Predecessor. The assessment of A.Y. 2008· ')9 was set aside by the then Ld. CIT. In the tabular chart given in the order u/s 264 dated 16.03.2012, it is seen that 4 issues were identified. Interest on advance for purchase of land was only one of the issues. Even on this issue, the Ld. CIT has noted the comments of the incumbent A.D.

stating that the action of the A.D. in making the said addition cannot be said to be unreasonable.

5.5 I had also called for the records of A.Y. 2008-09 and have examined them. I noticed that the reassessment proceedings u/s 144 r.w.s. 153A r.w.s. 264 have been concluded by the Assessing Officer on 08.03.2013 and he has again made the addition stating as under:-

> *"10. The assessee during the year, has given loan and advances of Rs.1,61,00,00/- to M/s Smart Tourist Pvt. Ltd on 09.04.2007. The assessee during the re-assessment proceedings, as filed a copy of ledger account of the assessee and in the said ledger account a remarks has been made that confirmation being enclosed, but ongoing through the entire annexures no such confirmations has been filed by the assessee. The assessee has also not given any explanation why the said loan was given to the above concern out of its funds and no interest has been charges for this loan. In absence of any explanation, evidence regarding identities of the parties, purpose of the loan, notional interest @ 12% per annum is charged on the loan amount given. Accordingly, a sum of Rs.19,32,000/- is added to the total income as notional interest on the loan/ advance given. Penalty proceedings U/s 271(l)(c) of the Income Tax Act is initiated for concealment of income and for furnishing of inaccurate particulars "*

5.6 The assessee's main argument that order u/s 143(3) for 2009-10 may be set aside on the grounds that earlier orders on the same lines have been set aside has no force behind it. Firstly, the earlier orders were set aside by my Ld. Predecessor after considering many issues, and the impugned issue was only one of the issue. Even on this issue, my Ld. Predecessor had noted the comments of the Assessing Officer about correctness of the addition and has not given any specific finding. On perusal of the records of A.Y 2008-09, I notice that the assessee has again failed to furnish documents like agreement to sell and

> valid confirmations in support of its contentions. Even during proceedings u/s 264, the assessee has not furnished these vital details. On objective consideration of the facts and circumstances of this case, I am of the opinion that the Assessing Officer was justified in making this addition and therefore, I refuse to interfere in the orders of the Assessing Officer on this issue.
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> 5.7 In view of the above discussion, I am satisfied that this is not an appropriate case for interference in exercise of revisional powers u/s 264. Accordingly, the revision application u/s 264 filed by the assessee is hereby rejected."

4. On going through the reasoning adopted by the Commissioner of Income Tax, it appears that the only reason why the addition was made was on account of the fact that no explanation has allegedly been given by the assessee as to why the loan/advance was given to Smart Tourist Private Limited. It was also noted that the identity of Smart Tourist Private Limited was not known. The logic that seems to have been applied by the revenue authorities is that the petitioner was a businessman and it would be imprudent for a businessman to advance a sum of Rs.1.6 crores as in the case of W.P.(C) 6265/2013 to Smart Tourist Private Limited and to not charge anything in return. The explanation sought to be given by the petitioner in both these cases was that the advances were made in the course of their business and it is not at all necessary that an advance given by a businessman at all times must have an element of interest also. There are various other considerations which come into the calculations when a businessman advances money to another. It is not at all necessary that interest must be charged. It was further submitted by the learned senior counsel appearing on behalf of the petitioners that there is no finding in the assessment orders

or in the order of the Commissioner of Income Tax that the petitioners had, in fact, received some amount by way of interest and that such amount was not shown in the accounts. It is also contended that the revenue authorities have not rejected the books of accounts of the petitioner. It was, therefore, submitted that unless and until there was a concrete finding that something was received by the petitioner from the said Smart Tourist Private Limited and other persons similarly situated, nothing can be added by way of notional income. A reference was made to the decision of the Guwahati High Court in ***B and A Plantations and Industries Ltd. v Commissioner of Income –Tax:*** **242 ITR 22**. The relevant portion of that decision reads as under:-

> "As regards the addition of notional interest the assessee made an interest free advance of Rs. 19,58,256 to Jorhat Investments Ltd., which is a sister concern. The case of the assessee is that they did not charge interest on that advance and in consideration of the same the assessee got the premises at a very low rent of rupees two per sq. feet in a prime locality of Calcutta.
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> 15. The Assessing Officer added a notional interest of 18 per cent. on the advance amount and added the income as the amount of interest. The said addition was approved by the Commissioner of Income Tax (Appeals) and the Tribunal.
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> 16. In this case there is no finding when the assessee had in fact received the interest or that the Jorhat Investments Ltd., had in fact paid the interest to the assessee and the interest was not reflected in the accounts. The finding is that the assessee ought to have charged interest.

17. The facts in the instant case are more or less identical with the case of Highways Construction Co. Pvt. Ltd. v CIT [1993] 199 ITR 702, wherein this court held (page 708) :

> "There is no finding of fact to the effect that actually the loan had been granted to the managing director or any other person on interest, or that interest had actually been collected and the collection of the interest was not reflected in the accounts. The finding of the Income Tax Officer is that the assessee ought to have collected interest. In other words, the view of the Income Tax Officer, which has been accepted by the Tribunal, was that the assessee, as a good business concern, should not have granted interest-free loan, or should have insisted on payment of interest. If the assessee had not bargained for interest, or had not collected interest, we fail to see how the Income Tax authorities can fix a notional interest as due, or collected by the assessee. Our attention has not been invited to any provision of the Income Tax Act empowering the Income Tax authorities to include in the income, interest which was not due or not collected. In this view, we answer question No. (ii) in the negative, that is, in favour of the assessee and against the Revenue."”

5. On going through the said decision, it can be discerned that the Guwahati High Court held that there was nothing to show that the assessee had, in fact, received interest or that the company to whom the loan was given had, in fact, paid interest to the assessee. There was also nothing on record to show that the alleged interest was not reflected in the accounts. The only finding recorded was that the assessee “ought to” have charged interest. Referring to an earlier decision of the Guwahati High Court, in ***Highways Construction Co. Private Limited v. CIT:*** **[1993] 199 ITR 702,** the Court observed that their attention had not been invited to any provision of the

Income-Tax Act empowering the income-tax authorities to include in the income, interest which was not due or not collected.

6. In similar vein, when we asked Mr Sahni, who is appearing for the respondent to point out some provision of the Income Tax Act, whereunder such 'notional' interest could be made the subject matter of tax, the only reference he made was to Section 144 of the said Act. However, we are clear that Section 144 does not at all apply to the present proceedings because the present proceedings originate from an assessment under Section 143(3) of the said Act.

7. In the absence of any specific provision under which the so called notional income on advances, could be brought to tax, we do not see as to how the impugned orders passed by the Commissioner of Income Tax can be sustained.

8. Consequently, we allow these writ petitions. The impugned orders are set aside. The addition on account of a notional income on advances is deleted. These writ petitions have been decided only in respect of the respective assessment orders for the assessment year 2009-10 and will not have any bearing on the other assessment years, the facts of which we have not examined.

BADAR DURREZ AHMED, J

SANJEEV SACHDEVA, J

APRIL 06, 2015/sv