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

\+ **ITA 581/2016**
\+ **ITA 707/2016**
\+ **ITA 731/2016**

CHINTELS INDIA LIMITED ..... Appellant
Through: Mr. M.S. Syali, Senior Advocate with Mr. Mayank Nagi & Mr. Tarun Singh, Advocates.

versus

DEPUTY COMMISSIONER OF INCOME TAX – CIRCLE 8 ..... Respondent
Through: Mr. Asheesh Jain, Senior Standing Counsel for the Revenue.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE PRATHIBA M. SINGH

O R D E R

% 19.07.2017

Dr. S. Muralidhar, J.:

1. These are three appeals filed by Chintels India Limited (hereafter 'Assessee') under Section 260A of the Income Tax Act, 1961 ('Act') against the orders of the Income Tax Appellate Tribunal ('ITAT').

Questions framed

2. ITA No. 581/2016 is directed against an order dated 10th March, 2016 passed by the ITAT in ITA No. 4808/Del/2012 for the Assessment Year ('AY') 2008-09. While admitting this appeal on 27th January, 2017, this Court framed the following question of law:

> "Did the Income Tax Appellate Tribunal (ITAT) fall into error in holding that the assessments for Assessment Year 2008-09 were pending, on the date of the search i.e. 25.03.2010, in the circumstances of the case?"

3. ITA Nos. 707/2016 and 731/2016 are by the Assessee against the same impugned order dated 10th March, 2016 passed by the ITAT in ITA Nos. 4809/Del/2012 for the AY 2009-2010 and 4810/Del/2012 for the AY 2010-2011 respectively.

4. While admitting these appeals on the same date, i.e., 27th January, 2017, this Court inadvertently framed the same question of law that was framed for AY 2008-09. However, both the counsel agree that the question that ought to be framed in both these appeals is:

> "Whether in the facts and circumstances of the case the ITAT was correct in law in confirming the addition on account of the claim of depreciation on software?"

Background facts

5. The facts in brief relevant to AY 2008-09 are that the Appellant/Assessee is engaged in the business of horticulture, agriculture and real estate. For AY 2008-09, the Assessee filed its return of income on 28th October, 2008. The Assessee maintains that for this particular AY 2008-09 no notice was received by it under Section 143(2) or 142(1) of the Act. The period of issuing such notice expired on 30th September, 2009.

6. A search and seizure operation under Section 132(1) of the Act was conducted at the business and residential premises of the Assessee on 26th March, 2010. The Assessee maintains that relevant to AY 2008-09, nothing incriminating was found during the search.

7. A notice dated 10th March, 2011 was issued by the AO to the

Assessee under Section 153A(1) of the Act and asking it to file its return of income in respect of AYs 2004-05 to 2009-10. In response thereto the Assessee/AO filed a return on 28th April, 2011 declaring the same income as was originally declared in the return filed under Section 139(1) of the Act.

Assessment orders

8. In the consequent assessment order dated 30th December, 2011 for AY 2008-09, the AO made an addition of Rs. 84,84,910 under the head 'bogus depreciation claimed'. The AO held that the Assessee had not filed any document about the use of the software. The software was supposed to have been purchased from M/s. Macro Infotech Limited ('MIL'). A detailed questionnaire had been issued to the Assessee on 19th August, 2011 requiring *inter alia* the Assessee to furnish the nature and description of the product/goods purchased from MIL, copies of the purchase bills obtained from MIL as well as copies of the bank statement of the Assessee evidencing payments.

9. The AO noted that the head office and site office of MIL was shown to be in Dehradun and a branch in Karol Bagh. However, on verification of both the addresses, it came to the notice of the AO that no such company was running from Dehradun. The address in Delhi belonged to Mr. Tarun Goyal, Chartered Accountant ('CA'). A search and seizure action was also conducted at the office of Mr. Goyal by the investigation Wing of the Department. During that search it was found that a number of bogus concerns were running from the same address, i.e., 13/34, WEA Chamber No. 404, Arya Samaj Road, Karol Bagh,

Delhi, which was the address of Mr. Goyal. MIL was also one of those concerns.

10. The Assessee gave an explanation that all the payments for the purchase of software for the sum of Rs.4,24,25,050 were made to MIL through payee's cheques drawn on Bank of Rajasthan; the software was installed in the Assessee Company and the purchases were duly shown in the books of accounts. The Assessee added that it was used as a marketing/sales tool in order to convince Sobha Developers Limited ('Sobha') to participate in the development of the group housing project. Later the software was handed over to Sobha for joint use of development and marketing consequent to entering into a Joint Development Agreement dated 25th September, 2008 for 32 acres of land for group housing projects. The Assessee claimed that the project stood cancelled by a subsequent agreement dated 8th November, 2011 and that the Assessee was informed that the software had been damaged/destroyed with Sobha and cannot be returned. Accordingly the Assessee had debited the purchases in the computer software account and claimed depreciation thereon.

11. The AO concluded that the Assessee had not offered any satisfactory explanation. No documentary evidence had been produced to show that the software had been handed over to Sobha Developers. Even in respect of software destroyed no document had been produced. It was concluded that bogus purchase bills of software in the sum of over Rs. 4.24 crore had been obtained from MIL for which they had issued cheques and taken back cash from Mr. Goyal after payment of

commission. By claiming depreciation on the software the Assessee had inflated its expenditure and reduced its income. MIL was held to be a non-descript company, the business of which was to provide bogus bills.

12. After the Commission of Income Tax (Appeals) ['CIT(A)'] dismissed the appeal of the Assessee, it Assessee went before the ITAT in respect of the assessment orders for AY 2008-09; 2009-10 and 2010-11.

Order of the ITAT

13. In the impugned order, the ITAT examined again the evidence furnished by the Assessee in support of the purchase of the software of the value of over Rs. 4.24 crore. It noted that there was no purchase of any hardware corresponding to the extent of purchase of the software. How the software was installed and how it was used was not demonstrated by the Assessee. All payments had been made in August, 2007. For claiming depreciation the Assessee had to establish *inter alia* that the asset was partly or fully owned by it and used it for the purposes of business. Further the act of providing software to Sobha was not established. The Assessee was only a confirming party in the cancellation agreement which stated that the software was destroyed and compensation was waived by the party of the first part (which was not the Assessee) but the seven persons who were different companies and individuals. It was not shown how those seven persons had the right to waive compensation in respect of the software which was the property of the Assessee and not of the seven persons. Even in the

cancellation agreement there was no specific reference to any software having purchased by the Assessee. Accordingly the appeal for AY 2008-09 was dismissed. For AY 2009-10 and 2010-11 for the reasons already mentioned, the ITAT confirmed the disallowance of depreciation on software.

14. In regard to AY 2008-09, a specific plea was raised by the Appellant that the assessment for AY 2008-09 had abated. This was because no notice had been issued to the Assessee either under Section 143(2) or under Section 142(1) of the Act within the stipulated time. The ITAT concluded that the date of initiation of search was 25th March, 2010 and the date of intimation under Section 143(1) of the Act was 27th March, 2010. The ITAT concluded that as on the date of initiation of the search the assessment for AY 2008-09 was pending and had not abated.

Submissions of Senior counsel for the Assessee

15. Mr. Syali, learned Senior counsel appearing for the Assessee referred to the CBDT Circular No. 549 dated 31st October, 1989, which clarified the legal position that when there was a failure to issue a notice to an Assessee under Section 143(2) of the Act within six months from the end of the month in which the return is furnished or during the financial year in which the return is furnished, whichever is later, then the Assessee "can take it that the return filed by him has become final and no scrutiny proceedings are to be started in respect of that return." This CBDT circular was referred to and clarified by the Punjab and Haryana High Court in ***Vipan Khanna v. Commissioner of Income***

Tax (2002) 255 ITR 220 (P&H).

16. Mr Syali referred to the decision in ***Assistant Commissioner of Income Tax v. Hotel Blue Moon (2010) 321 ITR 362 (SC)*** to urge that the notice under Section 143(2) of the Act was a *sine qua non* for proceeding with an assessment under Section 153A of the Act. Reference was also made to the decisions in ***Commissioner of Income Tax v. Kabul Chawla (2016) 380 ITR 573 (Del)*** and ***Indu Lata Rangwala v. Deputy Commissioner of Income Tax (2016) 384 ITR 337***.

17. On merits of the addition, Mr. Syali submitted that the statement recorded of Mr. Goyal behind the back of the Assessee was never furnished to the Assessee. Also the basis on which it was concluded that the Assessee had made bogus purchase of software was not provided to the Assessee. In other words it is submitted that the material on the basis of which the AO came to the conclusion about income having escaped assessment during the block assessment period was not forthcoming in the present case. Mr Syali submitted He that for AYs 2009-10 and 2010-11 the matter should go back to the AO for afresh examination of all materials with the Assessee being provided copies of the material that is adverse to it and which formed basis of the additions made by the AO.

Submissions of Senior Standing counsel for the Revenue

18. On the other hand, Mr. Asheesh Jain, learned Senior Standing Counsel for the Revenue, submitted that the view taken by the ITAT

that the assessment for AY 2008-09 should be taken to be pending was a plausible view. On merits he pointed out that the evidence placed on record by the Assessee was examined thoroughly by the CIT(A) as well as the ITAT and there was a categorical finding that the Assessee had not been able to show that the purchase of software was genuine. Accordingly it is submitted that the finding of the ITAT, concurrent with the findings of the AO and the CIT(A) in this regard did not call for any interference.

AY 2008-09

19. The above submissions have been considered. As far as AY 2008-09 is concerned, the fact that there was no notice sent to the Assessee under Section 143(3) of the Act before the deadline, i.e., 30th September, 2009, is not in dispute. The CBDT Circular No. 549 dated 31st October, 1989 deals with such a situation. Para 5.13 thereof reads as under:

> "5.13 A proviso to sub-section (2) provides that a notice under the sub-section can be served on the assessee only during the financial year in which the return is furnished or within six months from the end of the month in which the return is furnished, whichever is later. This means that the Department must serve the said notice on the assessee within this period, if a case is picked up for scrutiny. It follows that if an assessee, after furnishing the return of income does not receive a notice under section 143(2) from the Department within the aforesaid period, he can take it that the return filed by him has become final and no scrutiny proceedings are to be started in respect of that return."

20. In ***Vipan Khanna v. Commissioner of Income Tax*** (*supra*), the Punjab and Haryana High Court referred to the same circular and

observed that in case where the AO chose to verify the return and frame an assessment he has to issue a notice under Section 143(2) of the Act requiring the Assessee to produce his books of accounts and other material in support of his return. The High Court proceeded to observe:

> "....Thereafter he can make an assessment under sub-section (3) of section 143 of the Act. Another important change incorporated in sub-section (2) of section 143 of the Act is that the notice under this sub-section cannot be served on an assessee after the expiry of 12 months from the end of the month in which the return is furnished. Therefore, in a case where a return is filed and is processed under section 143(1)(a) of the Act and no notice under sub-section (2) of section 143 of the Act thereafter is served on the assessee within the stipulated period of 12 months, the assessment proceedings under section 143 come to an end and the matter becomes final. Thus, although technically no assessment is framed in such a case, yet the proceedings for assessment stand terminated."

21. In the present case, the facts speak for themselves. The Assessee filed its return on 21st October, 2008. The return was processed under Section 143(1) of the Act on 27th March, 2010. It has held by this Court in ***Indu Lata Rangwala v. Deputy Commissioner of Income Tax*** (*supra*) that the mere processing of a return under Section 143(1) of the Act and the sending of an intimation to the Assessee will not make it an 'assessment'. At the same time, the consequences of the Department not issuing a notice under Section 143(2) of the Act within the time stipulated as far as the filing of the return in normal course is concerned was not examined either in ***Commissioner of Income Tax v. Kabul Chawla*** (*supra*) or ***Indu Lata Rangwala v. Deputy Commissioner of Income Tax*** (*supra*). As notice by the Punjab & Haryana High Court in ***Vipan Khanna v. Commissioner of Income Tax*** (*supra*), the CBDT

circular makes it abundantly clear that once an Assessee does not receive a notice under Section 143(2) of the Act within the period stipulated then such an Assessee "can take it that the return filed by him has become final and no scrutiny proceedings are to be started in respect of that return."

22. The inevitable conclusion, therefore, in the present case, is that the ITAT was in error in holding that the assessment for AY 2008-09 should be treated as 'pending' whereas in terms of the above CBDT circular it should be treated as final in respect of which no scrutiny are to be started.

23. Consequently as far as ITA No. 581/2016 is concerned the question framed by this Court on 27th January, 2017 is answered in the affirmative, i.e., in favour of the Assessee and against the Revenue. The impugned order of the ITAT to the extent it negatives the plea of the Assessee is hereby set aside and the appeal is allowed.

AYs 2009-10 and 2010-11

24. Turning to the appeals for AYs 2009-2010 and 2010-11 the short question involved is whether the Assessee was able to demonstrate that it was the Assessee which, in fact, purchased the software for a value of over Rs. 4.24 crore from MIL whose address has not been able to be verified by the AO.

25. The Court finds that the ITAT has re-examined every shred of evidence to come to clear conclusion that the Assessee was not able to

demonstrate the genuineness of the purchase software. Further the story put forth by the Assessee that the software having been handed over to Sobha was also not substantiated by any documentary evidence or even otherwise. On facts, therefore, the concurrent opinions of the AO, CIT(A) and the ITAT to the effect that the purchase of the software was, in fact, a bogus transaction not entitled to depreciation cannot be said to suffer from any legal infirmity warranting interference.

26. In ITA Nos. 707/2016 & 731/2016, the question framed is answered in the negative, i.e., in favour of the Revenue and against the Assessee. These two appeals of the Assessee are accordingly dismissed.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

JULY 19, 2017
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