



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

+ **ITA No. 329/2006**

Date of decision : July 21, 2009

COMMISSIONER OF INCOME TAX ...Appellant.

Through: Ms. Prem Lata Bansal, Advocate with  
Mr. Paras Chaudhry, Advocate and  
Ms. Anshul Sharma, Advocate.

VERSUS

M/S. DALMIA AGENCIES (P) LTD. ....Respondent

Through: Mr. R.M. Mehta, Advocate.

**CORAM:**

**HON'BLE MR. JUSTICE A. K. SIKRI**

**HON'BLE MR. JUSTICE VALMIKI J.MEHTA**

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

% **JUDGMENT**

**A. K. SIKRI, J.(ORAL)**

1. The assessee had entered into a settlement with its workmen under Section 18(1) of the Industrial Disputes Act. As per the settlement, lump sum



payment was made to the workers. The assessee/respondent herein had filed return of income for the assessment year 2001-02 declaring a loss of Rs.44,37,666/-. The return was processed under Section 143(1)(a) of the Income Tax Act. Subsequently, the case was taken up for scrutiny and notices under Section 143(2) were issued on 29.10.2002 by the Assessing Officer.

2. During the assessment, the Assessing Officer, inter alia, found that the assessee company had claimed deduction of Rs.39,92,189/- representing payment to permanent workmen/staff members at Dalmia Puram, legal as well as ex-gratia compensation. The aforesaid amount of compensation was paid by the assessee in terms of Memorandum of Settlement arrived at between the assessee and its workmen under Section 18(1) of the Industrial Disputes Act. The Assessing Officer was of the opinion that since the amount was paid as lump sum compensation on the mutual understanding for the resignation/retirement of the workmen, it would be in the nature of payment made for voluntary retirement of those employees. The Assessing Officer, thus, considered that such an amount would be covered by the provisions of Section 35DDA and not under Section 37 of the Income Tax Act as claimed by the assessee.

3. As per the provisions of Section 35DDA which came into effect from 01.04.2001, the deduction is allowed at the rate of  $1/5^{\text{th}}$  of the expenditure



incurred during the year under 'Amortization of expenditure under Voluntary Retirement Scheme' and the balance amount is allowed in four instalments in the four subsequent years. Hence, the Assessing Officer passed the order dated 30<sup>th</sup> January, 2004 allowing only 1/5 of the expenditure against full expenditure claimed by the assessee for that year under Section 37 of the Act. At the same time, the Assessing Officer also opined that this would amount to concealment of income and initiated penalty proceedings under Section 271(1)(c) of the Income Tax Act. After issuing notice to the assessee under the aforesaid provision and hearing his objections thereto penalty order dated 30.07.2004 was passed by the Assessing Officer imposing penalty of Rs.12,63,048/-.

4. We may note at this stage that the assessee had accepted the assessment orders whereby deduction of aforesaid amount paid by the assessee to its workers was allowed under Section 35DDA of the Act. However, the assessee challenged the penalty order on the ground that the requirements of Section 271(1)(c) of the Act were not fulfilled and the penalty proceedings were illegally initiated by the Assessing Officer and consequently the penalty order passed also was not valid. In this behalf, submissions of the assessee was that the claim made by the assessee, treating the aforesaid payment as revenue expenses under Section 37(1) of the Income Tax Act, was



a bona fide move. Two opinions were possible and in case it was held by the Assessing Officer that the claim is allowable under Section 35 DDA and not under Section 37, that would mean that the Assessing Officer was not right in initiating penalty proceedings. Contention of the assessee found favour with the Commissioner of Income Tax (Appeals) who vide his order dated 8<sup>th</sup> October, 2004 set aside the penalty levied against the assessee.

5. The revenue challenged this order before the I.T.A.T. but without any success in as much as by reason of impugned order dated 30<sup>th</sup> August, 2005, the Tribunal has dismissed the appeal of the revenue. In the process, the I.T.A.T. has observed as under:

“ We have considered the rival contentions and the material on record. Firstly, we do agree with the observations of the CIT(Appeals) that all material facts were disclosed by the assessee and that there was no intention to conceal any particulars. The modus of claiming deduction was merely a matter of opinion and hence on that ground itself, no penalty is leviable. Secondly, nowhere in the assessment order we find any satisfaction recorded by the AO as to concealment by the assessee. This is a prerequisite before Commercial Enterprises in 246 ITR 568 and a host of other judgments which followed thereafter. Therefore, on any count, the penalty is not sustainable and hence we uphold the order of the CIT (Appeals) cancelling the same.”

6. Reason given by the I.T.A.T. that in the assessment order, no satisfaction is recorded by the Assessing Officer as to concealment by the assessee and setting aside the order on that ground, relying upon the judgment in the case



of *Ram Commercial Enterprises 246 ITR 56*, no more remains valid in view of legislative amendment in Section 271 by the Finance Act, 2008. By this amendment, sub-section 1(B) is inserted to Section 271 of the Income Tax Act retrospectively with effect from 1<sup>st</sup> April, 1989 as per which it is not necessary for the Assessing Officer to record such a satisfaction. It is for this reason that on 18<sup>th</sup> July, 2008, this Court taking note of the aforesaid amendment observed that the matter is to be now examined on merits.

7. For this reason, we heard the counsel for the parties on merits. Section 35DDA inter alia states that where an assessee incurs any expenditure in any previous year by way of payment of any sum to an employee in connection with his voluntary retirement, **in accordance with any scheme or schemes of voluntary retirement**, one-fifth of the amount so paid shall be deducted in computing the profits and gains of the business for that previous year, and the balance shall be deducted in equal instalments for each of the remaining succeeding previous years. Thus, this provision is applicable when Voluntary Retirement Scheme is introduced by the assessee and under this scheme, payments are made by the assessee to his employees on their voluntary retirement. It is well known that many times various companies come out with such Voluntary Retirement Schemes to ease out unwanted/surplus employees. The purpose is to give honourable exit with “golden hand shake”. Indubitably



there exist specific provisions in the Industrial Disputes Act to retrench surplus employees which can also be restored to by the employer. However, invocation of those provisions normally leads to litigation between the retrenched workmen and employer. Furthermore, the provisions of retrenchment etc. which are contained in Industrial Disputes Act would cover only those employees who are 'workmen' within the meaning of Section 2(s) of the Industrial Disputes Act' and it would not include non workmen/other employees. Guided by these considerations, Voluntary Retirement Scheme is normally introduced with benevolent objective to give extra benefits to the employees who come forward and opt for such a scheme by taking much more benefits which otherwise may not be available to such employees under the law. Section 35 DDA of the Act covers such a situation.

In the present case, what we find from the orders of the Assessing Officer as well as C.I.T. (Appeals) that assessee is engaged in the business of manufacturing of cement pipes and fittings, agricultural activities and investment in shares. It had closed its Rockfort unit at Dalmia Puram. Because of its closure, closure notice was issued to its employees whose services were no longer required as a result of the aforesaid closure. It appears that this led to a dispute between the employees and the employer which resulted into settlement under Section 18(1) of the Industrial Disputes Act. It



was because of this reason that the assessee believed that the payment made in a settlement arrived at under Section 18(1) of the Industrial Disputes Act, would qualify as revenue expenditure and it could claim the entire deduction under Section 37 of the Income Tax Act.

8. Interestingly, even the Assessing Officer in the assessment order took note of the judgment of the Supreme Court in the case of ***Indian Cable Company Limited Vs. Its Workmen AIR 1972 SC 2195***. In this case, the Apex Court held that when payment is made to workmen, who retire prematurely, it is treated as expenditure incurred on the ground of commercial expediency and thus expenditure so incurred would be allowable as an expenditure under Section 37(1) of the Income Tax Act. This also demonstrates that in the income tax return filed by the assessee when the assessee is claiming expenditure because of payment made under Section 18(1) of the Industrial Disputes Act and not under the Voluntary Retirement Scheme, it was a bona fide move on the part of the assessee and two views in the matter were possible, namely, whether the claim was to be allowed under Section 37(1) of the Act or it was allowable under Section 35DDA of the Act. In such circumstances, even if the Assessing Officer ultimately held that claim could be allowed only under Section 35DDA, we are of the view that it was not a case where the assessee had concealed the income or had furnished inaccurate particulars. In fact as



observed by the C.I.T.(Appeals) and as well as by I.T.A.T. complete disclosure was made by the assessee in this behalf.

6. We are, therefore, of the opinion that ingredients of Section 271(1)(c) of the Act are not satisfied in the present case and the findings arrived at by the two authorities below, which are concurrent, are findings of facts on this aspect. No substantial question of law arises for determination and this appeal is accordingly dismissed.

**A. K. SIKRI, J**

**VALMIKI J. MEHTA, J**

**JULY 21, 2009**

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