



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

% Judgment delivered on: 03.05.2010

+ **ITA 364/2010**

COMMISSIONER OF INCOME TAX Appellant

- versus -

DENSO HARYANA PVT. LTD Respondent

Advocates who appeared in this case:-

For the Appellant : Mr N. P. Sahni

For the Respondent : Mr C. S. Aggarwal, Sr Advocate with Mr Prakash Kumar

CORAM:

HON'BLE MR. JUSTICE BADAR DURREZ AHMED

HON'BLE MR. JUSTICE V.K. JAIN

1. Whether 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 Digest ?

BADAR DURREZ AHMED, J (ORAL)

1. The revenue is in appeal against the order dated 29.04.2009 passed by the Income Tax Appellate Tribunal in ITA No. 1952/Del/2008 relating to the assessment year 2003-2004.

2. The assessee was before the Tribunal in the aforesaid appeal being aggrieved by an order passed under Section 263 of the Income Tax Act, 1961 (hereinafter referred to as 'the said Act') by the Commissioner of Income Tax (Appeals). The provisions of Section 263 had been invoked by



and was prejudicial to the interest of the revenue. According to the Commissioner of Income Tax (Appeals), while calculating the book profits under Section 115JB of the said Act, sales commission of Rs 241.90 lacs claimed in the profit and loss account was not added back, even though this claim had been disallowed in calculating the total income under the normal provisions of the Act. The Commissioner of Income Tax (Appeals) was of the opinion that the mistake had resulted in under assessment of income under Section 115JB to the said extent. It was also observed by the said Commissioner that the assessment was made by the Assessing Officer without an adequate enquiry or investigation.

3. The Income Tax Appellate Tribunal, after hearing the parties, noted that the assessee company, which was a 100% subsidiary of Denso Corporation, Japan, was in the business of trading and manufacturing of gasoline engine management systems. During the year in question, a payment of Rs 2,41,89,190/- had been made by the assessee on account of the commission to its sole selling agent under an agreement which was duly approved by the Department of Company Affairs. A copy of the Central Government approval for appointing the said sole selling agent under Section 294 of the Companies Act, 1956 was also placed on record. The said commission was debited to the profit and loss account of the assessee company for the year in question. More importantly, the profit and loss account was audited and certified by the statutory auditors in accordance



Tribunal that in the original assessment the Assessing Officer had disallowed the commission by holding that the claim of the assessee was not sustainable under Section 37(1) of the said Act. This was so because, according to the Assessing Officer, the assessee company had violated the provisions of Section 294 of the Companies Act, 1956 by appointing the sole selling agent. The question of allowability of the sales commission was the subject matter of appeal before the Commissioner of Income Tax (Appeals), who held the same to be an allowable expenditure inasmuch as the same was incurred by the assessee for its business purpose.

4. The learned counsel for the respondent/ assessee informs us that after the decision of the Commissioner of Income Tax (Appeals), the revenue preferred an appeal before the Income Tax Appellate Tribunal but the said appeal was dismissed. Thereafter, no further appeal was filed before this Court on this issue. As such, the issue had become final. The Tribunal, therefore, was of the view that undeniably the commission that was paid to the sole selling agent, which was a business expenditure, required to be deducted while calculating book profits under Section 115JB of the said Act.

5. In any event, we find that insofar as the computation of income under Section 115JB is concerned, the powers of the Assessing Officer are very limited. This is clear from the decision of the Supreme Court in the case of *Apollo Tyres Ltd v. CIT*: 255 ITR 273 (SC) which, though it related to



115JB. In the said decision, the Supreme Court observed that the Assessing Officer, while computing income under Section 115J, has only the power to examine whether the books of account were certified by the authorities under the Companies Act, as having been properly maintained in accordance with the Companies Act. The Assessing Officer thereafter has only limited power of making increases and decreases as provided for in the Explanation to Section 115J. The Supreme Court made it clear that the Assessing Officer does not have the jurisdiction to go beyond the net profits shown in the profit and loss account, except to the extent provided in the Explanation to Section 115J of the said Act.

6. The said observations are clearly applicable to the present case. Once the profit and loss account was audited and duly certified by the statutory auditors to be in accordance with the Companies Act, 1956, it was not open to the Assessing Officer to go beyond the profits so declared except to the extent of making increases or decreases as per the Explanation to the said Section. It is not the case of the revenue that the Assessing Officer or the Commissioner of Income Tax was purporting to make any adjustments as provided under the Explanation. Consequently, the Tribunal was absolutely right in concluding that the provisions of Section 263 of the said Act could not be attracted because there was nothing erroneous in the original order passed by the Assessing Officer. The Tribunal has correctly placed reliance on the decision of the Supreme Court in the case of *Apollo Tyres Ltd*



that the allowance has been made in the subsequent year as well as in the preceding year.

No substantial question of law arises for our consideration. The appeal is dismissed.

BADAR DURREZ AHMED, J

V.K. JAIN, J

May 03, 2010
SR