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

Judgment reserved on : 15.09.2008
% Judgment delivered on : 03.10.2008

\+ **ITA 87/2006**

COMMISSIONER OF INCOME TAX ..... Appellant

-versus-

M/S PRAVEEN ELECTRONICS LTD ..... Respondent

Advocates who appeared in this case:

For the Revenue : Mr R.D. Jolly
For the Respondent : Mr Salil Aggarwal with Mr Prakash Kumar

CORAM :-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE RAJIV SHAKDHER

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

RAJIV SHAKDHER, J

1. This is an appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as "the Act") preferred by the Revenue against the judgment dated 28th February, 2005 passed by the Income Tax Appellate Tribunal (hereinafter referred to in short as "Tribunal") in ITA No. 3273/ Del/2000, in respect of, assessment year 1996-97.

1.1. The Revenue being aggrieved has proposed the following questions of

(i) Whether the I.T.A.T. has erred in law in deleting the disallowance of loss of Rs32,10,166/- on account of loss in trading of shares, treating as speculation loss by the Assessing Officer?

(ii) Whether the I.T.A.T. was correct in law in deleting the disallowance in spite of the decision of Apex Court in the case of Mcdowell Vs. CIT reported in 154 ITR 148?

(iii) Whether the order of I.T.A.T. is perverse, as it has ignored the relevant facts and material on record?

2. After hearing learned counsel for the Revenue, as well as, the assessee we are of the view that the findings recorded by the authorities below are pure findings of fact. There are no questions of law which arise for our consideration much less, substantial questions of law. The reasons for arriving at this conclusion are indicated by us hereinbelow. Before we proceed, it must be recorded that in the course of his submissions the learned counsel for the Revenue, Mr. R.D. Jolly fairly conceded that the first question of law as proposed in the appeal did not arise in the facts and circumstances of the present case. Therefore, we are left with only question Nos. (ii) & (iii) as proposed in the appeal.

3. Our reasons for arriving at the conclusion which we have, as indicated hereinabove are based on the following facts:-

3.1 On 29.11.1996 the assessee filed his return declaring a loss of Rs 93,220/. The Assessing Officer issued a notice under Section 143(2) of the Act. In response thereto the authorized representative of the assessee appeared before the Assessing Officer. It is important to note that in the first

subsequently represented by another set of representatives. This is relevant in view of the fact that the Assessing Officer has made some observations with regard to the lack of knowledge of the Director of the assessee in respect of the impugned transactions.

4. Coming back to the facts, the assessee, in his return had declared income by way of interest to the extent of Rs 38,02,385/-. Against the said income it had claimed expenditure by way of administrative expenses, in the sum of Rs 2,475/-, as also, interest charges amounting to Rs 5,62,200/-. What attracted the attention of the Assessing Officer was the loss claimed by the assessee in share transactions which resulted in a loss return. The Assessing Officer noticed that the assessee had purchased shares worth Rs 94,46,601/- which were sold for a total consideration of Rs 61,15,206/-; and consequently, the assessee had claimed a loss of Rs 33,31,395/-. The Assessing Officer disallowed this loss. A close scrutiny by the Assessing Officer revealed that: the loss to the assessee with respect to share transactions, had resulted from trading in shares of four companies referred to hereinafter; and also, that, all the share transactions in issue, had been handled by a share broker by the name of M/s Sushil Kumar Jindal & Co., Darya Ganj, New Delhi (hereinafter referred in short as "broker"). The companies whose shares were traded by the assessee are as follows:-

i) Jindal Capital Ltd.

ii) Karisma Flouriculture Ltd.

5. The Assessing Officer conducted his investigations. In pursuance thereto summons were issued under Section 131 to the broker. The broker was represented before the Assessing Officer through his counsel. The Assessing Officer also examined one of the Directors of the Assessee, namely, Mr. Sen. On completion of his enquiry the Assessing Officer came to the conclusion that the loss amounting to Rs 33,31,395/- in respect of share transactions had to be disallowed. Consequently, the said loss was added back to the total income of the assessee. The rationale for arriving at this conclusion is contained in the Assessing Officer's order dated 26th March, 1999. The rationale being:-

(i) the assessee had no experience in dealing in share transactions;

(ii) the former Director of the assessee, Mr. Sen, who was examined by him had stated that share transactions had not been carried out throughout the year in issue, or even the succeeding financial year. Mr. Sen had stated before the Assessing Officer that he was not only unaware of the loss suffered in the share transactions but had also not heard of the broker engaged by the assessee. Furthermore, the other Director of the assessee Mr. S.P. Kapre was not produced by the assessee;

(iii) the impugned share transactions were carried out at the fag end of

(iv) the share transactions involved huge losses and, in none of the transactions, assessee had earned profits. This was neither prudent nor credible;

(v) all transactions had been made through one broker, namely, M/s Sushil Kumar Jindal & Co. The assessee had not produced the broker or, his books of accounts;

(vi) enquiry in respect of shares dealt with by the assessee, whose distinctive numbers had been furnished by the broker, revealed that they were being dealt by other brokers at the Bombay Stock Exchange during the relevant period;

(vii) the scrutiny of the assessee's accounts and that of the books of accounts of broker had shown that, in respect of number of, transactions carried out between 24.2.1996 to 9.3.1996 the assessee had made payment in respect of net loss incurred by it, which, was evidence enough to show there was no delivery of shares;

(viii) though there was a huge volume of transactions of nearly Rs 90 lakhs (approximately) the expenses incurred were incredibly small, amounting to Rs 2,450/-, and;

(ix) the share transactions was a colourable device which was employed in collaboration with the broker only to reduce the

6. Being aggrieved, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) (hereinafter referred in short as "CIT(A)"). The CIT(A) examined the facts placed before the Assessing Officer and the submissions made by the assessee including the point-wise rebuttal made by the assessee before him. The CIT (A) after considering the material on record and the submissions of the assessee, came to the conclusion that the impugned share transactions with the broker were substantially in order and hence, could not be treated as bogus transactions for the reason that:- the assessee had brought on record documentary evidence in the form of contract/delivery notes, purchase and sale bills of broker, as also, details of bank accounts showing payments made and received by account payee cheques and details of distinctive number of shares as well as proof of taking physical possession of shares. The CIT(A) noted that against 2,30,300 shares purchased by the assessee from the four (4) companies referred to above, the Assessing Officer had doubts with regard to only 8,100 shares against which the assessee had suffered a loss of Rs 1,21,229/-. In these circumstances, the CIT (A) came to the conclusion, that having, regard to the fact that the assessee had rebutted each and every issue raised by the Assessing Officer by placing on record the relevant documentary proof and, given the fact that the statement of the ex-director of the company, Mr. Sen, on which reliance was placed by the Assessing Officer, was taken in the absence of the assessee, as also, the fact that the said director, Mr. Sen was not involved in the affairs of the company during the relevant period, and nor was Mr. Sen confronted

relevant period as bogus. The CIT (A), thus, thought it reasonable, in those circumstances, to disallow the loss with respect to 8,100 shares amounting to Rs 1,21,229/- even though the assessee had given a reasonable explanation by supplying the necessary data that at the relevant time the broker had in his possession a larger number of shares of each of the four companies than those purchased by the assessee, and that, the broker may have dealt with the shares of which otherwise the assessee was the owner and hence, possessed the details with respect to their distinctive numbers by breaching the custodian rule; for which, the assessee could not have been penalized for the infraction committed by the broker.

7. The Revenue being aggrieved by the order of the CIT(A) preferred an appeal to the Tribunal. The Tribunal after examining the matter in detail sustained the order of the CIT(A). The Tribunal's order was in line with the reasoning adopted by the CIT(A) – which was, that the Assessing Officer could not have treated the entire share transaction as bogus when he had asked the assessee to show cause with respect to only 6000 shares of Jindal Capital Ltd., 1100 shares of Karishma Flouriculture Ltd. and, 1000 shares of Bharthari Financial Services Ltd, on the ground, that during the month of February-March, 1996 the said shares were being dealt by some other broker in the Bombay Stock Exchange. The Tribunal found the view of the CIT(A) reasonable in disallowing the loss to the extent of Rs 1,21,600/- even while noticing the explanation of the assessee that the broker may have violated the

8. Before us the learned counsel for the Revenue reiterated the stand of the department as contained in the order passed by the Assessing Officer. On the other hand, the learned counsel for the assessee submitted that even though the entire share transaction was genuine in order to buy peace with the department it had decided not to file an appeal against the order of the CIT(A) in respect of a portion of the disallowance, amounting to Rs 1,21,600 sustained by the CIT(A).

9. On perusal of the record, we find that the heart of the matter is; that the Assessing Officer was dissatisfied with the explanation offered by the assessee with regard to 8,100 shares in respect of three (3) of the four (4) entities out of a total number of 2,30,300 shares traded by the assessee. Based on the perceived lack of explanation by the assessee, the Assessing Officer dubbed the entire transaction of shares conducted by the assessee through the broker, as a colourable device, with a view to evade tax. In our opinion the approach adopted by both the CIT (A) and the Tribunal was correct. Both the CIT(A), as well as, the Tribunal having examined the record and weighed the evidence placed before them came to the conclusion that the transaction was substantially genuine and in their wisdom they thought it fit and reasonable to disallow the loss with respect to 8,100 shares, amounting to Rs 1,21,600/-.

9.1 In our view the question whether the impugned share transaction in which the assessee was engaged was a colourable device or not, is essentially

***Tax*:(2001) 250 ITR 291 (at page 301)** are apposite. The same are extracted below:-

> "….. It may be necessary to deal with the question of "colourable device". A colourable transaction is one which is seemingly valid, but a feigned or counterfeit transaction entered into for some ulterior purpose. A conclusion about the nature of a transaction, i.e., whether it is colourable or otherwise, if supported by material or evidence is essentially one of fact."

As regards the contention of the Revenue in respect of the applicability of the judgment of the Supreme Court in ***Mcdowell v. CIT; 154 ITR 148,*** the scope of the same stands fully explained in the judgment of the Supreme Court in the case of ***Union of India v. Azadi Bachao Andolan; 263 ITR 706***. In any event, in view of our discussion above, the same is not relevant in the fact situation arising in the present case.

9.2 Furthermore, nothing has been brought to our notice by the learned counsel for the Revenue which would persuade us to hold that the findings returned by the authorities below were either contrary to the evidence placed on record, or was a case of 'no evidence' and hence, perverse.

10. In these circumstances, we are of the view that the orders of the authorities below do not call for any interference. In the result, the Revenue's appeal is dismissed.

RAJIV SHAKDHER, J