

Hollyhock Engineering (P) Ltd. Vs. Assistant Commissioner of

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Court : Income Tax Appellate Tribunal ITAT Ahmedabad

Decided On : Aug-13-1999

Appellant : Hollyhock Engineering (P) Ltd.

Respondent : Assistant Commissioner of

Judgement :

1. This is an appeal by the assessee against the order dt. 15th February, 1999, passed by the CIT(A)-I, Ahmedabad. In the various grounds of appeal, the assessee has challenged the action of the CIT(A) in respect of the following additions/disallowances : (i) In ground of appeal Nos. 1 to 11 the assessee has objected to the action of the CIT(A) in confirming the action of the AO in adding a sum of Rs. 19,00,500 being the alleged profit arising out of shares allotted to the assessee in the public issue.

(ii) In ground of appeal Nos. 12 the assessee has objected to the action of the CIT(A) in confirming the action of the AO in adding a sum of Rs. 2,92,274 being the interest on term deposits.

(iii) In ground of appeal Nos. 14 and 15 the objection of the assessee is with regard to the charging of interest under ss. 234A 234B and 234C. (iv) In ground of appeal No. 16 the assessee has objected to the initiation of penalty proceedings under s. 271(1)(c).

2. Briefly the facts are that the assessee-company was incorporated at Ahmedabad on 10th December, 1993. It filed its return, of income for asst. yr.

1994-95 declaring an income of Rs. 1,01,866 on 5th October, 1995. The return was processed under s. 143(1) of the Act on 21st November, 1995. Thereafter, the case was selected for scrutiny and notice under s. 143(2) and 142(1) alongwith the questionnaire were issued to the assessee seeking information with regard to the various items of income shown in the computation of income filed along with the return. The AO found that the assessee has shown the break-up of its income as under : (i) Interest on stock investment 77,676 (ii) Interest income 1,79,507 (iii) Service charges 25,000 3. The AO also found that the assessee had shown receipt of unsecured loan of Rs. 4,11,04,732 and it also had cash and bank balances of Rs. 3,90,99,226. Accordingly, the AO required the assessee-company to give details of these items along with the copies of accounts, confirmation, agreements, etc.

4. In response to the query raised by the AO, the assessee vide its letter, dt. 6th December, 1996, informed the AO that the assessee-company was followed along with similar other companies by the promoters/share-holders of Videocon Group of Industries. It was explained that in the year 1993, Videocon Group of Industries viz., Videocon International Ltd. (VIL) and Videocon Appliances Ltd. (VAL) had procured funds for implementing their projects. Since the project was to take some time and the funds raised were surplus with VAL and VIL, it was desired to utilise the funds to acquire the shares by making applications for public issues of various companies to take advantage of the buoyant stock market. As per the proportionate allotment system introduced by SEBI, number of shares to be allotted on each issue was subjected to a maximum ceiling of a single application.

In order, therefore, to procure large number of shares in such public issues, arrangements were made with different investment companies of Videocon Group and the assessee is one such company. For this purpose the assessee-company entered into an agreement dt. 18th December, 1993, with VAL and agreement dt. 25th January, 1994, with VIL by which it was stipulated as under : (a) VAL/VIL shall provide specified funds to be invested by the assessee in specified public issues.

(b) Such investments were made for and on behalf of "VAL/VIL" and all the accruing benefits thereby or in and on behalf of the account of VAL/VIL.

(c) Till the repayment, allotment or refund is completed, the amounts so invested would belong to VAL/VIL.

(d) All investments shall be treated as belonging to and to belong to VAL/VIL.

(e) The assessee shall be entitled to certain specified service charges only.

5. In both the agreements, the assessee-company has been referred to as "fund manager" and the "fund manager" was required to inform the financing company all the details of the amounts invested, mode and type of investments, time aspect of realisation of the expected returns. For the above services, the fund manager was entitled to service charges of the amount specified in the agreements. In the preamble of the agreements it has been clearly stated that the financing company had certain funds and were desirous of achieving optimum investments of the funds. In pursuance to the above agreements, VAL/VIL provided funds to the assessee-company for making applications for allotment of shares in specified public issues as selected by the financing company.

6. During the accounting year relevant to asst. yr. 1994-95 the assessee-company was successful in getting allotment of 1,900 equity shares of Nirma Ltd. and 5,100 partly convertible debentures of Lupins Laboratories Ltd. although it applied for seven public issues as noted by the AO at p. 3 of the assessment order : the other companies being Supreme Petrochem Ltd., Binani Zinc Ltd. Torrent Pharmaceuticals Ltd., Federal Bank Ltd. and Delta Industries Ltd. 7. The partly convertible debentures (PCDs) of Lupins Laboratories Ltd. were converted into equal number of shares on allotment i.e. 5,100 and the same were transferred to VAL on 21st February, 1994, by passing a journal entry at a price of Rs. 118 per share. Part B of those PCDs consisting of NCDs (Khokha) only were transferred by another journal entry on 21st February, 1994, at a price of Rs. 182 per NCD. Similarly 1,900 shares of Nirma Ltd. were transferred to VIL by passing a journal entry on 21st March, 1994, at issue price i.e. Rs. 110 per share.

8. M/s. VAL and M/s. VIL subsequently transferred those shares in the market by making a profit of Rs. 19,00,500 which has been worked out by the AO at p. 36 of the assessment order as under : (a) Cost per share being issue price 100 (b) Sale price per share purportedly shown in the hands of VAL 400 (c) Profit per share (a) - (b) 300 (d) No. of shares allotted 5,100 (e) Profit (c) x (d) 15,30,000 (a) Cost per share being issue price 110 (b) Sale price per share purportedly shown in the hands of VAL 305 (c) Profit per share (a) - (b) 195 (d) No. of shares allotted 1,900 9. According to the AO the profit earned by VAL and VIL is required to be taxed in the hands of the assessee because as per the perception of the AO the said profit belonged to the assessee-company although the profit earned by VAL and VIL has been shown by them in their respective income-tax returns. The reasons for the action of the AO as discussed in the assessment order can be summarised as under : (a) That the transfer of the shares was hit by the relevant provisions of the Benami Act.

(b) That the transfer of shares to the financing companies was illegal under the provisions of s. 13 of the Securities Contracts (Regulation) Act, 1956.

(c) Therefore, the agreements were void under s. 23 of the Contract Act.

(d) That the provisions of s. 187C of the Companies Act, 1956 were applicable and the appellant should have declared the details of the beneficial owners to M/s. Lupin Laboratories Ltd. and M/s. Nirma Ltd. (e) That the agreements were entered into with a view to circumvent the various restrictions imposed by SEBI and other authorities regulating the share transactions.

(f) That the transactions were therefore, colourable transactions, entered into with a view to avoid payment of tax in the hands of the right person and hence the ratio of the Supreme Court decision in the case of McDowell & Co. Ltd. vs. CTO (1985) 154 ITR 148 (SC), would apply to the case of the appellant.

10. On appeal by the assessee, the learned CIT(A) upheld the action of the AO for the reasons given in the impugned order.

11. The assessee is aggrieved and has filed this appeal. The learned authorised representative of the assessee submitted that the AO has sought to tax the income of Rs. 19,00,500 in the hands of the assessee by raising various issues and the CIT(A) has confirmed the said finding. The issues involved and the submissions of the learned authorised representative of the assessee are as under : 13. According to the AO the transactions between the assessee and VIL/VAL are illegal and, therefore, the profits earned by VIL/VAL is deemed to have been earned by the assessee. According to the AO the agreements entered into between VIL/VAL and the assessee was in contravention of the Benami Transaction (Prohibition) Act, 1988. The learned authorised representative of the assessee has submitted that the provisions of Benami Transaction (Prohibition) Act, 1988 have no application because under the said Act, a benami transaction is a transaction in which "property is transferred to one person for consideration paid or provided by another person". It was submitted : (i) Admittedly the funds for acquiring the shares have been provided by VIL/VAL.

(ii) In any case there is no transfer of existing property when shares are allotted.

14. It was submitted that the finding of the AO "that on allotment of shares by investee company to the investor against a price consideration, the property of the company i.e. shares got transferred to the investor", is clearly erroneous, inasmuch as for a company the share capital is never its assets in fact it is a liability.

15. As regards the finding of the AO that the transaction has resulted into a breach of provisions of s. 13 of Securities Contracts (Regulation) Act, 1956, because under the agreement the parties had agreed to transfer the shares at a future date, it was submitted that the view of the AO is erroneous because at the time when the agreements were entered into neither Nirma Ltd. nor Lupin Laboratories Ltd. were listed companies. It was pleaded that the provisions of this Act can only apply to the shares of listed companies only. Reliance was placed on the following decisions : (a) Normal J & Hamilton vs. Umed S. Patel (1979) 49 Comp. Cas. 1 (Bom); (b) Dahiben Umedbhai Patel vs. Normal J. Hamilton (1985) 57 Comp.

Cas. 700 (Bom); (c) Brooke Bond India Ltd. vs. U.B. Ltd. (1994) 79 Comp. Cas. 346 (Bom); and (d) J. C. Parekh vs. Deccan Paper Mills (1994) 80 Comp. Cas. 159 (CLB).

16. In any case it was pleaded that the shares were transferred in cash by the assessee to VIL/VAL by appropriately adjusting the amounts payable to VIL/VAL towards the sale price payable on the transfer of the said shares. The fact that only journal entries are passed later on makes no difference because on the date on which the shares are transferred by the assessee to VIL/VAL it had to pay to them the amounts received from them for making applications in the public issues of these companies.

17. It was submitted that according to the AO the assessee has contravened the provisions of s. 187C of the Companies Act, 1956 by not filing appropriate form in the office of the Registrar of Companies making a declaration as to the beneficial interest in the shares held by VIL/VAL. It was submitted that this provision cannot apply inasmuch as the law obliges a person to file such declaration within 30 days and in the present case immediately on receipt of shares, they were transferred to VIL/VAL and, therefore, there was no occasion to file such form. Accordingly it was pleaded that no provision of law is contravened by these transactions and as such any attempt to tax the income earned by VIL/VAL in the hands of the assessee on the ground of alleged breach of law, is totally misconceived.

18. However, it was further submitted that assuming (while denying) that the transaction is illegal, that does not mean that the AO has a right to displace the transaction and tax the assessee only on that ground. It was pleaded that if there is a breach of any law, the appropriate authority may take appropriate action but the same has no bearing on assessment of income. Reliance was placed on the decisions of the Supreme Court in the cases of CIT vs. Piara Singh (1980) 124 ITR 40 (SC) and CIT vs. S. C. Kothari (1971) 82 ITR 794 (SC). It was submitted that the assessment of income cannot undergo a change depending upon the legality or otherwise of the transaction.

19. It was further submitted that while commenting on the commercial rationale and the device for tax avoidance, the AO held that the transactions did not have

any commercial rationale and was as a matter of fact, colourable device for avoidance of tax as per the reasoning given by the AO at pp 27 to 36 in paras 13 and 14 of the assessment order. It was submitted that the AO has not appreciated the commercial rationale of the transactions at all and has thoroughly misunderstood the transactions. It was submitted that he has totally erred in holding that the agreements were colourable device for tax avoidance. It was submitted that the assessee has given reasons for these agreements which can be summarised in brief as under : 20. VIL/VAL had funds. They could not have, on their own, made large number of applications in public issues. Therefore, various applications were made through the assessee and other such investment companies for and on behalf of and for the benefit of VIL/VAL. The profits, if any, on such transactions were theirs. So also the loss.

For making applications the assessee-company was to get fees as service charges. In fact, law as also equity demand that the profits must go to VIL/VAL because the profits were generated only with the help of funds which belonged to VIL/VAL and except for making applications, the assessee-company had done nothing. It was submitted that if under the arrangement, the shares were not to be transferred by the assessee to VIL/VAL, at cost and if the assessee would have been entitled to the profits, it would be a case of breach of trust by VIL/VAL vis-a-vis their own shareholders because these funds were received by VIL/VAL in their own public issues and could not have been diverted by VIL/VAL for the benefit of a third party like the assessee. If VIL/VAL would not have got the shares at cost and if the assessee have made profits and retained the same, the AO having jurisdiction over VIL/VAL would have taken the view that this is a case of diversion of profits by VIL/VAL in favour of the assessee and it could have been called a case of tax avoidance within the ratio of decision of the Supreme Court in the case of McDowell & Co. Ltd. (supra).

21. It was submitted that the AO has emphasized that VIL/VAL are not liable to pay tax. However, this is factually incorrect because VIL has taxable income as noted by the AO at page 30 of the assessment order.

Similarly VAL although has no taxable income for asst. yr. 1994-95, it has taxable income for asst. yr. 1995-96. However, it was submitted that this issue is irrelevant for the simple reason whether or not VIL/VAL has any liability because the profit has actually been earned by VIL/VAL and is required to be taxed in their hands as the funds which generated this income belonged to VIL/VAL.

22. It was submitted that the undisputed facts are that the assessee transferred the shares to VIL/VAL at cost and it is also undisputed that VIL/VAL transferred these shares in the market and made profits out of the said transfer. Such profits can be regarded as belonging to the assessee if and only if a view is taken that : (i) though the transfer by the assessee to VIL/VAL is at cost, the AO is entitled to substitute for the cost, market value of shares, or (ii) the transfer is to be ignored being contrary to law and, therefore, the assessee continued to be the owner of the shares and, therefore, when VIL/VAL transferred the shares, in reality, it was transfer by the assessee and therefore, the profits would belong to the assessee.

23. It was submitted that both the above propositions are misconceived and contrary to the well settled law. So far as the first proposition is concerned, it was submitted that the law does not oblige a trader to transfer the assets at the maximum price and the mere fact that the transfer is made at a price below the market price does not entitle the AO to tax notional profit. Even in a case where the law entitles the AO to substitute for the sale price, market price [s. 52(1) of the Act] the Hon'ble Supreme Court in the case of CIT vs. Shivakami Co. (P) Ltd. (1986) 159 ITR 71 (SC) held that the sale price can be substituted by market value only when it is found that in reality what is received is higher than the sale price. It was submitted that in the instant case it is not even suggested that the assessee has received more than cost from VIL/VAL and, therefore, the Department cannot substitute the market value in place of cost as the amount realised by the assessee.

It was submitted that the AO however has held in the assessment order that because the transaction is illegal, the profit earned by VIL/VAL must be deemed to be that of the assessee. It was submitted that the finding of the AO is incorrect because the transaction is not illegal.

However, it was pleaded that assuming it to be so the profit earned by VIL/VAL cannot belong to the assessee. Reliance was placed on the decision of the Supreme Court in the case of B.O.I. Finance Ltd. vs.

Custodian AIR 1997 SC 1952. It was submitted that in view of the above judgment, irrespective of the finding as to whether the arrangement between the assessee and VIL/VAL, is legal or illegal, the transactions between them having been completed on transfer of shares by the assessee to VIL/VAL, the chapter is closed. It is not open to the assessee to contend that the transactions be undone and if a question arises as to who is the owner of the property, the only possible view is that the shares belonged to VIL/VAL. It was submitted that if VIL/VAL have earned profits on transfer of such shares, the profits must belong to them and the assessee can have no claim over the same.

Accordingly it was pleaded that the action of the AO as confirmed by the CIT(A) is not only opposed to law but opposed to equity.

Accordingly it was submitted that the addition of Rs. 19,00,500 is required to be deleted from the hands of the assessee.

24. The learned Departmental Representative strongly relied on the order of the AO as confirmed by the CIT(A). It was submitted by the learned Departmental Representative that the conduct of Videocon Group of Industries smacks of violation of various laws from the very beginning. It was submitted that a front is created by floating various companies at different places viz. Ahmedabad, Bombay and Delhi to obtain the maximum allotment of shares in public issues which would have been otherwise not possible. When the rules and regulations applicable for allotment of shares provide that a single person should apply in one application, is the same being not circumvented by creating the facade of so many companies Is the arrangement of so-called agreements between the investment companies and VIL/VAL not violative of Securities & Exchange (Regulation) Act It was pleaded that all these acts of the assessee-company in collaboration with VIL/VAL are opposed to public policy and the assessee cannot be allowed to reap the benefits of the same. It was submitted that the Hon'ble Supreme Court in the case of ITO vs. Ch. Atchiaiah (1996) 218 ITR 239 (SC) has held that the AO must

tax the right person and the right person alone in respect of a particular income Merely because a wrong person is taxed with respect to a particular income, the AO is not precluded from taxing the right person with respect to that income.

Accordingly it was submitted that simply because VIL/VAL has shown the income on sale of shares of Nirma Ltd. and Lupins Laboratories Ltd. in their returns, the AO cannot be debarred from taxing the same profit as the income of the assessee because the shares were acquired by the assessee in public issues and these were transferred to VIL/VAL in pursuance to agreements which are illegal per se and even if not illegal they were atleast opposed to public policy and as such should not be taken into consideration and the assessee should be deemed to continue to be the owner of those shares till these were transferred to third party by VIL/VAL and the profits shown to have been earned by VIL/VAL on the sale of those shares was actually belonging to the assessee and has been rightly taxed by the Departmental authorities in the hands of the assessee. Accordingly he supported the orders of the AO/CIT(A) in this regard.

25. We have considered the rival submissions and have also gone through the orders passed by the AO/CIT(A) along with various decisions cited by the learned authorised representative of the assessee as well as learned Departmental Representative and those considered by the Departmental authorities in their orders. The facts are undisputed. The whole arguments advanced by the learned authorised representative of the assessee are based on the agreements entered into by the assessee with VIL/VAL. In both the agreements the assessee-company has been referred to as fund manager whereas the other parties to the agreements had agreed to provide directly, indirectly or procure for the fund manager certain amounts for a period of maximum three months from the date of provision of funds. It was agreed that the fund manager shall invest the funds in public issues of companies as specified in the respective agreements. As per the agreements, the fund manager had agreed to make these investments for and on behalf of the financing companies i.e. VIL/VAL and account for all accruing benefits thereof to the financing companies i.e. VIL/VAL. All investments were to be treated as belonging to the financing companies i.e. VIL/VAL and the fund manager was to inform the financing companies all the details of the amounts

invested, mode and type of investments and time aspect of realisation and the expected returns and so on. For the above service, the fund manager was entitled to service charges of the amount specified in the agreements. It is undisputed that the funds necessary for investment in the shares of Lupin Laboratories Ltd. and Nirma Ltd. had been provided by the respective financing companies i.e. VIL/VAL as per the agreements. The shares were allotted to the assessee and were transferred to VIL/VAL at cost as per the agreements and thereafter these shares were sold by the financing companies i.e. VIL/VAL and the profits realised therefrom were disclosed by VIL/VAL in their respective income-tax returns. The assessee has also disclosed the service charges received as per the agreements in its return of income.

It would, therefore, be seen that the parties have acted according to the terms and conditions of the agreements and accounted for income, that they were entitled to as per the terms of the agreements. The AO has made the impugned addition mainly on the ground that the agreements were entered into between the assessee and VIL/VAL with a view to circumvent various restrictions imposed by SEBI and other authorities regulating the share transaction and, therefore, the transactions were colourable device entered into with a view to avoid payment of tax in the hands of the right person in terms of ratio of the Supreme Court decision in the case of McDowell & Co. Ltd. (supra) In this connection, we are of the opinion that the provisions of Benami Transaction (Prohibition) Act, 1988 are not applicable to the facts of the case because : (i) admittedly the funds for acquiring assets have been provided by VIL/VAL to whom the shares were transferred after allotment, and (ii) in any case there was no transfer of existing property when the shares were allotted to the assessee.

26. In any case the shares of the investee companies are not the assets of the investee companies but its liability and as such it will not come under the definition of benami transaction as per the provisions of Benami Transaction (Prohibition) Act, 1988. Similarly the provisions of s. 13 of the Securities Contract (Regulation) Act, are not applicable because the provisions of that Act apply to the shares of listed companies as per the ratio of the decisions relied upon by the learned authorised representative of the assessee and referred to in para 6.1 above

whereas at the time of agreements neither Nirma Ltd. nor Lupin Laboratories Ltd. were listed companies.

27. As regards violation of s. 187C of the Companies Act by not filing appropriate form in the office of Registrar of Companies making declaration as to the beneficial interest in the shares held by VIL/VAL, it is to be seen that even this provision has not been technically violated inasmuch as law obliges a person to file such declaration within 30 days of allotment of shares and the shares were transferred by the assessee to VIL/VAL immediately on allotment.

Therefore, there was no occasion to file such form.

28. However, even assuming though not admitting that the transactions entered into between the assessee and VIL/VAL as per the agreements were illegal and opposed to public policy, that does not mean that the IT Department has a right to displace the transactions and tax the assessee only on that ground. If there is a breach of any law, the Appropriate Authority may take appropriate action for that breach, but the same will have no bearing on the assessment of income in view of the decision of the Supreme Court in the case of CIT vs. Piara Singh (supra). The assessment of income therefore, cannot undergo a change depending upon the legality or otherwise of the transactions.

29. The assessee has given complete commercial rationale of the agreements in the preamble of these agreements viz. VIL/VAL had funds.

They could not have, on their own, made large number of applications in public issues. Therefore, various applications were made through the assessee and other such investment companies for and on behalf of and for the benefit of VIL/VAL. The profits, if any, on such transactions must necessarily belong to VIL/VAL; so also the losses. For making applications the assessee-company was to get fees as service charges.

In fact, law as also equity demand that the profits must go to VIL/VAL because the profits were generated only with the help of funds which belonged to VIL/VAL and except for making an application and getting allotment, the assessee-company

had done practically nothing. In case the shares allotted to the assessee were not transferred to VIL/VAL at cost and the assessee has made profits and retained the same, the AO having jurisdiction over VIL/VAL would have taken the view, which would have been impossible to resist, that this is a case of diversion of profits by VIL/VAL in favour of a third party (the assessee).

Therefore, by transferring the shares at cost to VIL/VAL, the assessee has done what was expected of it in law and in equity and there is nothing wrong and improper about the same. Reliance of the AO on McDowell's decision is misplaced because if VIL/VAL would not have got the shares transferred to them at cost and thereby permitted the assessee to take the profits, it would have been a case of tax avoidance inasmuch as the only reason why the assessee would have made profits, would have been supply of funds by VIL/VAL and therefore, what was legitimately due to VIL/VAL, would have been transferred to the assessee. Only in such a situation it could have been held that the arrangement is made whereby a person who has earned profit has diverted the same in favour of a third party for achieving certain tax advantage. In the present case before us the profits belong to VIL/VAL both in law and in equity because the funds were theirs; business decision as to which application was required to be made in which public issues was theirs. In fact except for signing applications on first occasion and handing over the share certificates together with transfer forms on the second occasion, the assessee has done nothing and if for doing "such nothing" if the assessee would have got profit of Rs. 19,00,500 at the cost of VIL/VAL, it would have been certainly a case of tax planning apart from being morally and commercially dishonest transactions. Thus taking into consideration the totality of the facts and circumstances of the case, we are of the opinion that the Departmental authorities were not justified in taxing the profit of Rs. 19,00,500 in the hands of the assessee.

30. Before parting, it may be necessary to examine the question from another angle as to who is entitled to the profits of Rs. 19,00,500, is it the assessee or VIL/VAL According to the AO in view of the alleged illegality or impropriety the profits earned by VIL/VAL on transfer of shares really belonged to the assessee. The above finding is contrary to well settled law and irrespective of the decision whether transactions/agreements between the assessee and VIL/VAL were legal

or illegal, proper or improper, the inevitable conclusion is that having transferred the shares to VIL/VAL at cost, the profits on subsequent transfer of shares by VIL/VAL belongs to them only and not to the assessee. The AO can regard that profit as belonging to the assessee if and only if a view is taken that : (i) though the transfer by the assessee to VIL/VAL is at cost, the Department is entitled to substitute for the cost, market value of shares.

(ii) The transfer has to be ignored being contrary to law and therefore, the assessee continue to be the owner of the shares and therefore, when VIL/VAL transferred the shares, in reality it was transfer by the assessee and therefore, the profits would belong to the assessee.

31. Both the above propositions are misconceived and contrary to the well settled legal position. As far as the first proposition is concerned, the law does not oblige a trader to transfer the assets at the maximum price and the mere fact that the transfer is made at a price below the market price, does not entitle the Department to tax notional profit. In the case before us the shares of Lupins Laboratories Ltd. and Nirma Ltd. allotted to the assessee were transferred to VIL/VAL at cost in terms of the agreements and even in a case where the law entitles the Revenue to substitute for the sale price, market price [s. 52(1) of the Act] the Supreme Court has held in the case of CIT vs. Shivakami Co. (P) Ltd. (supra) and K. P. Verghese vs. ITO (1981) 131 ITR 597 (SC) that the sale price can be substituted by market value only when it is found that in reality what is received is higher than the sale price. In the present case, it is not even suggested by the AO in his order that the assessee has received more cost from VIL/VAL. Therefore, the Revenue cannot substitute market value in place of cost as the amount realised by the assessee. However, in the assessment order the AO has held that because the transaction is illegal, the profit earned by VIL/VAL must be deemed to be that of the assessee. In this case, it will be useful to refer to the decision of the Supreme Court in the case of B.O.I. Finance Ltd. vs. Custodian (supra) referred to by the learned authorised representative of the assessee wherein it is held that if the transaction is illegal, the Court will not enforce it. However, even if the transaction is illegal at law, benefit can pass under or pursuant to such contract and in fact, if the property has been transferred under such a contract, then the same cannot be undone at the

instance of the transferor on the ground that the transfer was under an illegal contract. In para 64 of the judgment the Court observed as under : "The validity of the transfer of the securities has to depend on the provisions of the Transfer of Property Act and the Sale of Goods Act relating to transfer and not to the validity of the agreement preceding the transfer. Like any other movable goods the securities could validly be purchased on delivery against payment of price as per ss. 4, 19 and 20 of the Sale of Goods Act. The price paid while taking delivery, was the consideration for the transfer of the securities. When the transfer of title has taken place the agreement between the parties preceding this cannot invalidate the transfer." 32. Thus in view of the Supreme Court decision in the case of B.O.I.Finance Ltd. (supra) it has to be held that irrespective of the finding as to whether arrangement between the assessee and VIL/VAL, be legal or illegal, the transactions between them having been completed on transfer of shares by the assessee to VIL/VAL, the chapter is closed.

The assessee is not entitled to contend that the transactions be undone and if the question arises as to who is the owner of the property, the only possible view is that the shares belong to VIL/VAL and thereafter if VIL/VAL have earned profits on transfer of such shares, the profits must belong to them and the assessee can never have any claim over the same. Accordingly, the issue raised by the assessee in ground of appeal Nos. 1 to 11 is adjudicated in favour of the assessee and against the Revenue and the addition of Rs. 19,00,500 is directed to be deleted.

33. Coming to ground of appeal No. 12 relating to the addition of Rs. 2,92,274, the AO has discussed the issue in paras 16 to 16.3 of the impugned order as under : In its P&L a/c the assessee has shown an interest income of Rs. 1,17,728 as interest on Term Deposit kept with Federal Bank, Fort Branch, Mumbai for the purpose of obtaining stock invest instruments to subscribe in various public issues. However, it is found that the assessee has accounted only for interest received and credited by the bank till the year end and has not accounted for interest which has accrued, though not received, at the year end. The assessee was asked to explain why interest accrued on Term Deposit has not been reflected in the P&L a/c. The assessee vide its letter dt. 5th March, 1997 has replied that interest on

FDR is available for the minimum block of 46 days and if FDR is broken before 46 days, no interest is receivable on such FDR and for this reason, they have not taken into account interest on FDRs which was outstanding on 31st March, 1994.

The above contention of the assessee has been examined and not found acceptable. The assessee is following mercantile system of accounting. Even otherwise under s. 209 of the Companies Act, a company is obliged to maintain its books of accounts on mercantile basis. Therefore, interest on term deposits becomes liable to be accounted for on accrual basis. The assessee's argument that the bank does not give interest if the FDR is broken before the period of 46 days, is not correct. Even if a FDR is encashed before the date of maturity, interest is always allowed to the depositor, may be at somewhat lower rate. Further, the argument of the assessee is found to be hypothetical only because in reality no FDR is found to have been encashed before the maturity date. It is a well established proposition of law that income may accrue at a point of time prior to its quantification or computation which is not a condition precedent to accrual. [CIT vs. Thaigaraja Chetty (1953) 24 ITR 325 (SC), Mewar Industries Ltd. vs. CIT (1963) 47 ITR 72 (Raj)].

Therefore, in view of the above the assessee was asked to work out the interest on term deposits which has accrued but not accounted for in its books of accounts. The same has been worked out at Rs. 2,92,274, which is added to the total income of the assessee." 35. After hearing the parties to the dispute, we are of the opinion that the Departmental Authorities were justified in taxing the amount of Rs. 2,92,274 as interest income on term deposits in the hands of the assessee on accrual basis because admittedly the assessee is maintaining its books of accounts on mercantile basis and income may accrue at a point of time prior to its quantification or computation which is not a condition precedent to accrual. The computation of Rs. 2,92,274 as accrued interest has been made on the basis of working given by the assessee and as such we will uphold the action of the Departmental authorities in this regard.

36. As regards ground of appeal Nos. 14 and 15 with regard to charging of interest under ss. 234A, 234B and 234C are concerned, no specific arguments were

advanced in relation to these grounds which are accordingly dismissed as having not been pressed. Even otherwise, these grounds do not arise out of the order of the CIT(A) as he has not given any finding in this regard.

37. Similar is the position with regard to ground of appeal No. 16 relating to initiation of penalty proceedings under s. 271(1)(c) which is premature and even otherwise this ground does not arise out of the order of the CIT(A). The same is accordingly dismissed.

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