Advocates Who Appeared in This Vs. for the

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Court : Delhi

Decided On : Jan-11-2012

Appellant : Advocates Who Appeared in This

Respondent : for the

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI % Judgment delivered on 11.01.2012 + ITA No. 215/2011 CIT ... Appellate versus PRADEEP AGENCIES JOINT VENTURE ... Respondents AND + ITA No. 221/2011 CIT ... Appellate versus PRADEEP AGENCIES JOINT VENTURE ... Respondents Advocates who appeared in this case: For the Appellant : Ms Rashmi Chopra For the Respondent : Mr Rakesh Gupta, Ms Rani Kiyala and Mr Kunal Nagpal CORAM: HON'BLE MR JUSTICE BADAR DURREZ AHMED HON'BLE MR JUSTICE V.K.JAIN BADAR DURREZ AHMED (ORAL).

1. These appeals are taken up together as they arise of the common order passed by the Income Tax Appellate Tribunal (hereinafter referred to as 'the said Tribunal') dated 31.03.2010 in ITA Nos. 3322 and 3323/Del/2009 pertaining to the ITA Nos. 215/11 and 221/11 *Page 1 of 6* assessment years 2003-04 and 2004-05. Both these appeals are concerned with penalty proceedings under Section 271(1)(c) of the Income Tax Act 1961 (hereinafter referred to as 'the said Act')..

2. The assessee is an association of the persons comprising of five members namely Laxmi Traders, Bijay Paper Trading Co., Pradeep Agencies, Biswanath

Industries Limited and Bishwanath Traders and Investment Limited. As indicated in the impugned order the said association of persons was constituted for carrying on the business of procuring orders on behalf of M/s Reliance Industries Limited (RIL) for supply of Purified Terephthalic Acid to M/s Indo Rama Synthetics India Limited. In respect of the assessment years in question, the assessee i.e., the association of persons (A.O.P) had filed a return of income at nil and refund had also been claimed on the tax deducted at source. During the course of assessment proceeding, the assessee was required to explain as to why the incomes of `. 2,37,55,912/- and `. 2,78,38,386/- in respect of the assessment year 2003-04 and 2004-05, respectively, should not be charged to tax in the hands of the A.O.P. by applying the provisions of Section 167(B)(2) of the said Act..

3. The A.O.P. had distributed the profit amongst its members as per their respective shares which were defined in the Joint Venture Agreement dated 30.03.2002 and all of them have shown their respective shares as income under the provisions of Section 67(A) of the said Act. According to the assessee, it is for this reason that section 167(B)(2) of the said Act was not applicable. This contention of the assessee was not accepted by the Assessing Officer and the share of each of the members of the Joint Venture Agreement having exceeded the maximum amount not chargeable to tax, the maximum marginal rate was applied to the A.O.P ITA Nos. 215/11 and 221/11 *Page 2 of 6* in terms of Section 167(B)(2) and the entire income was assessed in the hands of the A.O.P. This order was passed by the Assessing Officer and was confirmed by the Commissioner of Income Tax (Appeal) in the appeal filed by the assessee..

4. It may be pointed out that the assessee had referred to the CBDT circular No. 75/19/191/62-ITJ dated 24.08.1966 and it was contended that Sections 86 and 167 (B) of the said Act had no applicability in the facts of the present case. It was submitted that the said sections would come into play when the income was first assessed in the hands of the A.O.P. and not in those cases where the assessment was first done in the hands of the individual persons. It was also contended that inasmuch as the members of the A.O.P. were assessed prior to the assessment in the hands of the A.O.P. the said provision would not be applicable and that in terms of the circular the A.O.P. could not be taxed for the very same income which

had been disclosed by the members in their individual returns. The Commissioner of Income Tax (Appeals) did not agree with the submissions made by the assessee..

5. In respect of assessment year 2003-04, the assessee had filed an appeal being ITA 17/Del/2007 before the said Tribunal. While considering the said appeal, the Tribunal felt that it was a case which was fit to be heard by a Special Bench consisting three or more members of the Tribunal. The referral order is dated 04.04.2007. Paragraphs 9,10 and 11 of the referral order are relevant and therefore extracted below:- "9. On a careful consideration of the matter, we are of the considered opinion that the appeal raises a question of general public importance, viz., the applicability and binding nature of circulars issued by the CBDT on the interpretation of a statutory provision vis--vis the judgment of the Supreme Court ITA Nos. 215/11 and 221/11 *Page 3 of 6* placing a contrary interpretation thereon. The argument addressed by the assessee appear to be supported by the judgments of the Supreme Court in Dhiren Chemicals Ltd. And Indian Oil Corporation (supra), on the binding nature of circulars, whereas the argument of the Department appears to be supported by the judgment of the Supreme Court in Achtaiah' case (supra) on merits and on the interpretation of Section.

4. The moot question is: which of the two views is to be preferred?.

10. We therefore consider this to be a case fit for being decided by a Special Bench. The papers are accordingly placed before the Hon'ble President for constitution of the same..

11. The suggested question for being referred to the Special Bench is: "Whether the assessment made on the AOP is invalid, in the light of the Board's circular dated 24th August 1966 or is valid in the light of the judgment of the Supreme Court in Achtaiah's case (218 ITR 239)?" The Special Bench ultimately decided the appeal on 31.08.2007 in favour of the revenue and against the assessee. The Assessee had filed an appeal before this court under section 260A of the said Act, however, that was also dismissed by this court by an order dated 06.10.2009. Insofar as the quantum proceedings are concerned, the matter rests there..

6. The present proceedings, as already pointed out above, arise out of the penalty proceedings initiated under Section 271(1)(c) of the said Act. The point urged by the learned counsel for the revenue is that when the assessee had filed the return in respect of the assessment year 2003-04 as also for the assessment year 2004-05 the position was absolutely clear inasmuch as the Supreme Court in the case of ITO v. Ch. Achtaiah: 218 ITR 239 (SC) had clearly held that the ITA Nos. 215/11 and 221/11 *Page 4 of 6* assessment could not be made in the hands of the members of the A.O.P. and that the assessment ought to have been made in the hands of the A.O.P itself. It was, therefore, submitted by the learned counsel for the revenue that, knowing this position, the fact that the assessee had filed a nil return, in itself, is indicative that the assessee had deliberately shown the income in the hands of the members of the A.O.P in order to evade taxes..

7. The learned counsel for the revenue took us through the order passed by the Assessing Officer as well as the Commissioner of Income Tax (Appeals) in respect of her contention..

8. We have also heard the learned counsel for the assessee who submitted that the only point that has to be examined is whether the Tribunal was right in deleting the penalty on the ground that two views were possible when the assessee filed the nil return. He submitted that the best proof of this submission is that the Tribunal itself, when it was considering the quantum appeal in respect of the assessment year 2003-04, was in doubt as to which of the two views were possible. It is for this reason that the matter had been referred to the Special Bench. The learned counsel for the revenue sought to counter the submission by stating that the referral order was passed on 04.04.2007 which is much after the date on which the return was filed and on that date there was no doubt at all with regard to the position in law..

9. Having considered the arguments advanced by the counsel for the parties, we are of the view that the submissions made by the learned counsel for the assessee cannot be brushed aside that there were two views possible inasmuch as ITA Nos. 215/11 and 221/11 *Page 5 of 6* the Tribunal itself was in doubt as to which of the two views were to be preferred. And it is for this very reason that the

Tribunal had passed the referral order dated 04.04.2007 requiring the matter to be considered by a Special Bench. The fact that the referral order came into being much after the returns were filed would be of no help to the revenue inasmuch as all that the referral order indicates is that a doubt existed with regard to which of the views were possible. It cannot be said that prior to that date, the assessee could not have had such a doubt in its mind when it had indeed filed its return..

10. Therefore, we see no reason to disagree with the Income Tax Appellate Tribunal in its conclusion with regard to the penalty proceedings and in particular in its order deleting the penalty imposed on the assessee. We feel that no substantial question of law arises for our consideration inasmuch as it is a settled principal of law that where two views are possible a penalty cannot be imposed on the assessee..

11. The appeals are dismissed. BADAR DURREZ AHMED, J V.K. JAIN, J JANUARY 11, 2012 kb ITA Nos. 215/11 and 221/11 Page 6 of 6