+* THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on : 06.03.2009

+ ITA Nos. 697/2007, 698/2007 & 699/2007

ESTER INDUSTRIES LIMITED ..... Appellant

versus

COMMISSIONER OF INCOME TAX, DELHI-IV ..... Respondent

Advocates who appeared in this case:

For the Appellant : Ms Prem Lata Bansal, Advocate
For the Respondent : Mr R Santhanam, Advocate

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. These are appeals preferred by the assessee under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') against a common judgment dated 22.12.2006 passed by the Income Tax Appellate Tribunal (hereinafter referred to as the 'Tribunal') in ITA No. 3655/Del/2000, ITA No. 3657/Del/2000 and ITA No. 3656/Del/2000 in respect of assessment years 1993-94, 1995-96 and 1994-95 respectively.

2. In an earlier round the assessee had filed an appeal under Section 260A of the Act against a common judgment of the Tribunal dated

31.01.2005. A Division Bench of this Court by an order dated 19.01.2006 had set aside the judgment of the Tribunal dated 31.01.2005 based on a concession that the Tribunal had disposed of the appeal without affording a fair and reasonable opportunity of being heard.

3. In the present appeal, the assessee is principally aggrieved on account of the fact that the Tribunal has once again failed to apply its mind to the issues raised and the submissions made before it. The principal submission of the assessee before the Tribunal was that the Assessing Officer had made certain additions and disallowances mechanically while computing the income without issuing a show cause notice or providing an opportunity of hearing to the assessee in respect of the said additions and disallowances. It is noticed that the Commissioner of Income Tax (Appeals) [hereinafter referred to as the 'CIT(A)'] by an order dated 01.05.2000 had reversed the said additions and disallowances primarily on the ground that the Assessing Officer had not discussed the additions or supplied any reasons thereto. The Tribunal in appeal found that in most of the issues the CIT(A) had committed the same error while reversing the order of the Assessing Officer. In our view, in the first instance, the Tribunal ought to have examined as to whether the Assessing Officer could have made the additions or disallowed expenses claimed without affording adequate opportunity. Upon perusal of the impugned judgment, we find that the Tribunal has not applied its mind to this aspect of the matter. On the contrary, we are constrained to note that the impugned judgment of the Tribunal dated 22.12.2006 in the second round is,

but for the change in the composition of the Bench and a cosmetic change in language, almost similar to the judgment dated 31.01.2005 passed by the Tribunal in the first round.

4. The assessee in the present appeal is aggrieved by the disallowance of the following amounts claimed as allowances/expenses:-

(i) expenses on gifts or expenses on articles gifted which are stated to be in excess of the prescribed limit under Rule 6B of the Income Tax Rules, 1962 (hereinafter referred to as the 'Rules');

(ii) travelling expenses in excess of limits prescribed under Rule 6D;

(iii) payment made towards corporate membership, as well as, towards annual membership fee to New Friends Colony Club;

(iv) disallowance of 50% total entertainment expenditure under Section 37(2) of the Act;

(v) expenses pertaining to previous year;

(vi) disallowance of amounts claimed on account of statutory liability pertaining to provident fund by invoking the provisions of Section 43B of the Act.

5. The assessee being aggrieved had preferred an appeal to the CIT(A). As noticed above, the CIT(A) by an order dated 01.05.2000 had reversed the order of the Assessing Officer in respect of each of the said disallowances/additions by observing as follows:

> "3. Ground No.1- The Assessing Officer has made an addition of Rs. 57,911/- under rule 6B of the I.T.Rules. The appellant had presented some articles to its clients and the Assessing

Officer took this figure to be disallowable. The order is silent [as] to how the Assessing Officer has arrived at this figures. The A.R. has objected to this addition without any reasons being adduced in support of.

3.1 I have seen the order of the assessing Officer and ***it does not contain any discussion which would justify the addition under Rule 6B. It has not been shown as to how the limits prescribed have been transgressed.*** Hence the addition being without application of mind is deleted.

4. Ground no.2- This appertains to an addition of Rs.74,724/- allegedly made under Rule-6D of the I.T.Rule. As in the earlier ground, here also ***the addition has been made without any application of mind.*** Likewise, this addition too is deleted.

5. Ground no.3- This pertains to a disallowance of Rs.1,15,073/- in respect of payment made by the appellant to clubs. Out of this amount Rs.1 lakh relate to fee for admission as a corporate members in Friends Club, New Delhi, and Rs.12,000/- is the annual membership. The addition has been made by the A.O. in the computation of income without any discussion at all.

5.1 Before me the A.R. has stated that the membership of such clubs helps them to cultivate business relationships for latter operations. [The] judgment of CIT V. Hindustan Don Oliver 48 TTJ 552: Reliable Cigarette and Tobacco Inds. 51 TTJ 103, OTIS Elevator CO. 195 ITR 682 (Bom.). have been cited in support of his contentions.

5.2 On a consideration of the facts and the judicial pronouncements there is price in the arguments of the A.R. The addition has been made without appreciating that the expenditure has been incurred wholly and exclusively for the business needs of the company. Hence the addition of Rs. 1,15,073/- is deleted.

7. Ground no.5- The ground pertains to a disallowance of Rs.2,08,108/- being alleged entertainment expenditure disallowable u/s 37(2). ***Once again the addition has been made without any discrepancies or reasoning behind this addition.*** My attention was drawn to the decision of Delhi H.C in the case of CIT V expo Machinery 190 ITR 400 where it has been held that expenditure towards fooding etc. of company's guests and employees incurred by a company should not be disallowed in full and the expenditure attributable to the employees must be allowed as not being in the nature of entertainment. In view of this, the appellant gets the 50% relief of the disallowance made by the A.O.

> 11. Ground no.9- This ground relates to the disallowance of Rs.1,17,616/- in respect of provident fund and ESI contributions for March, 1993. The A.R. has argued that these have been paid before 15.4.93 by cheque into the bank and the cheque after realization had been duly credited to the a/c of the payee and the bank had issued the challan/receipt evidencing payment on 22.4.93. He argued that the evidence had been produced before the Assessing Officer.
>
> 11.1 It appears that A.O. ignored the proviso to Section 43B and also ignored the date of actual payment and was misguided by the date shown on the challan. To my mind there is no reason for any disallowance as the payment has been made within the time statutory allowed.
>
> 12. Ground no.10- This pertains to the disallowance of Rs.111893 made on the alleged ground that the statutory liability had been paid beyond the due date. The order is silent about the details.
>
> 12. Before me the A.R. has indicated that this ostensibly refers to payment made after the end of the previous year but before filing of the return and the proviso to Section 43B clearly entitles the appellant to claim this deduction.
>
> 12.1 In view of this situation, I have to delete the addition upto 50% as not being based on any cogent reasoning or material."

6. Against the aforesaid order of the CIT(A), the Revenue, being aggrieved, preferred an appeal to the Tribunal. The Tribunal in the first round by an order dated 31.01.2005 had upheld the order of the CIT(A) dated 01.05.2000 with respect to the following:-

(i) the disallowance pertaining to expenses amounting to Rs 23,94,030/- which according to the Assessing Officer were relatable to an earlier year;

(ii) the disallowance by the Assessing Officer on account of loss of sale of assets;

(iii) disallowance on account of expenses incurred for meeting statutory liability.

7. As noted above, a Division Bench of this Court by an order dated 19.01.2006 had set aside the order of the Tribunal dated 31.01.2005.

8. Accordingly, the Tribunal by the impugned judgment ostensibly set out to correct the wrong committed in the first round.

9. It is important at this stage to note that the Revenue before the Tribunal had preferred eight grounds of appeal which read as follows:

> "On the facts and in the circumstances of the case, the Ld. CIT(A) held:
> 1) in deleting an additions of 57,911/- made under Rule 6B ***despite the fact that this addition was made by the assessee itself in the original & revised return of income***
> 2) in deleting addition of Rs. 74724/- under Rule 6D ***despite the fact that the addition was made by the assessee itself in the original & revised return of income***
> 3) in deleting disallowance of 115073/- on account of payments to club ***despite the fact that this disallowance was made by the assessee itself in the original & revised return of income.***
> 4) in deleting disallowance of 208108/- u/s 37(2) ***despite the fact that this disallowance was made by the assessee itself in the original & revised return of income.***
> 5) in deleting disallowance of Rs.23,94,030/- pertaining to previous year's expenses ***despite the fact that this disallowance was made by the assessee itself in the original and revised return of income.***
> 6) in deleting addition of Rs.5,25,703/- on account of loss on sale of asset
> 7) in allowing 50% of statutory liability of Rs.111893/- without assigning any reason.
> 8) in allowing depreciation of Rs.9135433/- on account of exchange rate fluctuation."

10. A perusal would show that the basic ground for preferring an appeal by the Revenue against the order of the CIT(A) was that all such additions

or disallowances had been made by the Assessing Officer in view of the fact that the assessee had itself made such disallowances in its original and revised return of income. The Tribunal by the impugned order dated 22.01.2006 had reversed the order of the CIT(A) and restored the order of the Assessing Officer primarily on the ground that the assessee both in his original, as well as, in his revised return had made admissions which formed the basis of the additions/disallowances made by the Assessing Officer.

11. According to us, the Tribunal ought to have examined the issue as to whether the fact that assessee had made an admission with respect to an addition/disallowance in its original return or in the revised return would *ipso facto* bar the assessee from claiming an expense or disputing an addition if it is otherwise permissible under law. This is so especially in view of the circumstances, that the Assessing Officer while making the additions/disallowances did not call upon the assessee to furnish any explanation. The upshot of the submission made by the learned counsel for the assessee, is that, had the assessee been given an opportunity by the Assessing Officer it could have demonstrated that no additions or disallowances were called for, in view of the binding precedents of Courts and/or Tribunal in respect of each of the addition/disallowance. The observations made in the Tax Audit Report could not have formed the basis of additions/disallowances by the Assessing Officer. On this aspect of the matter the observations in the judgment of the Supreme Court in the

case of ***Pullangode Rubber Produce Co Ltd vs State of Kerala and Anr:***

(1973) 91 ITR 18 at Page 20 being apposite are extracted hereinbelow:-

> *"It is no doubt true that entries in the account books of the assessee amount to an admission that the amount in question was laid out or expended for the cultivation, upkeep or maintenance of immature plants from which no agricultural income was derived during the previous year. An admission is an extremely important piece of evidence but it cannot be said that it is conclusive. It is open to the person who made the admission to show that it is incorrect."*

11.1 We find that the Tribunal instead of examining the matter from this angle has repeated the order passed in the first round without due application of mind to the issues which called for adjudication.

12. In these circumstances, we set aside the impugned judgment of the Tribunal. The Tribunal will re-hear the parties, and if, the Tribunal is of the view that the matter requires to be remanded to the Assessing Officer for passing a fresh order of assessment, it will do so giving an opportunity to the assessee to appear before the Assessing Officer so as to enable him to make his representation before him with regard to the facts as well on law on each of the issues. These appeals are disposed of with the aforesaid directions.

RAJIV SHAKDHER, J.

March 06, 2009 **BADAR DURREZ AHMED, J.**
mb