* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ ITA No.88/2007

\# CIT, CENTRAL-II, NEW DELHI ..... Appellant through
! Ms. P.L. Bansal with
Mr. M.P. Gupta, Advs.

versus

$ M/S. K.J. BUSINESS CENTRE ....Respondent through
^ Mr. Ajay Vohra with
Ms. Kavita Jha, Advs.

WITH

ITA No.90/2007

CIT, CENTRAL-II, NEW DELHI ..... Appellant through
Ms. P.L. Bansal with
Mr. M.P. Gupta, Advs.

versus

M/S. K.J. BUSINESS CENTRE ....Respondent through
Mr. Ajay Vohra with
Ms. Kavita Jha, Advs.

% Date of Hearing : January 20, 2009

Date of Decision : April 02, 2009

CORAM:
* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE RAJIV SHAKDHER

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

VIKRAMAJIT SEN, J.

1. Heard.

2. Admit.

3. On behalf of the Revenue the following questions of law, stated in the Appeal to be of substantial nature, have been proposed for the Assessment Year 1994-1995(ITA 90/2007):-

(a) Whether ITAT was correct in law in confirming the order passed by CIT(A) and thereby deleting the addition of Rs.19,84,000/- made by the Assessing Officer on account of commission paid by M/s G E International to M/s Arora & Associates?

(b) Whether ITAT was correct in law in confirming the order passed by CIT(A) and thereby deleting the addition of Rs.1,07,50,000/- made by the Assessing Officer on account of commission paid by M/s AIFACS to M/s Manik Enterprises?

(c) Whether ITAT was correct in law in allowing the assessee to spread the entire commission of Rs.62,05,375/- over the period of 06 years and thus charging only 1/6th of the commission in the present year?

(d) Whether order passed by ITAT is perverse in law i) when it ignored the relevant material found by the Assessing Officer and held that the concerns M/s Arora & Associates and M/s Manik Enterprises are not the benami of the assessee and ii) when it allowed the assessee to spread the income over 06 years ignoring the relevant

provisions of law and the standard accounting practice of the trade?

For Assessment Year 1995-1996 (ITA No.88/2007)

(1) Whether ITAT was correct in law in confirming the order passed by CIT(A) and thereby deleting the addition of Rs.58,50,000/- made by the Assessing Officer on account of commission paid by M/s AIFACS to M/s Competent Holding Limited treating the same as income of the assessee?

(2) Whether ITAT was correct in law in confirming the order passed by CIT(A) and thereby deleting the addition of Rs.3,84,,000/- made by the Assessing Officer on account of commission paid by M/s AIFACS to M/s Achha & Associates and M/s. Creative Investment & Marketing treating the same as income of the assessee?

(3) Whether order passed by ITAT is perverse in law when it ignored the relevant material found by the Assessing Officer and held that the concerns M/s Arora & Associates and M/s Manik Enterprises are not the benami of the assessee?

(4) Whether ITAT was correct in law in confirming the order passed by CIT(A) and thereby deleting the addition of Rs.51,75,000/- made by the Assessing

Officer on account of commission paid by M/s AIFACS to M/s Manik Enterprises treating the same as income of the assessee?

4. At the outset, we need to underscore that so far as findings of fact are concerned interference of the High Court would be justified only if it appears to it that the conclusions arrived at by the ITAT are palpably perverse.

5. The entitlement of sundry parties to the receipt of commission essentially entails a determination of facts and the High Court must be loathe to enter into that arena except in the case of perversity. In both the Appeals this question has been dealt with threadbare at all the three stages of the assessment adjudication. In these proceedings we are concerned with the receipt of commission for the letting-out of property belonging to the All India Fine Arts and Crafts Society(AIFACS) to M/s. G.E. International. For the Assessment Year 1994-1995 the Assessee had received Rupees 64,75,000/- as commission from AIFACS. While framing the assessment for Assessment Year 1995-1996 the Assessing Officer noticed that AIFACS had paid a sum of Rupees 15,92,500/- to Manik Enterprises (P) Ltd., Rupees 30,00,000/- to SMC Food Ltd. and Rupees 28,50,000/- to Competent Holding (P) Ltd. The Tenant, namely, M/s. G.E. International also paid commission amounting to Rupees

19,84,000/- to M/s. Arora & Associates, Rupees 2,00,000/- to M/s. Achha & Associates and Rupees 1,84,000/- to M/s. Chetan Investments and Marketing Services. So far as the Appellant is concerned the commission paid by AIFACS was in two instalments, viz. Rupees 40,00,000/- on 31.12.2003 and Rupees 24,70,000/- on 15.2.1994.

6. The CIT(A) did not agree with the finding of the Assessing Officer that the Assessee was, in fact, solely and exclusively entitled to the receipt of the entire commission; that the Assessee had distributed commission to its various benami or family concerns with the intention of spreading its income and thereby evading tax. The CIT(A) also did not agree with the Assessing Officer that the Assessee was not entitled to stagger or spread out the receipt of the commission of Rupees 64,75,000/- over a period of six years. In Assessment Year 1994-1995 the Assessee had shown its income as 1/6th of the said sum of Rupees 64,75,000/-, that is, Rupees 10,78,500/-. Out of this sum the Assessee had claimed that it had to pay commission to M/s. Trehan Estate Agency to the extent of Rupees 8,08,875/-, thus showing only a sum of Rupees 2,69,625/- as taxable. The additions of Rupees 28,50,000/- and Rupees 30,00,000/- paid by AIFACS to Competent Holding (P) Ltd. and SMC Food Ltd. aggregating Rupees 58,50,000/- were deleted by the CIT(A).

After duly noting the constitution of ownership of Manik Enterprises (P) Ltd., and the aspect of lifting of corporate veil, the CIT(A) deleted the addition of Rupees 51,75,000/- made by the Assessing Officer. It was also highlighted by the CIT(A) that a company has to bear a higher incidence of tax and, therefore, it would be of no advantage to the Assessee to share the commission and thereby eventually subject itself to a higher taxation. The addition of commission of Rupees 2,00,000/- and Rupees 1,84,000/- to M/s. Achha & Associates and M/s. Chetan Investment & Marketing Services respectively were also deleted. However, the addition of commission of Rupees 8,09,375/- paid by the Assessee to M/s. Trehan Estate Agency was sustained since the CIT(A) considered this to be without consideration and justification. The Tribunal has upset this finding primarily for the reason that payment had not been returned by M/s. Trehan Estate Agency to the Assessee and the fact that there was a distant relationship between them was insufficient reason to disallow the said amount. It is clear that the factual matrix was carefully considered by the CIT(A) as well as the ITAT, calling for no further consideration on our part. The ITAT has observed that the conclusion of the Assessing Officer to the effect that the commission had been distributed to different parties by the Assessee was not based on any material

on record. The ITAT has also opined that it was erroneous for the Assessing Officer to conclude that Manik Enterprises (P) Ltd., M/s.Achha & Associates, M/s.Chetan Investment and Marketing Services and M/s. Arora & Associates were not independently entitled to the receipt of commission as they had no role to play in the subject letting out of property belonging to M/s. All India Fine Arts and Crafts Society(AIFACS) to M/s. G.E. International.

7. In *CIT –vs- Walchand and Co. (Pvt.) Ltd., Bombay*, AIR 1967 SC 1435 their Lordships have opined that because of "the hierarchy of authorities the Appellate Tribunal is the final fact finding body : its decision on questions of fact are not liable to be questioned before the High Court." To the same effect are the observations in *CIT, Calcutta –vs- Karam Chand Thapar and Brothers (P) Ltd.*, AIR 1989 SC 1045, as will be clear from a reading of the following passage:-

> 7. ....Where the Tribunal has come to the conclusion that the loss incurred by the assessee in the sale of shares held by it was a trading loss and its is not the case of the Department that in arriving at its decision the Tribunal had taken into consideration any irrelevant material or failed to take into consideration any relevant material, there is no room for interference by the Court. It is well settled that the Tribunal is the final fact finding body. The questions whether a

particular loss is a trading loss or a capital loss and whether the loss is genuine or bogus are primarily questions which have to be determined on the appreciation of facts. The findings of the Tribunal on these questions are not liable to be interfered with unless the Tribunal has taken into consideration any irrelevant material or has failed to take into consideration any relevant material or the conclusion arrived at by the Tribunal is perverse in the sense that no reasonable persons on the basis of facts before the Tribunal could have come to the conclusion to which the Tribunal has come. It is equally settled that the decision of the Tribunal has not to be scrutinised sentence by sentence merely to find out whether all facts have been set out in detail by the Tribunal or whether some incidental fact which appears on record has not been noticed by the Tribunal in its judgment. If the court, on a fair reading of the judgment of the Tribunal, finds that it has taken into account all relevant material and has not taken into account any irrelevant material in basing its conclusions, the decision of the Tribunal is not liable to be interfered with, unless, of course, the conclusions arrived at by the Tribunal are perverse.

8. In *K. Ravindranathan Nair –vs- CIT*, (2001) 247 ITR 178(SC):2001(1) SCC 135 it has been prescribed that the Tribunal is the final fact finding forum and its decision can be questioned only if it partakes of a perverse nature, that is, it is indicative of an action, opinion or conclusion which could not

reasonably be arrived at; that an incorrect conclusion is not invariably perverse unless it is palpably deliberate or mala fide.

9. None of the arguments addressed on behalf of the Revenue can persuade us to conclude that these findings of fact partake of the nature of perversity. So far as the sharing of the commission between the Assessee and the aforementioned business concerns is concerned, no substantial question of law arises for our consideration.

10. The second question which we are called upon to inquire into is whether it was legally permissible for the Assessee to stagger its income over a period of six years by showing the commission received as advance payments in the Assessee's Books of Accounts. There is some controversy as to whether the Assessee could be entitled to spread the income over a period of nine years for the reason that the Lease was eventually negotiated for this period instead of six years. The concurrent finding at all the three tiers of adjudication is that the Appellant had shown 1/6th of the entire commission, which undisputedly had been paid in one instalment in its Books of Accounts, and hence there was no justifiable ground to claim that instead of 1/6th it was entitled to 1/9th of the commission annually. The Assessee has not filed any Appeal on this point. The Tribunal has noted that in the Books of Accounts the Assesee had spread

the commission receipts over a period of six years initially. Following the conclusion arrived at by another Bench of the Tribunal the ITAT had also opined that this spreading over of commission was a practice followed in the trade. We are unable to subscribe to the opinion that the extant practice in the trade is to spread commission over the period of a Lease. However, since this practice has been given approval to by the Tribunal in the case of Manik Enterprises(P) Ltd. as well as M/s. Arora & Associates, applying the principle of consistency we decline to interfere in the facts and circumstances of the present case. In *Union of India -vs- Kaumudini Narayan Dalal*, [2001] 249 ITR 219 and *Union of India –vs- Satish Panalal Shah*, [2001] 249 ITR 221 their Lordships have opined that it is not permissible for the Revenue to accept a legal proposition in the case of one assessee and assail in the case of another. We think there is sufficient reason for our attention to be drawn to *Commissioner of Income-Tax –vs- Varghese Mani*, [2001] 252 ITR 735. In that case a total of Rupees 2,11,500/- was received by way of interest but the Assessee had admitted only Rupees 32,965/- as interest, attributable to the previous year ending on March 31, 1990 on the ground that the discounted value of interest also included interest which would accrue over the future period of three years. It was held that the entire interest accrued and received

was assessable in the Assessment Year 1990-1991. In *Commissioner of Income-Tax –vs- A.R. Santhanakrishnan*, [2002] 256 ITR 187 certain amounts were deposited in three years Government Bonds but the discounted interest was received in lump sum. It was held that interest in its entirety had to be taxed in the year of receipt. In *P.L. Ganapathi Rao –vs- Commissioner of Income-Tax*, [2006] 285 ITR 501 the Agreement spelt out that a total sum of Rupees 4,00,000/- was to be paid towards rentals for a period of five years, to be adjusted in the following manner:- Rupees 1,00,000/- in the first year, Rupees 90,000/- in the second year, Rs.80,000/- in the third year, Rupees 70,000/- in the fourth year and Rupees 60,000/- in the fifth year. The Court noted that the Agreement mentioned the consideration of Rupees 4,00,000/-; right to claim a return of the money from the Assessee was conspicuous by its absence. Hence, the sum of Rupees 4,00,000/- would be taxed in the year when it was received. To the same effect is *E.D. Sassoon & Company Ltd. –vs- Commission of Income-Tax, Bombay City*, [1954] 26 ITR 27. We decline to answer this question whether it is permissible to spread the income over six years primarily because of the observations of the Supreme Court pertaining to the rule of consistency. This is especially so

since no specific question pertaining to this aspect of the law has been proposed on behalf of the Respondent.

11. We also find it difficult to accept the reasoning of the Tribunal that an oral statement to the effect that it was understood between the parties concerned that commission would be refundable if the Lease was terminated before stipulated tenure, must be accepted even in the absence of a written covenant to this effect. Such terms are of such far-reaching import that its absence in the relevant document could only be indicative of the falsity of the claim.

12. The Appeals are dismissed with no order as to costs.

(VIKRAMAJIT SEN)
JUDGE

(RAJIV SHAKDHER)
JUDGE

April 02, 2009
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