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

\+ **Rev. Pet. NO.668 of 2011**
**in**
**ITA No.157 of 2011**

*Reserved on: 2nd March, 2012*
% *Pronounced on: 1st June, 2012*

RAHULJEE & COMPANY
PVT. LTD. . . . APPELLANT/REVIEW PETITIONER
through : Mr. P.L. Juneja, Advocate.

VERSUS

INCOME TAX APPELLATE
TRIBUNAL-I & OTHERS . . .RESPONDENTS
through: Mr. Sanjeev Sabharwal, Sr. Standing Counsel.

**CORAM :-**
**HON'BLE THE ACTING CHIEF JUSTICE**
**HON'BLE MR. JUSTICE M.L. MEHTA**

**A.K. SIKRI (Acting Chief Justice)**

1. The appeal of the review petitioner was decided by this Bench vide judgment dated 08.8.2011. In the very first paragraph, disallowance, which was made by the Assessing Officer, was taken note of. The same are as under:

> "(i) Claim for damages by the customer:₹14,04,483/-.
> (ii) Payment made to Mr. Sunil Kumar :₹2,00,000/-.
> (iii) Expenses estimated to have been incurred:₹80,000/-
> (iv) Foreign Travel of Sh. Pawan Goel :₹17,122/-
> (v) Disallowance of ₹16,088/- u/s 40A (3)
> (vi) Interest u/s 217 be consequently reduced."

2. In paragraph 2 of the judgment, it was pointed out by this Court that the learned counsel for the assessee/appellant

confined his grievance only to disallowance of payment of ₹2,00,000/- made to one Mr. Sunil Kumar. This issue has been considered and decided in favour of the appellant/assessee holding that there was sufficient evidence to prove the expenditure of ₹2,00,000/- by the assessee.

3. In this Review Petition, learned counsel for the appellant/assessee submits that there were two more grounds which were also pressed at the time of arguments and mistake has occurred in observing that the grievance was confined only to the aforesaid issue pertaining to ₹2,00,000/- made to Mr. Sunil Kumar. Thus, two grounds mentioned by the learned counsel are as follows:

    1.) Disallowance of foreign travel expenses of ₹17,122/- incurred by Mr. Pawan Goel.

    2.) Deletion of entire interest under Section 217 of the Income Tax Act (hereinafter referred to as 'the Act').

4. We find that in the written submission which was filed by the learned counsel for the review petitioner, these two issues were also adverted to and may be somehow wrong impression was gathered at the time of arguments that they have been given up. When we pointed out this aspect to the learned counsel for the Revenue-Department, he agreed that instead of going into controversy as to whether the same were pressed at the time of hearing or not, he would have no objection if these are decided on merits. Arguments on these issues were also heard and the same were considered on merits. We, thus,

proceed to frame the following two substantial questions of law:

(a) Whether any legal error is committed by the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal') in affirming the disallowance of ₹17,122/- allegedly incurred on account of foreign travel by Mr. Pawan Goel?

(b) Whether the Tribunal committed legal error in holding that interest under Section 217 of the Act was to be paid?

**Issue No.(a):**

5. It was the submission of learned counsel for the assessee/Review Petitioner that travelling expenses of Mr. Pawan Goel was disallowed without considering the affidavit of the Director, a resolution and the judgment of the Supreme Court in particular in ***S.A. Builders Vs. CIT (Appeals) (SC)***, [288 ITR 2]. From the order of the Assessing Officer, we find that the AO has not disputed that the aforesaid expenses were, in fact, by Mr. Pawan Goel on foreign travel. However, he was of the opinion that such expenses incurred by Mr. Pawan Goel were not for business purposes.

6. The CIT (A) confirmed the aforesaid order of the AO holding that Mr. Pawan Goel was neither a Director nor an employee of the office, but was a relative of the Director. The assessee had submitted that it had obtained the permission from the Reserve Bank of India, but this aspect was turned down as not relevant

for deciding the issue. The reason given by the CIT (A) holding that expenses were not incurred for business purpose, which are as under:

> "The assessee claims that it paid the amount to Shri Pawan Kumar for foreign travel for the purpose of the business of the assessee company. The assessee has not done any business in brass during the year nor it has been established that the visit of Shri Pawan Goel wsa in some way advantageous to the actual business engaged by the assessee company during the year. It is stated tht he is an expert in brass and the assessee was contemplated doing business in brass and, therefore, his foreign travel expenses were met by the assessee company. Even otherwise, the assessee has not established that he is an expert in brass sheet or that any agreement was entered into between him and the assessee."

7. The Tribunal affirmed this finding observing as under:

> "The I.T.O. disallowed foreign travel expenses of ₹17,122/- to Shri Pawan Goel. Shri Pawan Goel for whom the expenditure is claimed, is neither a Director not the assessee. The nexus of the expenditure with the business was not established with any amount of certainly. For this as well as for the reason given by the authorities below no interference is called for nexus on this account. This point is deleted against the appellant."

8. According to the respondent/Revenue, therefore, there is a consistent finding of the authorities below that there has not been any 'nexus' of expenses of ₹17,122/- for the purpose of business of the assessee and it is a finding of fact.

9. As mentioned above, the Revenue has not doubted the incurring of the expenditure of foreign travel by Mr. Sunil Kumar. The only question is as to whether this was for business purpose. It is recorded that the nexus between the

foreign travel of Mr. Sunil Kumar and the business of the assessee has not been established. Normally, it would have been a finding of fact, as argued by the learned counsel for the Revenue. However, in the present case, we find that the only reason for disallowing the expenditure is that Mr. Pawan Goel was neither a Director nor an employee. Second reason given is that it has not been established that the assessee had any business in brass during the year or that Mr. Sunil Kumar is expert in brass sheet or that any agreement was entered into between him and the assessee. These are totally irrelevant considerations. If there is a foreign travel in connection with the business, merely because in the said foreign travel, no business could be transacted or the foreign travel did not result in bagging any contract is not the determinative factor. It is not also necessary that the expenditure on Mr. Pawan Geol could be claimed by the assessee only if he was a Director or an employee. The relevant factor was as to whether he was sent by the assessee abroad in connection with the business of the assessee. In order to prove this, the assessee had produced the resolution of the company authorizing Mr. Sunil Kumar to undertake the said foreign travel. The assessee had even filed the affidavit to this effect. These documents really clinch the issue, which would indicate that Mr. Sunil Kumar had undertaken the travel solely for the purpose of the assessee's business and for which purpose, he was duly authorized by the Board of Directors of the assessee. This material aspect is brushed aside on the specious ground that Mr. Pawan Geol was neither a Director nor an employee.

10. The Supreme Court in ***S.A. Builders (supra)*** took the following view, which are as under:

> "We agree with the view taken by the Delhi High Court in *Phaltan Sugar Works (B.) Ltd.* [2002] 254 ITR 377 that once it si established that there was nexus between the expenditure and the purpose of the business (which need not necessarily be the business of the assessee itself), the Revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the board of directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximize his profit. The income-tax authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The authorities must not look at the matter from their own view point but that of a prudent businessman……."

11. We, thus, answer the question in favour of the assessee holding that there is a perversity in the findings of the Tribunal as it ignored the material facts and addressed the issue from a wrong angle.

12. The assessee is accordingly entitled to deduction of ₹17,122/- as travel expenses.

**Issue No. (b):**

13. Learned counsel for the assessee argued that before levying of the interest under Section 217 of the Act, it is necessary that the assessee should be given a notice of hearing as has been held by the Andhra Pradesh High Court in the case of ***Ambica Chemical Products Vs. ITO*** [191 ITR 382] against which Special Leave Petition filed in the Supreme Court was also dismissed which was reported as ***187 ITR (Statutes) 162.***

According to the Department, there is no requirement of giving a notice of hearing before charging of the interest under Section 217 of the Act for the reason that there is no provision under the Act which provides for giving any separate notice for levy of the interest since interest is not a penalty and hence, the notice is not required to be issued.

14. Mr. Sanjeev Sabharwal, learned counsel for the Revenue relied upon the judgment of Patna High Court in the case of ***CIT Vs. Bishwanath Tulsyan*** [220 ITR 178] and that of the Gauhati High Court in the case of ***Bansidhar Sewabhagowan and Co. Vs. CIT*** [222 ITR 16 (Guj.)].

15. Relevant portion of Section 217 is extracted below to understand when interest can be charged under this Section:

> "**217.** [(1) Where, on making the regular assessment, [the [Assessing] Officer finds –
>
> (a) that any such person as is referred to in clause (a) of sub-section (1) of section 209A has not sent the statement referred to in that clause or the estimate in lieu of such statement referred to in sub-section (2) of that section; or
>
> (b) that any such person as is referred to in clause (b) of sub-section (1) of section 209A has not sent the estimate referred to in that clause,]
>
> simple interest at the rate of [fifteen] per cent per annum from the 1st day of April next following the financial year in which the advance tax was payable in accordance with the said [sub-section(1) or sub-section (2)] up to the date of the regular assessment shall be payable by the assessee upon the amount equal to the assessed tax as defined in sub-section (5) of section 215.]"

16. The AO while making the assessment in the assessment order recorded as under:

> "Issue demand notice and challan after charging interest u/ 217."

17. We are of the opinion that the Patna High Court rightly took the view that issuance of show cause notice is not a condition precedent before charging interest under Section 217 of the Act. The Court took note of the fact that no doubt, the interest charged could be waived on certain grounds and one of these being the assessee showing sufficient cause of purpose. However, the High Court still took the view that show cause notice was not necessary on the ground that this issue is no longer *res integra* in view of the decision rendered by the Apex Court in ***Central Provinces Manganese Ore Co. Ltd. Vs. CIT*** [160 ITR 961], wherein the Court had held that the nature of levy of interest under sub-Section (8) of Section 139 and under Section 215 of the Act was not in the nature of penalty, but by way of compensation and the judgment in the case of ***Ambica Chemical Products (supra)*** cited by the learned counsel for the assessee does not look into the matter from this angle, which is only one paragraph judgment which does not discuss the issue in detail.

18. Moreover, we have ourselves given the benefit of waiver of interest to the assessee in respect of those additions which have been deleted. This would further extend to the travelling

expenses of Rs.17,122/- which has been allowed by this order. Thus, substantial relief of interest under Section 217 of the Act stands granted to the assessee. We, thus, hold that no separate notice for levy of interest was required as the requirement of notice was satisfied during the assessment proceedings itself.

19. The review petition is allowed to the aforesaid extent.

**ACTING CHIEF JUSTICE**

**(M.L. MEHTA)**
**JUDGE**

**June 01, 2012**/pmc