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

Judgment reserved on: 13.01.2011
% Judgment delivered on: 01.02.2011

\+ **ITA No.14/1999**

COMMISSIONER OF INCOME TAX ..... APPELLANT

Vs

M/s. ESCORTS LTD. ..... RESPONDENT

Advocates who appeared in this case:

For the Appellant : Ms. Prem Lata Bansal, Advocate
For the Respondent : Mr. R.M. Mehta, Advocate

CORAM :-
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
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. This is an appeal preferred under Section 260A of the Income Tax Act, 1961 (hereinafter, referred to as the 'Act') against the judgment of the Income Tax Appellate Tribunal (hereinafter referred to as the 'Tribunal') dated 08.10.1998 passed in I.T.A. No.3003/DEL/1997, pertaining to the assessment year 1992-1993. By the impugned judgment the Tribunal set aside the order of the Commissioner of Income Tax, Delhi-II (hereinafter, referred to as 'CIT') dated 27.03.1997.

1.1 The CIT by virtue of this order disallowed the claim of the assessee in respect of the capital loss on transactions relating to purchase and sale of units issued by the Unit Trust of India, which were ubiquitously referred to at the relevant point in time as Unit-64. Besides this, by the same order, the CIT also directed the Assessing Officer to verify whether any expenditure had been incurred in regard to the impugned transactions towards brokerage and administrative expenses, and that if it were so found, the

expenditure incurred was required to be adjusted against the dividend income earned in respect of the said units, for the purpose of computation of reliefs claimed by the assessee under section 80 M of the Act.

2. The department being aggrieved by the Tribunal's order has preferred the present appeal in the background of the following brief facts:-

2.1 The assessee filed its return of income for the relevant assessment year on 31.12.1992 declaring an income of Rs.12,09,36,306/- . By an assessment order dated 24.03.1995, the taxable income was assessed at Rs.13,75,08,630/-.

2.2 The CIT while scrutinizing the records pertaining to the assessee for the relevant assessment year, appears to have noticed that the assessee had evidently claimed that it had incurred a capital loss of Rs.3,15,65,000/- in connection with purchase and sale of the aforementioned units. At that stage, it appeared to the CIT that the Assessing Officer had permitted the carry forward of the aforementioned capital loss to the assessee without due verification and enquiry.

2.3 Consequently, the CIT issued a show cause notice dated 18.02.1997 to the assessee. By virtue of the said show cause notice, the assessee was called upon to explain as to why, assessment order dated 24.03.1995 ought not to be cancelled. The assessee's explanation in this regard, was sought for, on or before 26.02.1997.

2.4 It is not disputed that the assessee submitted his explanation initially vide three (3) letters dated 24.02.1997, 13.03.1997 & 26.03.1997. It is also not disputed by the department that hearings in that regard were held by the CIT on three different dates i.e., 26.02.1997, 25.03.1997 & 26.03.1997.

2.5 It appears that in the interregnum, that is, in the month of March, the assessee submitted one more letter dated 13.03.1997. At the hearing held on 25.03.1997, a query was raised by the CIT as to why expenditure incurred on retention of legal ownership should not be allowed/adjusted against dividend income. The case was adjourned by the CIT to 26.03.1997. The CIT thereafter proceeded to pass an order under section 263 of the Act on 27.03.1997.

2.6 Aggrieved by this order of the CIT, the assessee preferred an appeal to the Tribunal. By the impugned judgment, the Tribunal set aside the order of the CIT passed under section 263 of the Act.

2.7 As noticed above, against the judgment of the Tribunal, the department has come up in an appeal to this court. This court by order dated 30.08.2000 framed the following question of law:

> ***"whether on the facts and in the circumstances of the case, Tribunal was justified in cancelling the order passed under Section 263 of the Income-Tax Act, 1961 ?"***

3. In support of the appeal, arguments were addressed by Ms. Bansal, while the case of the assessee was put forth by Mr. Mehta.

4. Briefly, Ms. Bansal contended as follows:-

4.1 The Tribunal had misdirected itself in as much as it had set aside the order of the CIT under section 263 of the Act by holding that the genuineness of the transactions was in issue, and that the said issue was not squarely put forth in the show cause notice issued to the assessee. It was submitted that the genuineness of the transaction from the point of view of the department was never in issue. According to the learned counsel, in so far as the department was concerned, the central issue was: whether the cost of retaining the legal ownership in the units had to be adjusted against dividend income earned by the assessee, in respect of which deduction was sought evidently by the assessee under section 80 M read with the provisions of section 80 AB and section 57(iii) of the Act. The learned counsel submitted that on a closer look – if the transactions are unscrambled, as was done by the CIT, it would show that what assessee had done, in effect, was to buy and sell the units (some of which had the same distinctive numbers) either on the same day or in close proximity to raise finance for himself; and therefore, the difference between the cost price and the sale price of the units was nothing but in sum and substance, a facet of interest paid by the assessee for retaining legal ownership of the units in issue. It was contended that the assessee had throughout accepted the position

that the legal ownership, in respect of the units in issue, remained with the assessee as the units were never sent to UTI for effecting change of ownership. This device, according to the learned counsel was adopted by the assessee to give an impression that the transactions in issue were real, and not speculative.

4.2 It was further contended by Ms. Bansal that the price differential; which occurred on account of the fact that the buyback price was higher than the cost price – was nothing but expenditure incurred in retaining legal ownership, and thus required adjustment against the dividend earned by the assessee in the wisdom of the CIT as, according to him, the failure on the part of the Assessing Officer to make such adjustment was both erroneous and prejudicial to the interest of the revenue.

4.3 As regards the observations of the Tribunal, that the judgment of the Supreme Court in the case of ***McDowells & Co. Ltd. Vs. CTO (SC) 154 ITR 148*** had not been put to the assessee both in the show cause notice as well as during the course of proceedings before the CIT; Ms Bansal contended that this objection was a mere red herring and nothing turned on it since the law laid down by the Supreme Court in the ***McDowells*** case was widely known. What was important from the assessee's point of view, according to Ms Bansal was whether the basis which propelled the CIT to exercise power under section 263 of the Act, had been made known to it. Based on the record, the learned counsel contended, it could not be argued by the assessee that it was taken unawares as regards the line of enquiry carried out by the CIT for the purpose of eliciting its response.

4.4 In sum and substance, it was the learned counsel's say that the Tribunal's finding, that the order of the CIT, proceeded on a basis entirely different to what was put to the assessee in the show cause notice issued to it; was contrary to the record and hence, perverse.

4.5 It was also contended that the CIT's order enhancing and/or modifying the order was in consonance with the power conferred on him under section 263 of the Act. In support of her submissions, the learned counsel relied upon the following judgments :-

CIT Vs. Electro House 82 ITR 824 (SC), 827 and ***CIT vs Panna Devi Saraogi (1970) 78 ITR 728 (Cal.) at pages 739-40.***

5. As against this, Mr. Mehta submitted that the respondent/assessee had been carrying out the aforementioned transactions for past several years including in the assessment year which preceded the relevant assessment year. The department had not impugned the genuineness of the transactions. Mr Mehta relied upon the assessment order of the relevant assessment year to demonstrate that the Assessing Officer had allowed the assessee's claim to only "carry forward" the impugned short term capital loss. The attempt being to show that transactions were not novel. To buttress this submission, Mr. Mehta drew our attention to paragraph no.7 of the impugned judgment, wherein the Tribunal has adverted to the fact that the issue before them had received the attention of the CIT in the assessment year 1986-1987; and who, in his wisdom, had returned a decision in favour of the assessee, against which, the department had not preferred an appeal.

5.1 It was contended that the genesis of the notice issued by the CIT under section 263 of the Act was the enquiry made by the Assessing Officer with regard to the purchase and sale of the units by the assessee in the subsequent assessment year i.e., Assessment Year 1993-1994; which resulted in the Assessing Officer disallowing the claim of short term capital loss, on the ground that it constituted "speculative loss". In sum and substance, Mr. Mehta contended this material was obviously not available to the Assessing Officer at the stage when, the assessment order was passed for the relevant assessment year i.e., Assessment Year 1992-1993. Therefore, according to the learned counsel the reliance placed by the CIT on material (which was not available at the time of passing of the assessment order), to reopen the assessment proceedings was not permissible.

5.2 It was further contended that (as correctly held by the Tribunal), the CIT had passed order dated 27.03.1997 on grounds different from ones which he had proposed in the show cause notice dated 18.02.1997; and, thus, it could not be sustained.

5.3 As regards, the nature of the transactions, Mr. Mehta submitted before us that in so far as the assessee was concerned, the transactions in issue were made with the object of investment. The transactions were genuine as they were followed by actual physical delivery of units alongwith an executed transfer deed. The payments in respect of units sold were received by cheque. According to Mr. Mehta, there was nothing to show that the transactions were speculative in nature. It was contended that the explanations with regard to the queries raised in this regard were furnished to the Assessing Officer. Therefore, it was his contention, that based on the fact that the transactions were not different than that which obtained in the earlier years, CIT could not have come to a conclusion different from the one taken in the earlier years. In support of his submissions, the learned counsel relied upon the following judgments:- ***CIT Vs. Gulmohar Finance Ltd. 170 Taxman 483*** and ***CIT Vs. Ashish Rajpal 180 Taxman 623***

6. In rejoinder Ms Bansal apart from reiterating the stand taken in the opening, laid particular emphasis on the submission that principle of res judicata had no applicability to income tax proceedings.

7. We have heard the learned counsel for both parties and perused the material available on record.

7.1 Before we proceed further it may be noticed that while admitting the appeal this court vide order dated 30.08.2000 had directed the department to file paper books with orders, not only those pertaining to assessee, but also in relation to any other assessee which the Tribunal had been following. Unfortunately, the department has not bothered to file the paper book. Even though we had the option of dismissing the appeal on the ground of the failure on the part of the department to file requisite paper books, we have, based on the submissions of Ms. Bansal that the appeal can be argued based on the material available on the file of this court, decided to hear the mater on merits. We must express our anguish at the approach adopted by the department, especially with regard to matters which have been pending since long.

8. Moving on to the merits of this case, in our view the first and foremost aspect which would have to be kept in mind is that the assessment proceedings qua the assessee have been reopened by the CIT by taking recourse to the powers conferred upon him under Section 263 of the Act. It is now trite law that for invoking the provisions of Section 263 of the Act the CIT's enquiry should have led him to a conclusion that the order he seeks to revise is both erroneous and prejudicial to the interest of the revenue. It has to be borne in mind that the every loss to the revenue is not necessarily prejudicial to revenue [see ***M/s. The Malabar Industries Co. Ltd. Vs. CIT, Kerala State (2000) 2 SCC 18*** & ***CIT Vs. Max India Ltd. (2007) 295 ITR 282(SC)***]. With this parameter in mind, it would be necessary to appreciate important facets of the case which have emerged on perusal of the record.

8.1 Firstly, the fact that assessee had been engaged in the activity of buying and selling the units for several years, prior to the relevant year, is not disputed by the department. As a matter of fact it appears that this very issue was raised before the CIT(A) in the assessment year 1986-87. The CIT(A), in the said assessment year, decided the issue against the department. The department evidently did not carry the matter in appeal. We find that the department has not challenged this position in the grounds of appeal raised before us

8.2 Secondly, the issue as observed by the Tribunal (which is once again not challenged in the appeal filed before us) was raised by the department for the first time in the assessment year succeeding the relevant assessment year, i.e., in assessment year 1993-94. In the said assessment year (i.e., 1993-94) the assessing officer had dubbed the transactions as 'speculative'. As a matter of fact, the Tribunal has noted in paragraph 5 of its judgment that it was this material pertaining to the succeeding assessment year, i.e., 1993-94 which was available on record, which prompted the CIT to proceed against the assessee under the provisions of Section 263 of the Act. Therefore, it is quite evident that on the date when the assessment order was passed in the relevant assessment year, i.e., on 24.03.1995 the order of the CIT(A) for the subsequent assessment year, i.e., 1993-94 was

not available to the assessing officer. This order was available only subsequently which, evidently prompted the CIT to proceed under Section 263 of the Act.

8.3 These broad facts, therefore, form the background in which a show cause notice (in short 'SCN') was issued by the CIT to the assessee. It therefore becomes necessary, at this stage, to advert to the relevant parts of the show cause notice dated 18.02.1997. The CIT, after giving a prefatory note of the transaction at hand, as understood by him, concluded by observing as follows:

> *"the order u/s 143(3) for the Asstt. Year 1992-93 is, thus found to be* ***erroneous*** *on a/c of – 1) Treating the transaction relating to purchase, sale, re-purchase and re-sale on investment account whereas the transactions are actually in the nature of trading of Units 64. 2) Allowing carry forward of short term capital loss of Rs 315.60 lakhs, in trading of Units 64 that were ready forward transactions and speculative in nature. 3) Allowance of interest to the extent of funds borrowed for the business of the company but actually utilized in trading of Units – 64".*

8.4 A reading of the operative part of the SCN would clearly demonstrate that the department impugned the transactions carried out by the assessee by dubbing them as transaction in the "***nature of trading***" as against the stand of the assessee that they were in the nature of "***investments***". The department went on to caricature the transactions as "***ready forward transactions and speculative in nature***". The department also objected to allowance of interest on borrowed funds on the ground that it was not utilized for the purposes of business but in effect utilized in carrying out trade in the aforementioned units.

9. Pursuant to the above, the assessee (as noticed by us in the earlier part of our judgment) filed its reply with the CIT. The reply filed by assessee is not on record. The department which is the appellant in the matter, has failed to file the complete record, though it is the appellant before us - even so, a perusal of the judgment of the Tribunal would show that the assessee had furnished information with regard to the units, starting from, the year 1988-89 and, had attempted consequently, a reconciliation in respect of the

loss claimed. This is apparent on reading of paragraphs 7 and 8 of the impugned judgment. The attempt which the assessee sought to make was to disabuse the CIT that the transactions in issue were speculative in nature. The CIT it appears to have shifted the goal post, in a manner of speaking, by raising a query, at the hearing held on 25.03.1997 to the effect as to "***why expenditure incurred on retention of legal ownership should not be allowed/adjusted against dividend income***". A cross reference of the SCN would show that this was not the precise query which the department had raised with assessee in its show cause notice dated 18.02.1997. As a matter of fact a perusal of the show cause notice would show that the department while seemingly taking the stand that the transactions in issue were in the nature of trading and not on investment account – apparently contradicted itself by holding that they were ready forward transactions, which were, speculative in nature. Apart from this apparent contradiction, the CIT's order dated 27.03.1997 does not contain a finding to the effect that the stand taken by the assessee that the units had actually been physically delivered along with executed transfer deed; was false. Without such a finding the allegation that the transactions were speculative, cannot sustain. But more importantly, the fundamental nature of the transactions which was examined year after year; more importantly in the assessment year 1986-87 remained the same. Therefore, in our opinion, the department could not have changed its view as regards the nature of the transactions in issue in the relevant assessment year by dubbing it as erroneous. If the fundamental nature of transactions had to be questioned it necessarily had to be carried to its logical conclusion in the assessment year 1986-87.

10. It was sought to be argued before us by Ms Bansal that the principle of res judicata did not apply to the income tax proceedings, and that by its very nature every assessment year provided a fresh cause of action to the department. Broadly, this proposition is correct, though with a caveat. Courts in the recent past have increasingly veered to the view that where a fundamental aspect of a transaction is found as having permeated through different assessment years and, this fundamental aspect has stood

uncontested then, the revenue cannot be allowed to change its view taken in earlier assessment years unless it is able to demonstrate a change in circumstances in the subsequent assessment year. The department in the instant case has not been able to bring to our notice any such changed circumstances which could have persuaded us to sustain the approach of the CIT taken in this case. On this aspect of the matter the observations of the Supreme Court in the case of ***M/s Radhasoami Satsang, Saomi Bagh, Agra vs CIT (1992) 1 SCC 659 at page 661 in paragraphs 16&17*** being apposite, are for the sake of convenience extracted hereinbelow:

> *"16. We are aware of the fact that strictly speaking res judicata does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where* ***a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year****.*
> *17. On these reasonings in the absence of any material change justifying the Revenue to take a different view of the matter-and if there was not change it was in support of the assesses-we do not think the question should have been reopened and contrary to what had been decided by the Commissioner of Income-Tax in the earlier proceedings, a different and contradictory stand should have been taken. We are, therefore, of the view that these appeals should be allowed and the question should be answered in the affirmative, namely, that the Tribunal was justified in holding that the income derived by the Radhasoami Satsang was entitled to exemption under Sections 11 and 12 of the Income Tax Act of 1961".* (emphasis is ours)

10.1 Similarly, the Supreme Court in ***Bharat Sanchar Nigam Ltd. & Anr. vs UOI & Ors. (2006) 3 SCC 1*** while discussing the ambit of the principle of res judicata made the following observations:

> "*20. The decisions cited have uniformly held that res judicata does not apply in matters pertaining to tax for different assessment years because res judicata applies to debar Courts from entertaining issues on the same cause of action whereas the cause of action for each assessment year is distinct.*

> ***The Courts will generally adopt an earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual position****. The reason why Courts have held parties to the opinion expressed in a decision in one assessment year to the same opinion in a subsequent year is not because of any principle of res judicata but because of the theory of precedent or the precedential value of the earlier pronouncement.* ***Where facts and law in a subsequent assessment year are the same, no authority whether quasi judicial or judicial can generally be permitted to take a different view.*** *This mandate is subject only to the usual gateways of distinguishing the earlier decision or where the earlier decision is per incuriam. However, these are fetters only on a coordinate bench which, failing the possibility of availing of either of these gateways, may yet differ with the view expressed and refer the matter to a bench of superior strength or in some cases to a bench of superior jurisdiction".*

10.2 The principle received further elucidation by the Supreme Court in the case of ***Municipal Corpn. Of City of Thane vs Vidyut Metallics Ltd. & Anr. (2007) 8 SCC 688***. The Court speaking through Justice C.K. Thakker (as he then was) articulated the applicability of principle of res judicata broadly as follows: The proposition that the strict rule of res judicata as envisaged in Section 11 of the Code of Civil Procedure, 1908 has no application, cannot be debated. The crucial aspect which requires to be borne in mind is: whether the issue in question arose ***"directly"*** and ***"substantially"*** in a particular year or was it an issue which arose ***"incidentally"*** or ***"collaterally"*** in respect of which the revenue had taken a view one way or the other. If the issue arose "directly" and "substantially" in the earlier assessment years in respect of which the revenue had taken a view one way or the other then, it was not open to the department to change its opinion on "fundamental aspects" of the matter. (See observations made in paragraph 18 to 24 of the judgment). This would be truer, in our opinion, in a case where the revenue seeks to exercise revisional jurisdiction qua the assessee.

11. In addition we wish to refer to two more judgments. The first one being a judgment of the Bombay High Court in the case entitled ***CIT vs Gopal Purohit (2010)***

228 CTR 582. This case is referred to since it dealt with transactions somewhat similar to the one we are grappling with. The other being: a judgment of a Co-ordinate Bench of this Court.

11.1 In ***Gopal Purohit*** *(supra)* case the Bombay High Court was called upon to decide whether the approach adopted by the Tribunal in holding the revenue to the view taken in the earlier years, in relation to transactions in shares, was correct or not. The Tribunal held that delivery based transaction in shares could be treated in the nature of investment transaction and, the profit received therefrom ought to be treated either as short-term or long-term capital gain, as the case may be, inconsonance with the view taken by the revenue in the preceding assessment years. As noticed above, the revenue questioned this approach of the Tribunal before the High Court, on the ground that the principle of res judicata was not attracted. The Division Bench of the Bombay High Court, while rejecting the contention of the department, observed as follows:

> *"3. In so far as Question (b) is concerned, the Tribunal has observed in paragraph 8.1 of its judgment* ***that the assessee has followed a consistent practice in regard to the nature of the activities, the manner of keeping records and the presentation of shares as investment at the end of the year, in all the years****. The revenue submitted that a different view should be taken for the year under consideration, since the principle of res judicata is not applicable to assessment proceedings.* ***The Tribunal correctly accepted the position, that the principle of res judicata is not attracted since each assessment year is separate in itself. The Tribunal held that there ought to be uniformity in treatment and consistency when the facts and circumstances are identical, particularly in the case of the assessee. This approach of the Tribunal cannot be faulted. The revenue did not furnish any justification for adopting a divergent approach for the Assessment Year in question.*** *Question (b), therefore, does not also raise any substantial question". (emphasis is ours)*

11.2 This court in the case of ***CIT vs Neo Poly Pack (P.) Ltd. (2000) 245 ITR 492*** similarly followed the principle of "consistency" as against the principle of res judicata propounded by the revenue.

12. In our opinion, at the heart of the matter, is the issue: whether the department could re-open an assessment based on a fresh inference of transactions which have been carried on by the assessee and accepted in-turn by the revenue for several preceding years on the pretext of dubbing them as erroneous. In our view the answer has to be in the negative otherwise.

12.1 In the case of ***CIT vs Associated Food Products P. Ltd & Popular Bread Factory (2006) 280 ITR 377 (MP)*** the Division Bench of the Madhya Pradesh High Court while considering the issue as to whether the CIT had correctly exercised its power under Section 263 of the Act by re-opening a block assessment, had cited with approval the following passage from the judgment of the Andhra Pradesh High Court in the case of ***Sirpur Paper Mills Ltd. vs Income-tax Officer (1978) 114 ITR 404*** which somewhat summed up the scope of the power under Section 263 of the IT Act.

> *"As observed in Sirpur Paper Mills Ltd. v. ITO : [1978]114ITR404(AP) by Raghuveer J. (as his Lordship then was), the Department cannot be permitted to begin fresh litigation because of new views they entertain on facts or new versions which they present as to what should be the inference or proper inference either of the facts disclosed or the weight of the circumstances. If this is permitted, litigation would have no end, 'except when legal ingenuity is exhausted'. To do so, is '. . . to divide one argument into two and to multiply the litigation ".*

12.2 We respectfully concur with the principle adopted by the Division Bench of Madhya Pradesh High Court in respect of the provisions of Section 263 of the Act.

13. Therefore, in our opinion, given the fact that the assessee had been engaged in these transactions in the preceding assessment years, CIT could have had no occasion to take recourse to revisional powers under Section 263 of the Act on the fundamental aspects of the transactions in issue on which a view had been taken and, not shown to us as having been challenged. The argument of Ms Bansal that the CIT only sought to treat the price differential as the cost incurred by the assessee towards retention of legal ownership in the units; is premised on the transactions being different from that what the

assessee claimed them to be in the earlier assessment year – a position which decidedly remained unchallenged. Such an approach is against the principle of consistency. The department has not shown any special circumstances warranting deviation from the said principle.

13.1 At this point, it is pertinent to note that we are not much impressed by the view taken by the Tribunal that since, the judgment of the Supreme Court in the case of ***McDowell & Co. Ltd.*** *(supra)* was not put to the assessee the show cause notice dated 18.01.1997 issued by the CIT was bad in law. According to us the more substantive issue was: the nature of the transaction, and the view that the department had taken qua the assessee in the earlier assessment years. Therefore, while concurring with the conclusion of the Tribunal our emphasis would be on the aspects discussed above. The judgments cited by Ms Bansal do not deal with point in issue and hence, are distinguishable.

14. In these circumstances, we are of the opinion that the question of law framed has to be answered against the department and in favour of the assessee. Accordingly, the appeal is dismissed.

RAJIV SHAKDHER, J

SANJAY KISHAN KAUL,J

FEBRUARY 01, 2011
yg/kk