AFR **RESERVED**

Case :- INCOME TAX APPEAL No. - 9 of 2005

Petitioner :- Commissioner Of Income Tax (Central), Kanpur

Respondent :- Smt. Swapna Roy

Petitioner Counsel :- Shri D.D. Chopra

Respondent's counsel : Shri J.N. Mathur, Shri Mudit Agarwal

connected with

Income Tax Appeal No.8, 20, 21,22, 23 and 31 – all of the year 2005.

Hon'ble Devi Prasad Singh,J.
Hon'ble S.C. Chaurasia,J.

(Delivered by Hon'ble Devi Prasad Singh, J)

1. Appeal under Section 260-A of the Income Tax Act was admitted on 14.2.2005. The Court has not framed substantial question of law itself while admitting the appeal keeping in view the question of law framed by the appellant enumerated in the memo of appeal. After hearing learned counsel for the parties on 18.3.2010, the following substantial question of law was framed by the Court :

1. Whether the first appellate court and the tribunal had committed substantial illegality by deleting the addition with regard to interest on the loan taken from a company of Sahara Group without recording any finding with regard to dominant purpose for which the loan was taken keeping in mandate of class-III of Section 57 of the Income Tax Act ?
2. Keeping in view the fact that the controversy with regard to assessment year 1994-95 and subsequent year 1997-98 has been settled upto appellate stage and question involve in the present assessment year is the same as of those years now it is not open for this court to enter into illegality committed by the appellate authority or tribunal

and appeal is not maintainable ?

FACTS

2. The dispute relates to assessment year 1996-97. The assessee filed her return of income on 13.8.1996 disclosing net loss of Rs.17,38,311/-. Notice under Section 143(2) of the Income Tax Act, 1961, in short, Act was issued on 8.10.1996. Notice under Section 142(1) of the Act was issued on 31.10.1996. These notices were served upon the respondent assessee on 10.10.1996 and 11.10.1996 respectively.

3. After service of notice aforesaid, the assessee filed a revised return on 31.3.1998 reducing the loss to the tune of Rs.30,56,670/- In consequence thereof, notice under Section 143(1)(a) was sent for service on 23.9.1998, followed by a notice dated 26.9.1996 under Section 142(1) of the Act which was served on the assessee on 30.10.1998.

4. The respondent assessee claims to be employee of M/s Sahara India, a firm of which the assessee is working as Head of Department of personnel affairs. In form 16, the gross salary of the assessee has been disclosed as Rs.1,57,250/- per month.

5. The assessee has also shown herself as partner in M/s. Chhavi Advertising and M/s. Sahara India Marketing. The assessee claimed loss under the head of other sources being interest accrued on loan taken for the purpose of investments in share capital of companies belonging to the group of income accrued during the year. Though the assessee has claimed unabsorbed brought forward losses for earlier year but the

amount has not been specified in the return. The assessment immediately preceding year of 1995-96 was completed on a positive income by the time the assessing officer was considering the income and loss return of the assessee for the year 1996-97.

6. The income drawn by the assessee as salary is from Sahara India Limited where Shri Subroto Roy (husband) is one of the partners with 63% share. Keeping in view the relationship of the assessee with her husband having 63% interest, the assessing officer observed that in view of the provisions contained in Section 64(i)(ii), the income of the assessee is liable to be clubbed in the hands of her husband Shri Subroto Roy. The assessing officer has noted that the assessee does not possess any technical or professional qualification required for appointment as Head of Department in the firm M/s. Sahara India Limited. However, the assessing officer keeping in view the fact that the respondent assessee has filed separate return of income, it was considered on a protective basis in her assessment without any prejudice to treatment in view of Section 64(i)(ii) of the Act.

7. The assessing officer has considered the question with regard to foreign tour of the assessee to Hongkong, Singapur, United Kingdom, France, Switzerland and disallowed the claim on the ground that the assessee has not adduced any evidence in support of her contention that the foreign travels were undertaken for the purpose of business of her employer. The assessing officer has considered the assessee's income from other sources from Radio, doordarshan and GFDA Scheme which is Rs.2,060/- and Rs.20,000/- respectively.

8. However, the controversy involved in the present appeal relates to disallowing the interest claimed on the loan taken

from Sahara India Mutual Benefit Co. Limited(in short, SIMBCL).

The assessee has taken the following loan from SIMBCL :

01.4.95	Opening balance	20,712,923.47
09.08.95	Amount Paid	1,150,000.00
04.12.95	Amount Paid	3,520,000.00
09.12.95	Amount Paid	499,000.00
22.12.95	Amount Paid	20,000,000.00
31.03.96	Interest	8,446,885.00
		54,328,808.47

The assessee invested the amount received aforesaid as under :

09.08.95	11,50,000	Investment in Chhabi Advertising (Firm
04.12.95	35,20,000	Investment in Sahara India Marketing (Firm)
09.12.95	4,99,000	Investment in Shares of Sahara India Electrical Limited
22.12.95	1,00,00,000	Investment in shares of Sahara India Housing Limited
23.12.95	1,00,00,000	Investment in share of Sahara India International Corpn. Ltd.

9. Before the assessing officer, the assessee claimed interest on the aforesaid loan pertaining to respective year. The assessing officer has observed that the figure for the claim of loan substantially vary between original return filed and the revised return which according to the assessing officer is as under :

1.	Claim as per original return	71,80,561/-
2.	Claim as per revised return	31,98,921/-
3.	Claim as per statement filed on 18.2.99	21,30,827/-

4.	Figure as per statement reproduced above	84,46,885/-
5.	Figure as per letter dated 18.2.99	81,08,386/-

10. The assessing officer noted that in similar way, the loan was taken by all the assessee belonging to Sahara Group namely shri Subroto Roy Sahara, Smt. Swapna Roy, Shri J.B. Roy, Shri O.P. Srivastava, Shri Istiaque Ahmad, Shri Sanjay Bahadur Mishra, Shri U.K. Bose and all of them claimed deduction of interest accrued on the loan under Section 57(iii) of the Act.

11. It has been noted by the assessing officer that the loan amount was advanced from time to time without any collateral security and only on the basis of personal security. The loan advanced to assessee without any collateral security by the companies of the Sahara Group has been taken as unusual act on the part of the companies by the assessing officer.

12. It has been noted by the assessing officer that the assessee is substantial share holder of companies and partnership firms belonging to Sahara India Groups (supra), hence occupies a privileged position vis-à-vis other ordinary persons who have approached M/s. Sahara India Mutual Benefit Co. Limited for loan. It has been further noted by the assessing officer that the Directors who hold substantial interest in M/s. SIMBCL are Ashok Roy Chaudhary, brother in law of Shri Subroto Roy Sahara, the Managing worker of the whole group and Smt. Vandana Bhargava.

13. The assessing officer observed that since the assessee does not hold shares having 10% voting power or more as stipulated in Section 2(22)(e) of the Act, the provision of deemed dividend are not directly attracted. The assessing

officer observed that the whole transaction has been made to circumvent the provision of law/statutory provision and the loan was obtained by the assessee by virtue of her privileged beneficial position in the group. While narrating the factual position, the assessing officer observed that there is no stipulation in the sanction letter for the loan with regard to manner in which the principal or interest accrued thereon are to be repaid. Virtually, in absence of any terms and conditions entered into between parties or imposed by the company of the firm, the repayment of loan has been left at the sweet will of loanee, i.e. the assessee Smt. Swapna Roy. There appears to be no specific pinpointed stipulation in the terms and conditions of the loan requiring to pay the same in specified period. The sanction letter obtained in the case of Ishtiaq Ahmad , one of the recipients of such loan vaguely mentions that the loan shall be repayable in five years. Apart from above, it has been noted by the assessing officer that the total amount of debt of assessee at the face value much exceeds the value of assets. If the amount of interest accrued on the loan is included in the amount of debt, the total liability to repay the interest is not supported by any commensurate asset or income.

14. The assessing officer has noted that the companies in whose shares the loan has been invested are the companies belonging to the Sahara Group and they have never declared any dividend nor there is any possibility of their declaring any dividend in future. The assessing officer observed that many of the companies have already closed their activities and many like Sahara India Limited would have more liabilities than assets. The assessing officer remarked that the value of shares are not even worth the dust. It has also been noted by the assessing officer that the firm in which the loan money has been introduced and the capital are either closed or running in

huge loss like Sahara India Mass Communication. The assessing officer observed that virtually, the loan amount has been adjusted against the loss accumulated over the years.

15. Keeping in view the conflicting figure claimed by the assessee at different stages of assessment proceeding while submitting revised return or revised statement, the assessing officer observed that the amount of interest varied by wide margins which shows the lack of knowledge on the part of assessee with regard to her real liability.

16. In spite of repeated demand raised by the assessing officer, the assessee failed to produce the share certificates, in respect of the shares held by them. The assessing officer noted that only few certificates were produced but not the original shares as in the case of Subroto Roy Sahara, J.B. Roy, O.P. Srivastava and Ishtiaq Ahmad. Before the assessing officer, the assessee failed to explain as to how they would repay the loan since the investments made out of the loan was productive and many of the companies have either closed or their business are running on hot water. It has been noted by the assessing officer that in most of the cases though the cheques for loan amount were issued earlier but were presented for payment at the bank at the end of financial year like 13th February, 1996 or in some cases in March, 1996.

17. Keeping in view the facts and circumstances of the case and over-all evidence on record, the assessing officer observed that the liability to pay interest is not real but artificial and hypothetical. There is neither intention nor any possibility to repay the loan or interest by assessee in future and likely to remain on paper for years to come. Assessing officer further observed that the companies in which the loan has been invested are not listed in the stock exchange and as such are

not marketable and hence those are not likely to fetch any resale value and in near future, those companies are not likely to declare any dividend keeping in view past 20 years history of the group.

18. Keeping in view the fact that there is no possibility of income of any dividend in future and not even a penny has ever been earned by the assessee from the shares held in the past so far, the amount in question cannot be treated as expense towards interest on loan was allowed or expanded wholly and exclusively for the purpose of making or earning income for dividend in view of the provisions contained in Section 57(iii) of the Act. The assessing officer observed that the reference of making and earning income under Section 57(iii) of the Act should be construed as reference to real and feasible income. The assessing officer observed that the expenses incurred for the purpose of earning imaginary or hypothetical dividend in future is not substantiated by placing any material on record. Hence not allowable under Section 57(iii) of the Act. It has been observed that to attract Section 57(iii) of the Act, it is necessary that the possibility of income coming from investment. The possibility should be real and not hypothetical. The word, “expanded” wholly and exclusively for the purpose of making or earning such income used in Section 57(iii) should be construed in strict sense and not liberally to give a way to the assessee to abuse the provision.

19. It has also been observed by the assessing officer that the whole nature of loan transaction involved and the artificial interest liability created in order to set off the existing and future real income of the assessee and thereby to avoid the incidence of taxation, falls within the scope of mischief of activities. It has also been observed by the assessing officer that the income disclosed by the assessee in the return of income is the income from salary which is accounted for by the assessee on each

basis and the deductions/rebates allowable on th same are also claimed on the same basis. In spite of lot transaction, the assessee has not maintained any book of accounts.

20. Accordingly, the assessing officer had declined to provide any deduction with regard to interest of Rs.31,98, 921/- under Section 57(iii) of the Act.

21. The finding recorded by the assessing officer dated 23.3.1999 under Section 143(iii) of the Act was the subject matter of appeal before the Commissioner, Appeal, Lucknow (CIT/Appeal). The first appellate authority had partly allowed the appeal and allowed their deduction under Section 57(iii) of the Act relying upon his earlier order dated 23.7.1998 for the assessment year 1995-96. While allowing the appeal, the C.I.T. Appeals with regard to foreign travel of assessee observed that the appellant is in a position to furnish necessary detail to prove that the expenditure with regard to foreign travel of Rs.2,18,820/- which was added to total income of the assessee could be expenditure and proved by the assessee. Hence the assessee should be given an opportunity to produce evidence and the matter was remitted for reconsideration by the assessing officer by providing fresh opportunity to prove that the foreign travels were undertaken for the employer's business. With regard to disallowing the appellant's claim of Rs.21,30,827/- in respect of interest paid on borrowed capital for the purpose of investment in share of companies, C.I.T. Appeals relied upon the earlier verdict of the year 1995-96 allowing such claim. The appellate authority has observed that only difference is the reliance placed by the assessing officer on the judgment of Madras High Court reported in **151 ITR 653 CIT versus Sujani Taxtile (P) Limited** which does not apply. Disallowance of the appellant's claim amounting to Rs.21,30,827/- in respect of interest paid on borrowed capital

for the purposes of investment in the share of companies was set aside by the C.I.T. (Appeals) and allowed under Section 57(iii) of the Act.

22. The revenue as well as the assessee preferred an appeal before the tribunal. Before the tribunal, the revenue raised the plea that the C.I.T.(Appeals) was not justified in deleting addition of Rs.21,30,827/-. However, the tribunal also relying upon its order dated 12.3.2004 for assessment year 1994-95 had dismissed the appeal of revenue as well as the cross objections.

23. Feeling aggrieved, the revenue preferred the present appeal with submission that whole purpose of taking loans from a company of the Sahara Group and investing the same in the shares of the closely held companies of the same group was to create an artificial interest liability in the case of the assessee in order to set off the existing and future income of the assessee and thereby to avoid incidence of taxation through this colourable device. It has been stated that the assessee has only acted as a conduit in the aforesaid transfer of funds from one company of the group to other concerns of the same group. There has been no dominant intention of earning any income from the said transactions and the real purpose was to avoid incidence of taxation. For the questions framed above, the learned counsel for the appellant has relied upon the case in **Income Tax Appeal No.42 of 2003 Commissioner of Income Tax (Central) Kanpur versus Shri Deepak M. Kothari, Kanpur** and the cases reported in **(2006)13 SCC 252 State, CBI versus Sashi Balasubramanian and another, 154 ITR 148 (SC) McDowell and Co. Ltd. versus Commercial Tax Officer, 238 ITR 777 Commissioner of Income Tax versus Amritabeen R. Shah, 151 ITR 653 Commissioner of Income Tax versus Sujani Textiles (P.) limited, 131 ITR 659 Smt.**

Virmati Ramkrishna versus Commissioner of Income Tax, Gujarat-III, 115 ITR 519 SC Commissioner of Income Tax, West Bengal-III versus Rajendra Prasad Moody and **201 ITR 464 Sarabhai Sons (P.) Limited versus Commissioner of Income Tax.**

24. On the other hand, learned counsel for the respondent has relied upon the judgment reported in **(2001)10 SCC 231 Union of India and others versus Kaumudini Narayan Dalal and another, , (2002)1 SCC 605 Union of India versus Satish Panalal Shah, (2005)12 SCC 241 CCE, Meerut versus Eureka Forbes Limited, (2005)12 SCC 242 Collector of Central Excise & Customs versus P.M.P. Components Limited, (2005)12 SCC 419 Commissioner of Central Excise and Customs, Cochin I versus Alsthom T&D Transformers Limited, (2005)12 SCC 420 State of A.P. Versus Bhooratnam & Co., (2008)8 SCC 739 C.K. Gangadharan and another versus Commissioner of Income Tax, Cochin, judgment and order dated 3.2.2005 passed in WT Appeal No.4 of 1999 Commissioner of Wealth Tax versus Allied Finance (P) Limited, (2004)266 ITR 349 Director of Income Tax versus Lovely Bal Shiksha Parishad, (1992)193 ITR 321 Radhasoami Satsang versus Commissioner of Income Tax.**

25. During the course of hearing, it was vehemently argued by the appellant's counsel that since the quantum of tax involved in previous years was not substantial, hence the department has not filed appeal against the earlier assessment years' proceeds.

26. For adjudication of the question framed, it is necessary to look into the return filed, assessments made and the financial status of the companies. The information supplied has not been disputed by the learned counsel for the respondents in the

form of chart which is reproduced as under :

A.Y.	Returned Income	Assessed Income
1994-95	(-)9,89,630/-	(-)9,89,630/-
1995-96	(-) 1,46,181/-	(-)99,930/-
1996-97	(-)41,42,284/-	(-)40,07,280/-
1997-98	(-)67,99,970/-(Original) (-)83,10,164/-(Revised)	(-)71,83,640/-
1998-99	(-)4,11,35,025/- (Original) (-)8,60,80,825/- (Revised)	(-) 2,81,10,450/-

Name of the Company-M/s Chabbi Advertising

A.Y.	Returned Income	Assessed Income
1992-93	1,780/-	20,930/-
1993-94	5,980/-	1,71,947/-
1994-95	5,274/-	2,83,220/-
1995-96	6,280/-	3,87,660/-
1996-97	6,670/-	20,41,090/-
1997-98	4,75,380/-	4,75,380/-
1998-99	2,46,637/-	3,76,261/-

Name of the Company-M/s Sahara India Housing Corporation Ltd.

A.Y.	Returned Income	Assessed Income
1993-94	1,37,940/-(Original) 9,03,200 (Revised)	2,69,449/- (u/s 144) 10,34,710/-(u/s 143(3)/148)
1994-95	1,06,090/-	22,94,860/-
1995-96	14,32,700/-	1,79,61,860/-
1996-97	36,29,550/-	2,94,43,760/-
1997-98	4,36,350/-	39,73,893/-
1998-99	1,44,070/-	7,85,568/-

Name of the Company – M/s Sahara India Electrical Ltd.

A.Y.	Returned Income	Assessed Income
2001-02	4,03,710/-	4,28,475/-
2002-03	4,81,736/-	5,06,430/-
2003-04	5,30,350/-	5,30,350/-
2004-05	4,08,980/-	4,08,980/-
2005-06	29,830/-	29,830/-
2006-07	(-)13,206/-	(-)13,206/-

Since the case of M/s Sahara India Electrical Ltd. has been centralized in this circle from ward 7(2) New Delhi, therefore case records of A.Y. 2001-02, onward only are available with this circle.

27. Relying upon the aforesaid facts, learned counsel for the revenue stated that the whole purpose of raising loan of companies of Sahara Group and investing the same into shares of closely associated companies is to create an artificial interest liability in order to set off the existing and future income and thereby to avoid incidence of taxation which, according to the appellant's counsel, is a colourable device. It has been stated that the assessee only acted as a conduit in transfer of fund from one company of the group to other concerns of the same group. Dominant intention is not an earning from the said transaction but the real purpose is to avoid the incidence of taxation.

28. On the other hand, learned counsel for the respondent submits that the consistency in assessment should be maintained. Though the principle of res judicata is not applied but keeping in view the various pronouncements of the Hon'ble Supreme Court and other High Courts, it is not justifiable to depart from earlier practice. It has also been stated by the respondents' counsel that the appeal filed against the assessment year 1997-98 has been dismissed by the Delhi High Court. The Hon'ble Supreme Court has also dismissed

the Special Leave Petition.

29. A perusal of the order dated 17.2.2009 shows that the Delhi High Court has dismissed the appeal since the revenue has not provided necessary information with regard to assessment year 1996-97. Delhi High Court dismissed the appeal with regard to assessment year 1997-98 on the ground that the revenue had followed own order of the assessment year 1996-97. The appeal was dismissed by the Delhi High Court without framing any substantial question of law in limine. Hon'ble Supreme court dismissed the appeal without discussing the controversy involved.

30. It has also been stated that the observation of the assessing authority at least with regard to two companies, namely Sahara India Limited and Sahara India Mask Communication is based on unfounded facts as no investment was done by the assessee in these two firms.

CONSISTENCY

31. Learned counsel for the respondent has vehemently argued that the tribunal has rightly not interfered with the order of the appellate authority to maintain the consistency. It has not been disputed that every assessment year is independent and assessment can be made on the basis of the material on record. However, relying upon various pronouncements of the High Court and Hon'ble Supreme Court, it has been submitted that the consistency should be maintained and there is no material to depart from earlier practice. The tribunal's judgment should be affirmed.

32. In **2008(8)SCC 739 C.K. Gangadharan and others versus Commissioner of Income Tax**, their Lordships of

Hon'ble supreme Court held that where the revenue has not assailed the correctness of the order in one case, it would normally not be permissible to do so in other case on the logic that the revenue cannot pick and choose. It is necessary to maintain certainty in law.

However, their Lordships of Hon'ble Supreme Court dealt with the exception also and held that where the revenue does not prefer an appeal for just cause or where the revenue involved is quite small amount may make out a case of departure. It shall be appropriate to reproduce relevant portion from the judgment, to quote :

> "12. If the assessee takes the stand that the revenue acted mala fide in not preferring appeal in one case and filing the appeal in other case, it has to establish mala fides. As a matter of fact, as rightly contended by the learned Counsel for the revenue, there may be certain cases where because of the small amount of revenue involved, no appeal is filed. Policy decisions have been taken not to prefer appeal where the revenue involved is below a certain amount. Similarly, where the effect of decision is revenue neutral there may not be any need for preferring the appeal. All these certainly provide the foundation for making a departure."
>
> "13. In answering the reference, we hold that merely because in some cases the revenue has not preferred appeal that does not operate as a bar for the revenue to prefer an appeal in another case where there is just cause for doing so or it is in public interest to do so or for a pronouncement by the higher Court when divergent views are

expressed by the Tribunals or the High Courts."

33. In a case reported in **(2005)195 CTR Reports 528 Commissioner of Wealth Tax versus Allied Finance(P) Limited**, it has been held that the lack of consistency by revenue put their action to acid test. Hon'ble Supreme Court held that the principle of res judicata does not apply to the income tax proceedings since each assessment year is a unit by itself. If there is a fundamental aspect permeating through different years and the authorities have allowed that position to be sustained, it would not be appropriate to allow the position to be changed in subsequent year. For the sake of consistency, the same view should be continued to prevail in subsequent years unless there is some material change in the facts.

34. In **2004 Vol. 266 ITR 265 Director of Income-Tax versus Lovely Bal Shiksha Parishad**, the same view has been reiterated.

35. In the case reported in **1992 Vol. 193 ITR page 321 Radhasoami Satsang versus Commissioner of Income-Tax**, their Lordships of Hon'ble Supreme Court while dealing with the principle of consistency and principle of res judicata observed that unless there is a material change justifying the revenue to take different view of the matter, it shall not be proper for the revenue to reopen and take contrary view. To reproduce relevant portion from the judgment of Radha Swami Satsang (supra), to quote :

> "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.
>
> 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 Radhaswami Satsang was entitled to exemption under Sections 11 and 12 of the Income Tax Act of 1961.

Their Lordships of Hon'ble Supreme Court held that the proposition of law and observation made therein is confined to the said case and may not be treated as authority on the aspects for general application.

36. However, in the case reported in **(2007)8 SCC 688 Municipal Corporation of City of Thane versus Vidyut Metallics Limited and another**, Hon'ble Supreme Court while holding that the strict rule of res judicata as envisaged by Section 11 C.P.C. has no application, their Lordships further

held that as a general rule, each year's assessment is final for that year and does not govern later years because it determines the tax for a particular year. To reproduce relevant portion, to quote :

> 14. So far as the proposition of law is concerned, it is well-settled and needs no further discussion. In taxation-matters, the strict rule of res judicata as envisaged by Section 11 of the Code of Civil Procedure, 1908 has no application. As a general rule, each year's assessment is final only for that year and does not govern later years, because it determines the tax for a particular period. It is, therefore, open to the Revenue/Taxing Authority to consider the position of the assessee every year for the purpose of determining and computing the liability to pay tax or octroi on that basis in subsequent years. A decision taken by the authorities in the previous year would not estop or operate as res judicata for subsequent year. [vide Maharana Mills (P) Ltd. v. ITO, 1959 Supp (2) SCR 547 : AIR 1959 SC 881; Visheshwar Singh v. CIT, (1961) 3 SCR 287; Instalment Supp (P) Ltd. v. Union of India, (1962) 2 SCR 644; New Jehangir Vakil Mills v. CIT, (1964) 2 SCR 971; Amalgamated Coalfields Ltd. v. Janapada Sabha, 1963 Supp (1) SCR 172; Devilal v. STO, (1965) 1 SCR 686; Udayan Chinubhai v. CIT, (1967) 1 SCR 913; M.M. Ipoh v. CIT, (1968) 1 SCR 65; Kapur Chand v. Tax Recovery Officer, (1969) 1 SCR 691; CIT, W.B. v. Durga Prasad, AIR 1971 SC 2439; Radhasoami Satsang v. CIT, (1992) 1 SCC 659 : AIR 1992 SC 377; Society of Medical Officers v. Hope, 1960 AC 55; Broken Hill

> Proprietary Co. Ltd. v. Municipal Council, 1925 All ER 675 : 1926 AC 94 : 95 LJPC 33; Turner on Res Judicata, 2nd Edn., para 219, p. 193].

In the same judgment(supra), Hon'ble Supreme Court further proceeded to observe that, to quote;

> "A decision reached in one year would be a cogent factor in the determination of a similar question in a following year, but ordinarily there is no bar against the investigation by the Income Tax Officer of the same facts on which a decision in respect of an earlier year was arrived at."

37. Hon'ble Supreme Court further showed its agreement with the principle of law enunciated by Radha Swami Satsang(supra) (para 24).

38. In Income Tax Appeal No.127 of 2005 The Commissioner of Income Tax-I versus M/s Goel Builders, a Division Bench of this court, of which one of us (Hon'ble Devi Prasad Singh) was a member after considering the various pronouncements of other High Courts and Supreme Court proceeded to observe as under :

> "Law emerges after considering various pronouncements of Hon'ble Supreme Court and other High Courts is that the principle of consistency is a rule in general but for cogent reasons or on justifiable ground, the revenue has got right to depart from its earlier practice and take a different view which shall be determined upon the facts and circumstances of

each case. While departing from earlier practice, the revenue cannot act mechanically without applying its mind to earlier facts and circumstances under which a view was taken by the taxman and the facts and circumstances of the assessment year in question calling to depart from earlier view. Where there is a fundamental aspect permeating through different assessment years allowed by the authorities to sustain, it would not be appropriate to change the view in subsequent year except on justifiable ground like change of circumstances or non-consideration of relevant material or statutory provisions, or failure on the part of assessing or appellate authority to exercise jurisdiction for extraneous reason or small amount of revenue involved or other justifiable ground depending on facts of each case."

39. In the present case, the tax affect or revenue involved is Rs.31,98,921/- which seems to be not a meager amount keeping in view the quantum of interest disallowed by the assessing officer. Present appeal may not be thrown out to maintain the consistency in public interest as well as keeping in view the fact reasons assigned by assessing officer has not been taken into account by the tribunal.

40. The judgment referred to herein above shows that it is always open for the assessing officer to depart from earlier practice on substantial justifiable ground.

41. Apart from tax affect, the order passed by the assessing officer shows that the interest claimed by the assessee on the

loan taken in the relevant year varies. The gap between the original return and the revised return coupled with the subsequent statement filed by the assessee is enormous (supra). This fact shows that the assessee has not acted bona fidely in submitting revised return. The revised statement filed by the assessee is an incident of changing of stand with regard to income.

42. In case an assessee changes his or her stand repeatedly and does not come with clean hand, then it shall be sufficient to depart from earlier practice and the principle of consistency shall not come in the way to assess the income on the basis of the material on record.

43. Substantial amount has been invested by the assessee as is evident from the chart(supra) in the sisters concerned whinch are running in loss. Nothing has been brought on record by the assessee as to why she has invested such a huge amount in the firm running in loss since years. Neither the appellate authority nor the tribunal has tried to discuss this issue keeping in view the reasoning of the assessing authority.

There is no stipulation in the sanction letter of loan with regard to manner of repayment of principal amount and interest and the total amount of debt exceeds the face value of assets.

44. Though the assessing officer has taken note of the fact with regard to change in stand while filing revised income and the assessment and also with regard to financial soundness of the company where the assessee has invested the borrowed money but while reversing the order of the assessing officer, neither the appellate authority nor the tribunal had taken into account these aspects of the matter. No finding has been recorded by the appellate authority or the tribunal with regard to

justification of investment made in the firms which are running in loss since several years. A man of common prudence shall not invest in a company which is running in loss. Since these factors have not been considered to justify the investment, the principle of consistency shall not come in way to depart from earlier practice.

45. Several issues decided by the assessing officer have not been dealt with by the tribunal and mechanically the appeal of revenue has been dismissed to maintain the consistency. The tribunal should have dealt with the issues adjudicated by the assessing officer by passing a speaking and reasoned order instead of dismissing the appeal of revenue relying upon the outcome of the earlier assessment year. Dismissal of an appeal without passing a speaking and reasoned order by the tribunal relying upon earlier finding seems to be no not justified. The order should be reasoned after discussing the facts and circumstances and material on record keeping in view the settled law that every assessment year is independent in itself. Even if for the purpose of consistency, earlier practice is followed, it shall be incumbent on the tribunal or the appellate authority to discuss the material facts and pleading on record while dissenting with the order of the assessing officer. The tribunal has been failed to exercise jurisdiction vested in it. On this score also, right of the assessee seems to be not protected by the principle of consistency.

REASONED ORDER

46. Their Lordships of Hon'ble Supreme Court in the case reported in **JT 2010(4) SC 35 Assistant Commissioner, Commercial, Tax Department, Works, Contract and Leasing, Quota versus Shukla and Brothers** has held that it shall be obligatory on the part of the judicial or quasi judicial

authority to pass a reasoned order while exercising statutory jurisdiction.

47. The aforesaid view to pass reasoned order by the authorities which includes quasi-judicial authorities is consistently reiterated by the Hon'ble Supreme Court in earlier judgments. It has been held by their Lordships that the authorities have to record reasons, otherwise it may become a tool for harassment vide K.R. Deb versus The Collector of Central Excise, Shillong, AIR 1971 SC 1447; State of Assam and another versus J.N. Roy Biswas, AIR 1975 SC 2277; State of Punjab versus Kashmir Singh, 1997 SCC (L&S) 88; Union of India and others versus P. Thayagarajan, AIR 1999 SC 449; and Union of India versus K.D. Pandey and another, (2002)10 SCC 471.

48. In view of above, the tribunal should have dealt with the facts and circumstances and question of law involved and raised by the authorities, may be in precise instead of dismissing the appeal merely on the ground of consistency. Non-consideration of grounds assigned by the assessing authority by the appellate authority or the tribunal renders the order passed by them unjust, illegal and violative of Article 14 of the Constitution of India.

49. Hon'ble Supreme Court in a case reported in **AIR 1955 SC 633 U.J.S. Chopra versus State of Bombay** held that the judgment is the expression of opinion of the Court arrived at after due consideration of evidence and the arguments which shall form judicial determination.

50. In a case reported in **AIR 1957 SC 389 State of Bihar versus Ram Naresh Pandey and others**, their Lordships of Hon'ble Supreme Court held that the judgment means a

decision which affect the merit of a question between the parties by determining some right or liability.

Thus, it shall always be obligatory on the part of the appellate court or the tribunal to determine the issue involved by passing a reasoned order after considering the grounds and material on record as well as the finding and observations made by the assessing authority/ appellate authority.

DUTY OF APPELLATE AUTHORITY/TRIBUNAL

51. It is also settled law that the appellate authority while dissenting with the order of the subordinate authority should meet out the finding recorded by the original authority by assigning reasons. In the present case, reason assigned by the tribunal while taking different view than of the assessing authority is not based on due consideration of entire grounds relied upon by the assessing authority.

52. Hon'ble Supreme Court in a case reported in (2001)2 JT (SC) 407 Santosh Hazari versus Purushottam Tiwari(Dead) by L.Rs. held as under :

> “”The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for hearing both on questions of fact and law. The judgment of the Appellate Court must, therefore, reflect its conscious application of mind, and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the Appellate Court.”
>
> …….
>
> …….
>
> While reversing a finding of fact the Appellate

> Court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the First Appellate Court had discharged the duty expected of it."

The aforesaid proposition of law has been reiterated in a case, reported in **AIR 2001 SC 2171 Madhukar and others versus Sangram and others.**

53. In an earlier judgment, reported in **AIR 1998 SC 2713 Punjab National Bank and others versus Kunj Behari Misra**, Hon'ble Supreme Court after considering catena of earlier judgments held that in case the disciplinary authority disagrees with the conclusion reached by the enquiry officer, then while recording his own finding, it shall be obligatory to deal with the reason given by the enquiry officer. On the same analogy, in case the appellate authority differs with the finding recorded by the assessing officer, then each and every issue, grounds and circumstances dealt with by the assessing officer must be considered and difference of opinion must be supported by reasoned order.

Hence also, the appeal cannot be thrown out merely on the ground to maintain consistency with previous years.

BINDING PRECEDENT

54. Reliance placed by the learned counsel for the assessee to the dismissal of the appeal in limine by the Delhi High Court or the Supreme Court seems to be not sustainable. A perusal of the order passed by the Delhi High Court and Hon'ble Supreme Court shows that the appeal has been dismissed

without recording a finding with regard to argument advanced or dispute raised. It is settled law that a judgment shall be binding only in case the dispute is identical based on same set of facts. The judgment should be considered in reference to the context keeping in view the facts and circumstances of each case. It is not borne out from the judgment of the Delhi High Court that the question cropped up for adjudication in this Court was raised and adjudicated by the Delhi High Court.

55. The expression, “judgment” has been defined in Section 2(9) of the Code of Civil Procedure. The judgment means the statement given by a Judge on the grounds of a decree or order. Meaning thereby the Court has to state the ground on which it bases its decision. It must be intelligible and must have a meaning. It has a distinction from a word, order as the latter may not contain reasons. Unless, a judgment is based on reason, it would not be possible for an appellate/revisional Court to decide as to whether the judgment is in accordance with law vide **AIR 1954 SC 194 Surendra Singh and others versus State of U.P.**

56. Hon'ble Supreme Court in a case reported in **AIR 1970 SC 1168 M/s Tarapore & Co. Madras versus Tractors Export Moscow** held that the judgment means a final adjudication by the Court of rights of the parties.

57. In **AIR 1964 SC 1099(C.B.) Vidyacharan Shukla versus Khubchand Baghel and others**, their Lordships of Hon'ble Supreme Court held that the judgment is statement of reason given by a Judge.

58. So far as the argument of the respondent's counsel with regard to binding precedent is concerned, it has been held by Hon'ble Supreme Court by catena of judgments that the issue

which has not been considered by the Court while delivering a judgment cannot be said to be binding as a decision of the Court takes its colour from the questions involved in the case in which it is rendered and while applying decision to a later case, the court must carefully try to ascertain true principle laid down by the decision of the Court. The court should not place reliance upon the decision without discussing as to how the factual situation fits in with the fact, situation of the decision on which reliance is placed as it has to be ascertained by analyzing all the material facts and issue involved in the case and argued by both sides. The judgment has to be read with reference to and in context with a particular statutory provisions interpreted by the Court, as the Court has to examine as to what principle of law has been decided and the decision cannot be relied upon in support of a proposition that it did not decide (vide AIR 1971 SC 530 H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur and others versus Union of India, AIR 1985 SC 218 M/s. Amar Nath Om Parkash and others versus State of Punjab and others, AIR 1980 SC 1707 Rajpur Ruda Meha and others versus State of Gujarat, (1992) 4 SCC 363 C.I.T. Versus Sun Engineering Works(P) Limited. (1993)2 SCC 386 Sarva Shramik Sangh, Bombay versus Indian Hume Pipe Co. Limited and another, AIR 2005 SC 2499 M/s. Makhija Construction and Enggr. Pvt. Limited versus Indore Development Authority and others.

59. In **AIR 2002 SC 1187 Jawahar Lal Sazawal and others versus State of Jammu and Kashmir and others**, their Lordships of Hon'ble Supreme Court held that a judgment may not be followed in a given case if it has some distinguishing features.

60. In **AIR 2003 SC 511 Bhavnagar University versus Palitana Sugar Mill (P) Limited**, Hon'ble Supreme Court held that a decision is an authority for which it is decided and not

what can logically be deduced therefrom. A little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.

61. The aforesaid principle of law has been followed in other cases reported in AIR 2002 SC 3088 Delhi Administration versus Manohar Lal, AIR 2003 SC 2339 Union of India versus Chajju Ram, AIR 2003 SC 2661 Ashwani Kumar Singh versus U.P. Public Service Commission and others.

62. In view of above, keeping in view the finding and the material discussed by the assessing authority and the submission made by the parties, the judgment of the Delhi High Court does not have binding precedent being not a reasoned order deciding the issue in question. It also lacks persuasive effect being not deciding the issue involved.

INCOME FROM OTHER SOURCES

(Section 57(iii) of the Income Tax Act)

63. The question cropped up as to whether the amount invested by the assessee in sisters concerned running in loss since several years may be treated as investment made exclusively for the purpose of making or earning such income. Section 57(iii) of the Act is reproduced as under :

> "any other expenditure (not being in the nature of capital expenditure) laid out or expended wholly and exclusively for the purpose of making or earning such income."

64. Accordingly, the expenditure wholly and exclusively for the purpose of making or earning income may be deducted. It

shall be appropriate to consider some of the pronouncements of other High Courts and Hon'ble Supreme Court.

65. The Calcutta High Court in a case reported in **[2005]273 ITR 353(Cal) Consolidated Fibres and Chemicals Limited versus Commissioner of Income Tax** while interpreting Section 57(iii) of the Act held that taxability of income is not dependent upon its destination or the manner of its utilisation. It has to be seen at the point of accrual. It is not necessary that there should be a direct connection between the interest paid and the interest received for the purpose of claiming benefit under Section 57(iii). It should be seen whether the amount has been laid out or expended wholly and exclusively for the purpose of earning the income. Unless this test is satisfied the benefit under Section 57(iii) shall not be available.

66. Hon'ble Supreme Court in a leading case, reported in **[1978]115 ITR 516(SC) Commissioner of Income Tax, West Bengal-III versus Rajendra Prasad Moody** held that it is not necessary that any income should, in fact, have been earned as a result of expenditure. It is also not necessary to show that the expenditure was profitable one or that, in fact, any profit was earned.

67. Their Lordships held that merely because there is no profit the assessee's right to claim benefit under Section 57(iii) of the Act may not be thrown out. However, a close reading of judgment of Rajendra Prasad Moody (supra) shows that the Hon'ble Supreme court observed that the expenditure should be proper and bona fide. It shall be appropriate to reproduce relevant portion of the judgment of Rajendra Prasad Moody(supra) :

"We fail to appreciate how expenditure which is

> otherwise a proper expenditure can cease to be such merely because there is no receipt of income. Whatever is a proper outgoing by way of expenditure must be debited irrespective whether there is receipt of income or not. That is the plain requirement of proper accounting and the interpretation of Section 57(iii) cannot be different. The deduction of the expenditure cannot, in the circumstances, be held to be conditional upon the making or earning of the income."

Hon'ble Supreme Court further observed (supra) :

> "It is true that the language of Section 37(1) is a little wider than that of Section 57(iii), but we do not see how that can make any difference in the true interpretation of Section 57(iii). The language of Section 57(iii) is clear and unambiguous and it has to be construed according to its plain natural meaning and merely because a slightly wider phraseology is employed in another section which may take in something more, it does not mean that Section 57(iii) should be given a narrow and constricted meaning not warranted by the language of the section and in fact, contrary to such language."

68. In view of above, the condition precedent to avail the benefit of Section 57(iii) of the Act is that the investment must be proper and justified. Proper investment means correct investment with intention to earn profit. In Oxford Learner's Dictionary, the word, "proper" has been defined as right or

correct action in accordance with rules. Action should be real and good enough to avail the very object and purpose of investment acceptable socially and morally. (Oxford Advance Learner's Dictionary page 1210(7th Edition).

69. In **1994 ITR 2006 Patna 350 CIT versus Bihar Limited,** Calcutta High Court held that the expenditure is allowable as deduction from income from other sources only if it is found that, in fact, it has been expended wholly and exclusively for the purpose of making or earning such income and it is not in the nature of capital expenditure.

70. In a case reported in **151 ITR 653 Commissioner of Income Tax versus Sujani Textiles(P) Limited**, it has been held by the Madras High Court that where there was no question for any receipt of income from that source against which the interest on the borrowed funds could be set off, the interest paid by the company on borrowed funds could not be allowed as a deduction either under Section 36(1)(iii) or under Section 57(iii). The view taken by Madras High Court seems to be correct and we are in agreement to it.

71 In a case reported in **154 ITR 148 Mcdowell and Co. Limited versus Commercial Tax Officer**, Hon'ble Supreme Court took the note of the fact that the consequences of tax avoidance by an assessee is enormous. The black money flowing in the market discourage the honest taxpayers to file return and cause loss to exchequer.

72. It has been further observed that (supra), in a civilized society, the evasion of tax by dishonest taxpayers should be dealt with firmly and proper way to construe a taxing statute while considering a device to avoid tax is to be construed literally and strictly to preserve and check the tax avoidance. To

reproduce relevant portion (supra) :

> “We think that time has come for us to depart from the Westminster principle as emphatically as the British Courts have done and to dissociate ourselves from the observations of Shah, J. and similar observations made elsewhere. The evil consequences of tax avoidance are manifold. First there is substantial loss of much needed public revenue, particularly in a welfare State like ours. Next there is the serious" disturbance caused to the economy of the country by the piling up of mountains of black money, directly causing inflation. Then there is "the large hidden loss" to the community (as pointed out by Master Sheatcroft in 18 Modern Law Review 209) by some of the best brains in the country being involved in the perpetual war waged between the tax-avoider and his expert team of advisers, lawyers and accountants on one side and the tax-gatherer and his perhaps not so skillful advisers on the other side. Then again there is the 'sense of injustice and inequality which tax avoidance arouses in the breasts of those who are unwilling or unable to profit by it'. Last but not the least is the ethics (to be precise, the lack of it) of transferring the burden of tax liability to the shoulders of the guileless good citizens from those of the 'artful dodgers'. It may, indeed, be difficult for lesser mortals to attain the state of mind of Mr. Justice Holmes, who said, "Taxes are what we pay for civilized society. I like to pay taxes. With them I buy civilization." But, surely, it is high time for the judiciary in India too to part its ways from the principle of Westminster and the alluring logic of tax

> avoidance, we now live in a welfare State whose financial needs, if backed by the law, have to be respected and met. We must recognise that there is behind taxation laws as much moral sanction as behind any other welfare legislation and it is a pretence to say that avoidance of taxation is not unethical and that it stands on no less moral plane than honest payment of taxation. In our view, the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally or liberally, nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it."

73. The Delhi High Court in a case reported in **238 ITR 777 Commissioner of Income Tax versus Amritaben R. Shah**, held that the expenditure must be with primary motive of earning income. In order that an expenditure may be admissible under Section 57 of the Act, it is necessary that the primary motive of incurring it is directly to earn income falling under the head "Income from other sources". It shall be appropriate to reproduce from the judgment of **Amritaben R. Shah(supra)** :

> "The question which arises in this case is : whether the expenditure incurred for borrowing money for purchasing shares for acquiring controlling interest in a company can be held to be an expenditure incurred wholly or exclusively for earning income from dividend. There is no dispute in this case that the shares in question

> were purchased by the assessee for the purpose of acquiring controlling interest in the company and not for earning dividend. That being so, the expenditure incurred by way of interest on the loan taken by the assessee for the said purpose cannot be held to be an expenditure incurred wholly and exclusively for the purpose of earning income by way of dividends. From the nature of transaction, it is clear that the expenditure was not for the purpose of earning income by way of dividends but for the purpose of acquiring controlling interest in the company and, therefore, it would not be allowable as a deduction under Section 57(iii) of the Act.

74. In another case reported in **1964(33)ITR 140 Commissioner of Income Tax versus Amritaben R. Shah**, Hon'ble Supreme Court held that the expression "for the purpose of business" is narrower than the expression "for the purpose of making or earning profit" and the same view has been followed in **(1971)82 ITR 166 Commissioner of Income Tax, West Bengal I versus Birla Cotton Spinning and Weaving Mills Limited.**

75. In **2001 ITR 464 Sarabhai Sons Private Limited**, a Division Bench of Gujarat High Court held that income, in fact, should have been earned as a result of expenditure. However, the purpose of making or earning such income must be the sole purpose for which the expenditure must have been incurred. The distinction between purpose and motive must always be borne in mind for what is relevant is the manifest and immediate purpose and not the motive of personal consideration moving in the mind of the assessee for incurring

expenditure.

76. The legislature to their wisdom has used the word “laid out or expended wholly and exclusively for the purpose of making or earning such income. By using the word “wholly and exclusively”, the legislature cast a duty on the assessee to establish that the expenditure made was to earn income and not for any other purpose. These words make it obligatory for the assessee to ensure that by making investment, he or she had understood to earn income. For the purpose of earning income through the investment the assessee has to take into account the financial prospect of the company concerned. The principle applied to ascertain the intention of assessee to earn income shall be what a man of common prudence will think while expending in a company. In case there is no material on record to establish that the expenditure of the assessee is done bona fidely to earn income, the deduction under Section57(iii) of the Act shall not be available.

77. In the present context, the assessee has repeatedly submitted incorrect statement(supra) and borrowed the money for investment in her sister concerned managed by her close associate and relative which are running in loss without any expectation to gain profit. A man of common prudence shall never like to make investment in a company whose financial status is fragile and not liable to make profit.

78. The investment must be wholly and exclusively for the purpose of earning profit. At least dominant purpose of investment made must be to earn profit. The decision taken under the circumstances while making an investment should reveal that there was likelihood to earn profit. The investment or expenditure made in a company where there is no hope of earning profit shall not be covered by the Section 57(iii) of the Act (laid out or expended wholly and exclusively for the purpose

of making or earning such income).

79. After filing original return the petitioner has submitted revised return and statements giving out different figures. This act on the part of the assessee reveals that she has not acted bona fidely and tried to avail the benefit of Section 57(iii) of the Act by changing her stand. Neither the appellate authority nor the tribunal has considered this aspect of the matter with regard to bona fide of the assessee.

80. Though it is not unfair to borrow money or take loan from one concern and invest the same in other concern for the purpose of profit or income but while doing so, the assessee must act bona fide with primary motive to earn profit. The amount taken on loan from one concern and investment in other concern running in loss having fragile financial status cannot be treated as bona fide act on the part of the assessee. The action of the assess suffers from lack of bona fide and seems to be a device to help sister concern.

81. Some of the companies where the assessee has made investments are not listed in the stock exchange and not likely to fetch any resale value. The assessing officer may exaggerate the factual position but things as stand reveals that no person shall make investment in the companies which lacks financial soundness and where there is remote chance of profit or to earn income. The expenditure towards interest on loan does not seem to lay out or expend wholly and exclusively for the purpose of making or earning income from the shares under Section 57(iii) of the Act. The reasoning given by the assessing officer substantially seems to be correct while disallowing deduction.

82. There is one other aspect of the matter. While

interpreting the provisions contained in Section 57(iii) of the Act, the tribunal or the Court has got ample power to pierce the veil. The Court may find out from the material on record with regard to bona fide and intention of the assessee while claiming benefit of Section 57(iii) of the Act. Every word of Section 57(3) of the Act should be given meaning.

83. Hon'ble supreme Court consistently held that the taxing statute should be construed strictly vide **2004 (10) SCC 201, State of West Bengal Vs. Kesoram Industries Ltd, AIR 2000 SC 109 Mathuram Agarwal versus State of M.P., (1999)7 SCC 106 Mysore Minerals Limited M.G. Road, Bangalore versus CIT, Karnataka, Bangalore.**

84. It is no longer res integra that while interpreting statutory provisions, each and every word of the Act, every section and every chapter should be taken into account in reference to context. According to Maxwell any construction which may leave without affecting any part of the language of a statute should ordinarily be rejected. Relevant portion from Maxwell on the Interpretation of Statutes (12th edition page 36) is reproduced as under:-

> "A construction which would leave without effect any part of the language of a statute will normally be rejected. Thus, where an Act plainly gave an appeal from one quarter sessions to another, it was observed that such a provision, through extraordinary and perhaps an oversight, could not be eliminated."

85. In **2006 (2) SCC 670, Vemareddy Kumaraswami Reddy and another Vs. State of Andhra Pradesh**, their Lordship of Hon'ble Supreme Court affirmed the principle of construction and held that when the language of the statute is clear and unambiguous court can not make any addition or subtraction of words.

86. **In AIR 2007 SC 2742, M.C.D. Vs. Keemat Rai Gupta and AIR 2007 SC 2625, Mohan Vs. State of Maharashtra**, their Lordship of Hon'ble Supreme Court ruled that Court should not add or delete the words of a statute. Casus Omisus should not be supplied when the language of the statute is clear and unambiguous.

87. In **AIR 2008 SC 1797, Karnataka State Financial Corporation Vs. N. Narasimahaiah and others**, Hon'ble Supreme Court held that while construing a statute it can not be extended to a situation not contemplated thereby. Entire statue must be first read as a whole then section by section, phrase by phrase and word by word. While discharging statutory obligation with regard to take action against a person in a particular manner that should be done in the same manner. Interpretation of statute should not depend upon contingency but it should be interpreted from its own word and language used.

88. In **(2000) 3 SC 485 (K.V. Shivakumar Kumar Vs. Appropriate Authority),** Hon'ble Supreme Court has held that

equity or hardship are not relevant consideration for interpretation for taxing law.

89. In **2004 (10) SCC 201, State of West Bengal Vs. Kesoram Industries Ltd**., Hon'ble Supreme Court held that taxing statute should be construed strictly. If a person sought to be taxed comes within the letter of law, he must be taxed. However, in case, he does not fall in taxing category, tax cannot be imposed. There is no room for any intendment. There is no equity about tax. There is no presumption as to tax. Nothing is to be read and nothing is to be implied.

90. In **1994 ITR (2006) 688 Sc, H.H. Lakshmi Bai Vs. Commissioner of Wealth-Tax,** Hon'ble Supreme Court held that taxing statute in particular, have to be strictly construed and there is no equity in taxing provision.

91. In **2007 (3) SCC 668: Mahim Patram (P) Ltd Vs. Union of India**, Hon'ble Supreme Court held that taxing statute should be strictly interpreted.

LIFTING OF VEIL

92. Accordingly, while considering a case to extend the benefit under Section 57(iii) of the Act, the effect of words, “wholly and exclusively for the purpose” may not be diluted. By using three words, i.e. “wholly”, “exclusively” and “purpose”, the legislature had made it mandatory to find out the reason behind investment. In case, the dominant purpose is not for making or

earning such income, then deduction under Section 57(iii) shall not be available and to ascertain the purpose, the courts may lift the veil.

93. In corporate law, the Courts have ample power to lift the veil. It is the liability of the companies to be fair in dealing with tax matter. Being a separate juristic personality, it is expected that the companies shall not conceal their income or to escape the liability with regard to payment of tax. Lifting the corporate veil is to find out who is real person, beneficiary or in controlling the position of the company. The doctrine of “lifting the veil” has marked a change and it is adopted whenever and wherever a situation warranted.

94. Lord Denning M.R. in Littlewoods Stores Vs. I.R.C., (1969) 1 W.L.R. 1241 said:
"The doctrine laid down in Salomon's case has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can, and often do, draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind. The legislature has shown the way with group accounts and the rest. And the courts should follow suit...."

95. One of the most important circumstance in which the veil has been lifted is the cases of fraud or improper conduct of the promoters. Where dummy companies were incorporated by a promoter and his family members to conceal profits and avoid tax liability, the separate entity of the company has been ignored by looking through the veil and identifying those individuals who have deviced such method for their own benefits.

96. **In Juggilal Kamlapat Vs. Commissioner of Income Tax, AIR 1969 SC 932=1969(1) SCR 988** it was found that three brothers who were partners in the assessee firm were carrying on the managing agency in a dominant capacity in the guise of a limited company. The court held that the corporate entity has to be disregarded if it is used for tax evasion or to circumvent tax obligation or to perpetrate fraud.

97. In **C.I.T. Vs. Associates Clothiers Ltd., AIR 1963 Cal. 629** there was a sale by a company to another having some shareholders and the former company owning all shares in the latter. It was held that it would not escape the liability of tax under the Income Tax Act by taking recourse to the concept of separate legal entity.

In view of above, the assessing authority has rightly tried to find out the dominant purpose with regard to investment of borrowed money in the sister concern possessing fractured financial body and rightly held that the investment in the firm running in deficit since several years cannot be held exclusively for the purpose to earn income.

FINDING

98. Form the material on record, it appears that the assessee under the present appeal and the assessees of the connected appeals had taken loan from one associate concern and invested in other associate concern of Sahara group. Majority of the fund was invested in those associate firm which were running in loss since several years. Loan was sanctioned without guarantee or agreement, amount is huge, as evident from following facts:-

Assesse Swapana Roy, Employee of Sahara India Assessment Year	Loan taken from one sister concern substantially invested in those	Amount invested Rs. 54328808.47/-

1996-97	sister concern who are running in loss	
Assesse Ishtiaq Ahmad, Employee of Sahara India Assessment Year 1995-96 [ITA No. 23 of 2005]	Loan taken from one sister concern substantially invested in those sister concern who are running in loss	Amount invested Rs. 256861896/-
Assesse Mr. U.K.Bose, Employee of Sahara India Airlines Assessment Year 1994-95 [ITA No. 8 of 2005]	Loan taken from one sister concern substantially invested in those sister concern who are running in loss	Amount invested Rs. 052837216
Assesse Ishtiaq Ahmad, Employee of Sahara India Firm Assessment Year 1994-95 [ITA No. 22 of 2005]	Loan taken from one sister concern substantially invested in those sister concern who are running in loss	Amount invested Rs. 046214621
Assesse U.K.Bose, Employee of Sahara India Airlines Assessment Year 1996-97 [ITA No. 21 of 2005]	Loan taken from one sister concern substantially invested in those sister concern who are running in loss	Amount invested Rs. 146220000/-
Assesse U.K.Bose, Employee of Sahara India Airlines Assessment Year 1995-96 [ITA No. 20 of 2005]	Loan taken from one sister concern substantially invested in those sister concern who are running in loss	Amount invested Rs. 248776396/-
Assesse Ishtiaq Ahmad, Employee of Sahara India Assessment Year 1996-97 [ITA No. 31 of 2005]	Loan taken from one sister concern substantially invested in those sister concern who are running in loss	Amount invested Rs. 14622000/-
	Total Rs.	Rs. 819860937.47/-

It is strange that salary of Ishtiaq Ahmad and U.K.Bose is of few lacs, loan sanctioned without any guarantee and chance of return is remote and the investment of substantial amount is made in such sister firms which lacks financial backbone with

remote chance to earn income.

99. From the discussion hereinabove and keeping in view the fact that the assessee in question collectively along with other employees borrowed the fund from sister concern and invested in other sister concern majority of which lacks financial viability and running in loss since several years there appears to be no doubt that assessee and her associates (connected appeals) had not invested wholly and exclusively for the purpose of earning income. The material on record reveals that purpose was not to earn profit but it was a colourable device to utilise the fund of one firm in other sister concern for the purpose of trade or business.

100. In view of above, questions are answered as under:-

(I) The appellate court and tribunal had committed substantial illegality by deleting addition with regard to interest on loan taken from company of Sahara Group and investing it in a sister concern was not expended exclusively for the purpose of earning income.

(II) Keeping in view the facts and circumstances of the case and material on record assessee is not entitled to be benefited by principle of consistency and assessing officer had rightly assessed the income on the basis of return filed keeping in view the facts and circumstances of material on record.

101. Appeal is allowed accordingly. No order as to costs.

[Justice S.C.Chaurasia] [Justice Devi Prasad Singh]

Order date:-24.5.2010
kkb/madhu