IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B" NEW DELHI
BEFORE SHRI B.R. MITAL : JUDICIAL MEMBER
&
SHRI B.R. JAIN : ACCOUNTANT MEMBER

ITA no. 3630/Del/2009
Asstt. Yr: 2006-07

M/s Crystal Phosphates Ltd., Village & P.O. Nathpur, Distt. Sonepat.	Vs.	Asstt. Commissioner of Income-tax, Sonepat Circle, Sonepat. PAN: AABCC1978R

ITA no. 4002/Del/2009
Asstt. Yr: 2006-07

Asstt. Commissioner of Income-tax, Sonepat Circle, Sonepat.	Vs.	M/s Crystal Phosphates Ltd., Village & P.O. Nathpur, Distt. Sonepat.
(Appellant)		(Respondent)

Assessee by : Shri Gautam Jain CA
Respondent by: Shri Deepak Sehgal Sr. DR

O R D E R

Per B.R. Jain.:

These cross appeals, from the order dated 20-7-2009 of ld. CIT(A), Rohtak, raise following grounds in respective appeals:

ITA no. 3630/Del/09 (Assessee's appeal) :

1. "That the learned Commissioner of Income tax (Appeals) has erred both in law and on facts in upholding the assumption of jurisdiction of the learned Assistant Commissioner of Income Tax to initiate proceedings u/s 143(2) of the Act and, frame assessment u/s 144 of the Act despite the fact that

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initiation of proceedings was not in accordance with clause (v)(b) of para 2 of the instruction issued by Central Board of Direct Taxes for selection of cases for corporate assessee in financial year 2007-08.

1.1. That the finding of the learned Commissioner of Income tax (Appeals) that the appellant had acquiesced to the notice issued by the AO and has sought adjournment; for challenging the jurisdiction of the AO the appellant should have approached the higher judiciary for redressal of its grievance there is no force in the version of the appellant that it had waited till the disposal of its petition by the Addl. CIT and CIT and the assessment order in its case was passed on 24-12-2008, is misconceived both in law and on facts and therefore could not validly be adopted the basis to sustain the assumption of jurisdiction.

2. That the learned Commissioner of Income tax (Appeals) has erred both in law and on facts in upholding the disallowance of interest incurred and claimed by the appellant company on lease amount of Rs. 4 lacs without appreciating the facts of the case of the appellant company.

3. That the learned Commissioner of Income tax (Appeals) has erred both in law and on facts in disallowing a sum of Rs. 42,530/- representing the expenditure incurred by the field staff on the marriage occasion of dealers etc. which was in law eligible business expenditure and had to be allowed as such.

4. That the learned Commissioner of Income tax (Appeals) has erred both in law and on facts in sustaining the disallowance of sum of Rs. 5,11,538/- respect of foreign traveling expenses incurred by the appellant company as against disallowance of Rs. 5 lacs made by the Assessing Officer.

5. That the learned Commissioner of Income tax (Appeals) has erred both in law and on facts in upholding the disallowance of Rs. 1,64,890/- representing expenditure on fees and subscription.

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6. That the learned Commissioner of Income tax (Appeals) has erred both in law and on facts in upholding the adhoc addition of Rs. 25 lacs out of selling and distribution expenses and manufacturing expenses claimed by the appellant company."

ITA no. 4002/Del/09 (Revenue's appeal):

"1. On the facts and in the circumstances of the case, the ld. CIT(A) has erred in law and facts in deleting the addition of Rs. 93,18,740/- on account of unsecured loans from two persons namely M/s BRL Finlease Ltd. And M/s Centum Finance Ltd. As the assessee has not furnished confirmation of these two transactions and failed to prove the genuineness and creditworthiness of these two companies before the A.O.

2. On the facts and in the circumstances of the case, the ld. CIT(A) has erred in law and facts in deleting the addition of Rs. 60,000/- on account of interest charged on investment in shares (unquoted), which was made by the ASSESSING OFFICER under the provisions of section 14A of the Income-tax Act, 1961.

3. On the facts and in the circumstances of the case, the ld. CIT(A) has erred in law and facts in deleting the addition of Rs. 18,58,373/- on account of interest charged on advances to supplies and security deposits which was made by the A.O. under the provisions of section 14A of the Income-tax act, 1961.

2. First we proceed to deal with the legal ground relating to assumption of jurisdiction, raised in ground no. 1 & 1.1 of assessee's appeal. The assessee in ground nos. 1 & 1.1. of its appeal has challenged the jurisdiction to initiate proceedings which are contrary to the instructions issued by the CBDT for selection of cases for corporate assessee in F.Y. 2007-08.

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2.1. Facts in brief are that for the assessment year under consideration the assessee filed return of income on 28-11-2006 declaring income of Rs. 3,97,17,920/-. The case was selected for scrutiny by way of notice dated 17-10-2007 u/s 143(2) of the Act under the CBDT Instructions contained in Scrutiny Guidelines Clause 2(v)(b), which provides as under:

> 2. The following categories of cases shall be compulsorily scrutinized:-
> ……
> ….. .
> (v)(b) All cases in which an appeal is pending before the CIT(Appeals) against an addition/ disallowance of Rs. 5 lakhs or above, or the Department has filed an appeal before the ITAT against the order of the CIT(Appeals) deleting such an addition/ disallowance and an identical issue is arising in the current year. However, as in (i) above, the quantum ceiling may not be taken into account if a substantial question of law is involved."

2.2. The assessee, during the course of assessment proceedings vide letter dated 7-12-2007 challenged the assumption of jurisdiction on the ground that no addition/ disallowance exceeding Rs. 5 lacs was made in earlier year, which was pending in appeal before the CIT(A). Further, there was no identical issue arising in the current year as arising in earlier year. However, Add. CIT vide order dated 25-11-2008 and the CIT vide order dated 15-12-2008 rejected the contention of the assessee and held that notice issued was in accordance with law on the ground that in assessment year 2004-05, addition aggregating to Rs. 5,60,207/- were made in order of assessment which was pending in appeal before CIT(A).

3. In first appeal, the CIT(A), however, held that the notice issued was valid since appellant had acquiesced to the notice issued by AO and sought

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adjournment. He has held that the assessee could have approached the higher judiciary for redressal of its grievance that jurisdiction assumed by the AO was not valid.

4. Before us, the ld. Counsel for the assessee stated that jurisdiction could be assumed only if an addition/ disallowance of Rs. 5 lacs or more was pending in appeal before the CIT(A) and such identical issue also originated in the year under consideration. It was stated that there was no addition/ disallowance of Rs. 5 lacs in A.Y. 2004-05 and moreover there was no such identical issue arising in the year under consideration. In support ld. Counsel referred to following order of the ITAT:

(i) Smt. Nayana P. Dedhia Vs. ACIT 86 ITD 398 (Hyd), affirmed by High Court in the case of CIT Vs. Smt. Nayana P. Dedhia 270 ITR 572 (AP.
(ii) Aggarwal Farm Equipments Vs. ITO 148 Taxmann 33 (Mag.);
(iii) Sunita Finlease Ltd. Vs. DCIT 118 TTJ 263 (Billaspur)

4.1. It was further submitted that mere participation in proceedings cannot confer jurisdiction as has been held by Hon'ble Gujarat High Court in the case of P.V. Doshi Vs. CIT 113 ITR 22 (Guj.); and Bombay High Court in the case of Inventors Industrial Corporation Ltd. 194 ITR 548 (Bom.). It was also submitted that the finding of the CIT(A) that appellant had acquiesced to jurisdiction by seeking adjournment in response to notice dated 28-11-2007 is factually incorrect as would be seen from the letter dated 18-1-2008 filed before the ASSESSING OFFICER.

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5. The ld. DR in rebuttal referred to the order of assessment for A.Y. 2004-05 and submitted that the disallowance/ addition in aggregate were more than Rs. 5 lacs and since the issue involved in the year under consideration were more or less the same, therefore, the notice issued was in terms of the CBDT instruction and hence valid.

6. In reply, the appellant stated that what is to be considered is an issue individually and not in aggregate. The language of the instruction is addition or disallowance which is to be identical in issue. All the words are in singular form and not plural and hence the contention of the ld. DR is not justified.

7. We have considered rival submissions of the parties and gone through the relevant material available on record. The undisputed facts are that proceedings for assessment for the year under consideration were commenced by issue of a notice dated 17-10-2007. The authorities below have held that such a notice was valid notice, since the same was in accordance with clause (v)(b) of para 2 of the Instruction issued by the CBDT for selection of cases for corporate assessee for F.Y. 2007-08. The relevant portion of the Instruction has already been reproduced by us hereinabove. The order of assessment for A.Y. 2004-05 which has been made the basis for assumption of jurisdiction, shows that the same was passed u/s 143(3) vide order dated 18-12-2006. According to order, no disallowance was made in excess of Rs. 5 lacs though aggregate of all the disallowances was Rs. 5,60,207/-.The issue, therefore, arises whether the AO was correct in holding that since disallowance in aggregate exceeded Rs. 5 lacs, therefore, notice was valid. In our opinion, such a conclusion is

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contrary to the express instructions of the CBDT. In our opinion, there has to be an addition or disallowance of Rs. 5 lacs or more against which an appeal is pending and such an issue must also arise in the year under consideration. All these facts must be available to the AO on the date of assumption of jurisdiction. The burden is on assessing authority to establish that jurisdiction was assumed in accordance with the instructions of the Board. On facts, there was no disallowance of Rs. 5 lacs or more and in any case no finding is available from the order of the authorities below that an identical issue had arisen in the year under consideration. Moreover, it is also seen that each of the disallowances made in A.Y. 2004-05 were lump sum disallowances, which cannot be said to be arising in the succeeding year. Thus, in our considered opinion, notice issued u/s 143(2) was not in terms of the instructions issued by the CBDT. Now the question that arises is that since notice issued was not in terms of the instructions issued by the CBDT, can it be held that assumption of jurisdiction was illegal so as to hold the entire proceedings as invalid. In this context, we seek to rely upon the judgment of Hon'ble Andhra Pradesh High Court in the case of CIT Vs. Smt. Nayana P. Dedhia 270 ITR 572 (AP), affirming the decision of the Tribunal, by holding as under:

> "A very short question is involved. Admittedly, the Department issued a circular by way of press release on March 12, 1996. These guidelines were regarding "scrutiny assessment guidelines for assessment year 1996-97". By these guidelines, it was notified that the Income-tax Department had decided not to select returns for the assessment year 1996-97 for detailed scrutiny, if the total income declared is at least 30 per cent. more than the total income declared for the assessment year 1995-96. The case of the respondent before the Tribunal was that the Department had decided not to have detailed scrutiny for the assessment year 1996-97 if the income declared was at

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least 30 per cent. more than the income declared in 1995-96, therefore, the assessment itself was bad. The Tribunal accepted this contention. However, learned counsel for the appellant submits that these instructions were not binding on the Tribunal or court or were not available for execution to any judicial authority.

There is no dispute about the circular having been issued, which reads as under :

> "749A. Scrutiny assessment guidelines for assessment year 1996-97.
>
> The Income-tax Department has decided not to select returns for the assessment year 1996-97 for detailed scrutiny if the total income declared is at least 30 per cent. more than the total income declared for the assessment year 1995-96. The following further conditions should be fulfilled :
>
> (a) the total income for both the assessment years should exceed the basic exemption limit ;
>
> (b) the total income for the assessment year 1995-96 should not exceed Rs. 5 lakhs ; and
>
> (c) tax is fully paid for the assessment year 1996-97 before the return is filed.
>
> In these cases the taxpayers will not be required to attend Income-tax Offices in connection with their assessments. However, some of these cases will be scrutinized if there is positive information of tax evasion or there is a large claim of refund."

The conditions laid down in the circular are also fulfilled by the respondent and there is no dispute on that also. Now, the only question, which needs an answer is, as to what is the status of these circulars. The circular had admittedly been issued by the Central Board of Direct Taxes under section 119(1) of the Act. What is the scope of such circulars should not detain us because of the authoritative pronouncement of the hon'ble

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Supreme Court reported in UCO Bank v. CIT [1999] 237 ITR 889. The Supreme Court noted (page 895) :

> "What is the status of these circulars ? Section 119(1) of the Income-tax Act, 1961, provides that, 'the Central Board of Direct Taxes may, from time to time, issue such orders, instructions and directions to other income-tax authorities as it may deem fit for the proper administration of this Act, and such authorities and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board. Provided that no such orders, instructions or directions shall be issued (a) so as to require any income-tax authority to make a particular assessment or to dispose of a particular case in a particular manner ; or (b) so as to interfere with the discretion of the Appellate Assistant Commissioner in the exercise of his appellate functions'. Under sub-section (2) of section 119, without prejudice to the generality of the Board's power set out in sub-section (1), a specific power is given to the Board for the purpose of proper and efficient management of the work of assessment and collection of revenue to issue from time to time general or special orders in respect of any class of incomes or class of cases, setting forth directions or instructions, not being prejudicial to assessees, as to the guidelines, principles or procedures to be followed in the work relating to assessment. Such instructions may be by way of relaxation of any of the provisions of the sections specified there or otherwise. The Board thus has power, *inter alia,* to tone down the rigour of the law and ensure a fair enforcement of its provisions, by issuing circulars in exercise of its statutory powers under section 119 of the Income-tax Act which are binding on the authorities in the administration of the Act. Under section 119(2)(a), however, the circulars as contemplated therein cannot be adverse to the assessee.
>
> Thus, the authority which wields the power for its own advantage under the Act is given the right to forgo

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> the advantage when required to wield it in a manner it considers just by relaxing the rigour of the law or in other permissible manners as laid down in section 119. The power is given for the purpose of just, proper and efficient management of the work of assessment and in public interest. It is a beneficial power given to the Board for proper administration of fiscal law so that undue hardship may not be caused to the assessee and the fiscal laws may be correctly applied. Hard cases which can be properly categorized as belonging to a class, can thus be given the benefit of relaxation of law by issuing circulars binding on the taxing authorities."

The Supreme Court, in this judgment, which is clear from the paragraph quoted above, held in no uncertain terms that :

(a) the authorities responsible for administration of the Act shall observe and follow any such orders, instructions and directions of the Board ;

(b) such instructions can be by way of relaxation of any of the provisions of the section specified therein or otherwise ;

(c) the Board has power, inter alia, to tone down the rigour of the law and ensure a fair enforcement of its provisions by issuing circulars in exercise of its statutory powers under section 119 of the Income-tax Act ;

(d) the circulars can be adverse to the Income-tax Department, but still, are binding on the authorities of the Income-tax Department, but cannot be binding on the assessee, if they are adverse to the assessee ;

(e) the authority, which wields the power for its own advantage under the Act, has a right to forgo the advantage when required to wield it in a manner it considers just by relaxing the rigour of the law by issuing instructions in terms of section 119 of the Act.

This judgment leaves no room to doubt that the Tribunal

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> was right in holding that the income-tax authorities could have not selected the case for detailed scrutiny in view of the circular issued by the Board."

7.1. CIT(A) has proceeded to support the initiation of proceedings by holding that since the appellant had acquiesced to the jurisdiction by seeking adjournment in response to notice dated 28-11-2007, therefore action of the AO was valid. We find from the record that in response to notice dated 28-11-2007 the appellant had filed letter dated 18-1-2008 wherein it was stated as under:

> "With reference to your letter Dt. 07-01-08,it is respectfully submitted as under:
>
> That the jurisdiction over above case was with ACIT Sonepat Circle, Sonepat and the case was fixed for 09-01-08 and as such reply to your notice Dt. 28-11-07 could not be filed due to misunderstanding. The assessee was never informed that jurisdiction over this case has been transferred to your Honour. However, the above misunderstanding is regretted.
>
> Regarding reply to your queries, the case fixed for 18-01-08 was adjourned to 24-01-08 on the req8uest of the undersigned. Madam, before the assessment proceedings are taken up, the undersigned once again request your good self to kindly dispose off the objections Dt. 07-12-07 filed in your good office on 14-12-07)(photocopy attached for ready reference) and oblige."

7.2. Further in letter dated 7-12-2007 filed on 14-12-2007 the appellant had stated that:

> "Sir, in Assessment year 2004-05 your good self had made disallowances on the alleged ground that vouchers were not produced before you. How one can imagine that vouchers for this year also will not be produced unless one is astrologer. Although complete books of accounts along with vouchers for

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> A/y 2004-05 were produced before your good self. Thus no identical issue was involved in this case. Since the proceedings were initiated illegally and in gross violation of CBDT instructions, the same should be filed in view of judgment of ITAT Jabalpur Bench in the case of Aggarwal Farm Equipments Vs. ITO reported at 148 Taxman page 33."

7.3. From the aforesaid letter, it is evident that appellant had challenged the initiation of proceedings even prior to letter dated 18-1-2008 and even in letter dated 18-1-2008 it was requested to dispose off the objections raised earlier. Thus, it cannot be held that the appellant had acquiesced to the jurisdiction.

7.4. We may also refer to the judgment of Hon'ble Delhi High Court in the case of Dr. Nalini Mahjan Vs. CIT 257 ITR 123 and that of Hon'ble Supreme Court in the case of L. Hirday Narain 78 ITR 26 (SC), wherein it has been held that certain things which are required to be done in prescribed manner to be done in the same manner.

7.5. Thus, once the CBDT has issued instructions for assumption of jurisdiction for selection of cases of corporate assesses for scrutiny and assessment thereof, the same have to be followed in letter and spirit by the AO . The burden lies on the authority assuming jurisdiction to show and establish that such instructions have duly been complied and satisfied in letter and spirit. However, in the instant case, for the reasons stated above, instructions issued by the CBDT are not shown to have been satisfied for assumption of jurisdiction. Thus, we are in agreement with the contention raised by the appellant that notice issued u/s 143(2) of the Act for assumption of jurisdiction was not in terms of the instructions of the CBDT.

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Hence, both the notice and the assessment framed are held to be without valid jurisdiction and stand quashed as such.

7.6. Since we have quashed the notice as well the as assessment, we do not consider it necessary to render any decision on merits of the other grounds raised in both these appeals, as the necessary consequence thereof shall follow in the light of judgment rendered by the Hon'ble Calcutta High Court in the case of Rawatmal Harakchand Vs. CIT 129 ITR 346 (Cal.).

8. In the result, assessee's appeal stands allowed and that of the department is dismissed.

Order pronounced in open court on _____-11-2012.

(B.R. MITTAL) (B.R. JAIN)
JUDICIAL MEMBER ACCOUNTANT MEMBER
Dated: _____-11-2012.
MP
Copy to :

1. Assessee
2. AO
3. CIT
4. CIT(A)
5. DR

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