

Tax Scan - Simplifying Tax Laws

ORDER SHEET

IN THE HIGH COURT AT CALCUTTA

Special Jurisdiction
[Income Tax]

ORIGINAL SIDE

ITA 11 of 2010

ARVIND AND COMPANY

Versus

COMMISSIONER OF INCOME TAX- XV KOLKATA.

BEFORE:

The Hon'ble JUSTICE GIRISH CHANDRA GUPTA

The Hon'ble JUSTICE ASHA ARORA

Date : 21st June, 2016.

Mr. Ananda Sen, Adv.
Mr. S. S. Bhutoria, Adv.
..for the appellant
Mr. S. N. Dutta, Adv.
Mr. R. K. Sinha, Adv.
...for the respondent.

The Court : The appeal is directed against a judgement and order dated 24th July, 2009 passed by the learned Income Tax Appellate Tribunal "C" Bench in ITA No.1018/Kol/2009 pertaining to the assessment year 2006-07 by which an appeal preferred by the assessee was dismissed. The assessee has come up in appeal. The following questions of law were formulated on 6th August, 2010 when the appeal was admitted.

" i] Whether in the facts and in the circumstances of the case and on a true and proper interpretation of Section 24(b) of the Income Tax Act, 1961 was justified in law in

disallowing the interest paid to the partners on the ground that there is no specific provision for claiming interest paid to the partners on their capital against the income from house property?

ii] Whether the amount of interest paid to the partners from the partnership firm on account of interest though being assessed to tax can again be subjected to tax, being the same amount, as against the firm assessee ?”

The questions formulated were not really pressed by Mr. Sen. He, on the contrary, submitted that after the business in cotton was stopped, the firm decided to let out the godown on rent. He submitted that the rental income was erroneously shown by the assessee as an income arising out of house property. He submitted that the income really is a business income. In support of his submission he drew our attention to a judgement in the case of C.I. T. vs. Margarine and Refined Oils Co. Ltd., [2006] 282 ITR 576 [Karn] wherein the following views were taken:

“The manufacturing unit which was a capital asset of the business was leased out to a lessee carrying on the same business out of which the assessee derived income by way of rent. The said rental income was income from business.”

He submitted that the payment of interest to the partners was authorised by the Partnership Deed at the rate of 12% p.a. and it is at that rate that interest was paid to them. This should have been allowed under Section 40(b)(iv), which provides as follows:

[iv] any payment of interest to any partner which is authorised by, and is in accordance with, the terms of the partnership deed and relates to any period falling after the date of such partnership deed in so far as amount exceeds the amount calculated at the rate of [twelve] per cent simple interest per annum; or”

Mr. Dutta, learned advocate appearing for the revenue, submitted that the assessee cannot be allowed to spring a surprise on the other side by bringing in a new case which is sought

to be done by Mr. Sen. Case of the assessee has always been that the income arose out of house property. The new case now sought to be argued was never the case of the assessee either before the Assessing Officer or before the CIT(A) or before the learned Tribunal or even before this Court when the appeal was admitted.

He submitted that in any event when the business has been closed down and there is nothing to show that there was any intention to resume the business, the income arising out of that can only be said to be an income arising out of house property. He in support of his submission relied on a judgement in the case of Universal Plast Ltd. Vs. C.I.T., reported in [1999] 237 ITR 454 wherein the following views were taken:

“ The general principles relating to income from leasing out the assets of the business by an assessee are (1) no precise test can be laid down to ascertain whether income (referred to by whatever nomenclature, lease amount, rent or licence fee) received by an assessee from leasing or letting out of assets would fall under the head “Profits and gains of business or profession”; (2) it is a mixed question of law and fact and has to be determined from the point of view of a businessman in that business on the facts and in the circumstances of each case, including true interpretation of the agreement under which the assets are let out; (3) where all the assets of the business are let out, the period for which the assets are let out is a relevant factor to find out whether the intention of the assessee is to go out of business altogether or to come back and restart the same; (4) if only a few of the business assets are let out temporarily, while the assessee is carrying on his other business activities, then it is a case of exploiting the business assets otherwise than employing them for his own use for making profit for that business; but if the business never started or has started but ceased with no intention to be resumed, the assets also will cease to be business assets and the transaction will only be exploitation of property by an owner thereof, but not exploitation of business assets.”

We have considered the submissions advanced by the learned advocates for the parties and are of the opinion that the question whether the business has been closed permanently or there was any intention of resumption of the business is essentially a question of fact and that has to be decided only on the basis of documentary evidence and such other evidences which may be adduced. Similarly, whether interest was authorised by the Partnership Deed is also a question, which was never considered by any of the statutory authorities.

At the same time we find some substance in the submission that the income derived by the assessee by letting out the godown may be treated as a business income. In that view of the matter, the matter is remanded to the Assessing Officer. He will consider the questions (a) whether the income can be treated as an income arising out of business; and (b) whether the payment of interest to the partners can be allowed as a permissible deduction. He will decide these questions, after taking such evidence as the assessee may adduce, in accordance with law.

The questions formulated at the time of admission of appeal have now become redundant and they need not be answered.

The appeal is disposed of.

(GIRISH CHANDRA GUPTA, J.)

(ASHA ARORA, J.)