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D.B. INCOME TAX APPEAL NO.50/2003.
[MUMAL MARBLES LTD. VS. THE ACIT, UDAIPUR]

DATED : 24.01.2007

HON'BLE MR. RAJESH BALIA, J.
HON'BLE MR. CHATRA RAM JAT, J.

Mr.Rajendra Mehta for appellant.
Mr.K.K.Bissa for the respondent.

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Heard learned counsel for the parties.

In this appeal following substantial question of law arise for consideration as per order dated 08.09.2003.

> Whether in the facts and circumstances when the assessee has not claimed any deduction on account of Rs. 8,60,000/- made by him, the fact that receipt of repayment of the amount from the receipients is not believed by the Income Tax Authorities, any deductions can be made in the income?

It has been pointed out by learned counsel for the parties that in the last but one line of the question the word 'deductions' appears to have been a clerical slip because the dispute relates to the 'additions' made by the Assessing Officer about the advances made by the assessee and is not related to any claim to deduction by the assessee.

This appears to be correct. Accordingly, the correction is allowed and the question framed on 08.09.2003 is corrected and in the last but one line of the question the word 'deduction' is substituted by 'additions'.

From perusal of the three orders placed on record it appears that while real question that has cropped before the Assessing Officer was about the entries made in a cash book which was prepared for the purpose of explaining certain documents seized during the search and seizure operation on the premises of the appellant assessee. According to the Assessing Officer the cash book so prepared on the basis of documents seized during the search and seizure appear to represent certain unaccounted expenditure, capital expenditure and certain advances given and recoveries against the supplies of goods. Amongst these entries were the entries showing advances of Rs.8,60,000/- to twelve persons which the assessee had claimed to have advanced to certain suppliers of marble. This necessitated holding an inquiry into the nature and source of these advances. The Assessing Officer was of the opinion that amount of Rs.8,60,000/- is not paid by cheque and the assessee could not satisfactorily explain and could not produce any material evidence from which it can been proved that such transactions have been duly recorded in the cash

book. The assessee has stated before the learned Assessing Officer that the amount advanced have been received in due course but the same have not been entered into cash books but entered into loose papers of dairy. By referring to these facts the Assessing Officer has rejected the explanation and added a sum of Rs.8,60,000/- in the hands of the Company.

Apparently, Rs.8,60,000/- could have been added only if the Assessing Officer had examined the source wherefrom the Assessee secure Rs.8,60,000/- for making such advance. But obviously, he was not considering it to be a case where assessee was considered to be in possession of unexplained cash but were examining the nature of advances made by the assessee as to purchase of marble or for some other purpose. In such event only advances could not have been added. In that event if the assessee's transactions were not found to be correctly and completely recorded, only the profits or income involved in such transaction could have been subjected to additions.

The CIT [Appeals] in its order observed that there was no such entry of credit in diary or loose papers therefore it could not be established that amount has been received back. However it is a fact that advances were given to those who are dealing in marble. Therefore, the stand taken by the appellant

has some force because if the amounts were not received back against such advances then appellant must have received supplies of marble. Appellant has already surrender unrecorded sales of marble to the tune of Rs.9,32,000/- which would explain the unrecorded transactions of marble received through advance of Rs.8,60,000/-. Therefore, no addition can be made because either the advance was received back or the raw material was received against the advances. The appellant has already included unrecorded sale of Rs.9,32000/- and if the purchases of raw material amounting to Rs.8,60,000/- is accounted for it will increase the loss by Rs.8,60,000/-. Therefore, the addition of Rs.8,60,000/- will get neutralised to zero. On this premise relying on the decision of the ITAT, Patna the additions were deleted.

The Tribunal found the reasoning of CIT [Appeals] to be faulty. The Tribunal considering it to be that even if there was some unexplained expenditure, the addition under Section 69C of certain unexplained expenditure could be made. In the circumstances expenses have not been explained. Therefore, the additions made by the Assessing Officer were sustained.

The Tribunal's order is somewhat obscure as to controversy it was dealing. Reference for unexplained

expenses in the light of Section 69C was wholly out of place. The assessee has not claimed any deduction of expenses incurred. Hence, reference to unexplained expenses appears to be beyond the issue in contention before the Tribunal. Reference to Section 69C with reference to unexplained expenses also does not give a clue as to what Tribunal was addressing itself. Section 69C had nothing to do about expenses. It refers to investment found out of books. However, at one point it was observed by the Tribunal while considering the fourth submission by the authorities Representative of the Assessee that 'increase of the sales by a sum of Rs.9,32,000/- cannot lead us to the conclusion that advance made to twelve persons on various dates came out of these sales'.

However, the Assessee had not been asked by the two authorities below about source of Rs.8,60,000/- stated to have been advanced to supplier of marbles. But their inquiry was confined to fact whether in fact the transaction worth Rs.8,60,000/- took place or did not take place as the assessee had claimed that said advance had been received back by him having no profit came out of it. This rejection of fourth consideration on the ground which the assessee was never asked to explain has seriously prejudice to the case of the assessee.

In these circumstances, the order of the Tribunal cannot be sustained as it suffers from serious defects in reaching the real controversy arising out of the order of the Assessing Officer as well as CIT [Appeals] and the ground relied or by the Tribunal was never put to assessee so as to provide him any opportunity to explain it. This is without prejudice to objection, if any, that may be raised about such inquiry at second appellate stage.

In these circumstances, we deem it just and proper to set aside the order of the Tribunal and direct the Tribunal to decide the appeal filed by the Department afresh in accordance with law after clearly defining issues it is deciding and record its finding after giving adequate opportunity to respective parties before it.

Appeal is accordingly allowed.

No costs.

[CHATRA RAM JAT]J. **[RAJESH BALIA], J.**

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