

(2010) 09 DEL CK 0373

Delhi High Court

Case No: ITR No. 495 of 1992

DLF Universal Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision: Sept. 1, 2010

Hon'ble Judges: Reva Khetrapal, J; A.K. Sikri, J

Bench: Division Bench

Advocate: P.N. Monga, for the Appellant; Prem Lata Bansal, for the Respondent

Final Decision: Dismissed

Judgement

A.K. Sikri, J.

The following question of law is referred for opinion of this Court:

Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was correct in law in holding that the loss of Rs. 2,08,774/- incurred due to embezzlement made by the employee at the Ahmadabad Branch was not allowable in the assessment year 1982-83 in which year it was discovered.

2. The facts leading to the raising of the aforesaid question are as under:

In the return filed by the assessee for the assessment year 1982-83, the assessee had claimed a loss of Rs. 2,08,774/- on account of embezzlement by one of its employees at Ahmadabad Branch. The Assessing Officer, however, disallowed the same on the ground that it was not connected with the normal business activities. In the appeal filed by the assessee before the CIT (A), this view of the Assessing Officer was found absurd. The Commissioner (Appeal) held that loss of money due to embezzlement by the employee while handling the funds of the business in discharging his duties was allowable deduction. However, at the same time, CIT (A) was of the opinion that this loss could not be allowed in the assessment year 1982-83, inasmuch as, the assessee had not proved that despite all means exhausted by it, it would not be in a position to recover the aforesaid amount from the employee who had embezzled the same. The Tribunal has upheld this view of

the CIT (A). While doing so, the Tribunal has placed reliance on the judgment of the Supreme Court in [Associated Banking Corporation of India Ltd. Vs. Commissioner of Income Tax, Bombay-1](#). In the said judgment, the Supreme Court took the view that before treating the amount embezzled by the employees as a loss, it is necessary for the assessee to prove that inspite of all possible measures taken by the assessee for recovery of the amount, it is not possible to recover the said amount. The Supreme Court was of the view that the amount cannot be allowed as deduction in the year in which embezzlement took place but it can be claimed only in the year when it is found that the said amount has become unrecoverable inspite of taking all possible measures to recover the same. Following observations of the Supreme Court taking this view in the aforesaid judgment may be quoted:

It is wrong to say that irrespective of other considerations, as soon as an embezzlement of the employer's funds takes place, whether the employee is aware or not of the embezzlement, there results a trading loss. So long as there is a reasonable prospect of recovery of the amounts embezzled, trading loss in a commercial sense cannot be deemed to have resulted.

Embezzlement of the funds by an agent, like a speculative adventure, does not necessarily result in loss immediately when the embezzlement takes place, or the adventure is commenced. Embezzlement may remain unknown to be principal, and the assets embezzled may be restored by the agent or servant. In such a case in the commercial sense no real loss has occurred. Again it cannot be said that in all cases when the principal obtains knowledge of the embezzlement loss results. The erring servant may be persuaded or compelled by process of law or otherwise to restore wholly or partially his ill-gotten gains. Therefore, so long as a reasonable chance of obtaining restitution exists, loss may not in a commercial sense be said to have resulted.

3. Applying the aforesaid proposition of law to the facts of the present case, the Tribunal arrived at a finding that there was nothing to show that the steps taken by the assessee for the recovery of the aforesaid amount had been completely exhausted and there was no possibility or any ray of hope of recovery of the embezzled funds. The Tribunal also noted that the CIT (A) directed the Assessing Officer to allow the claim of the assessee in the year where it could be proved that despite all means being exhausted, the loss could not be recovered.

4. As finding of fact is recorded in the year in question that the assessee was not in a position to prove that there was no possibility of recovering the amount embezzled by the employees, the claim was rightly disallowed in that year. We, therefore, answer the question in favour of the revenue and against the assessee.