

ITEM NO.12 COURT NO.3 SECTION IIIA

SUPREME COURT OF I N D I A
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (Civil)...../2009
CC 10548/2009

(From the judgement and order dated 20/11/2008 in ITA No.8/2007
of the HIGH COURT OF RAJASTHAN AT JODHPUR)

COMMR. OF INCOME TAX, UDAIPUR, RAJASTHAN Petitioner(s)

VERSUS

M/S SECURE METERS LTD. Respondent(s)

(With appln(s) for c/delay in filing SLP)

Date: 11/08/2009 This Petition was called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE S.H. KAPADIA
HON'BLE MR. JUSTICE AFTAB ALAM

For Petitioner(s) Mr. Gopal Subramaniam, S.G.
Mr. Arijit Prasad, Adv.
Mr. D.Mohta, Adv.
Mr. B.V. Balaram Das, Adv.

For Respondent(s)

UPON hearing counsel the Court made the following
ORDER

Delay condoned.

Dismissed.

(N. ANNAPURNA) (MADHU SAXENA)
COURT MASTER COURT MASTER

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

INCOME TAX APPEAL No. 8 of 2007

C.I.T. UDAIPUR
V/S
M/S SECURE METERS LTD.

Mr. KK BISSA, for the appellant / petitioner

Mr. SANJAY JHANWAR & Mr. ARUN BHANSALI, for the
respondent

Date of Order : 20.11.2008

HON'BLE SHRI N P GUPTA, J.
HON'BLE SHRI KISHAN SWAROOP CHAUDHARI, J.

ORDER

This appeal has been filed by the Revenue against the order of the learned Tribunal dt. 21.12.2005, so far as it relates to Appeals no. 390 and 405. However, it is clarified, that as a matter of fact the appeal is confined to the order of the Tribunal so far as it relates to Appeal No. 405 only, which appeal was filed by the assessee, regarding the matter relating to assessment year 1996-97. We find from the perusal of para-9 of the order of the Tribunal, that it was conceded that the Revenue's appeal was infructuous, and was inadvertently taken, because the learned C.I.T. has decided the ground in favour of the Revenue itself.

The appeal was admitted vide order dt. 21.3.2007, by framing two substantial questions of law reading as

under:-

"(1) Whether the amount received by the assessee from its buyers of its product, to the extent it relates to octroi, sales Tax and Excise Duty is not includable in the total turn over vis-à-vis the export turn over for the purpose of computation of amount deductible under Section 80HHC of the Income Tax Act, 1961?

(2) Whether in the fact and circumstances of the case, Tribunal was justified in holding the expenses incurred in relation to issue of debentures to be allowable as deduction under Section 37 of the Act of 1961 as revenue expenditure?"

On the first question, the learned Tribunal has held, that the controversy involved about includability of octroi, excise duty and sales tax in the total turn over, for calculating deductions under Section 80 HHC, is already covered by the decision of the Special bench of the Tribunal, by a decision of the Karnataka High Court, Calcutta High Court, and Bombay High Court, so also Madras High Court, and therefore, considering overwhelming judicial position settled, the Tribunal found that the C.I.T. (A) was not justified in holding otherwise, and the ground was, therefore, allowed.

Before us it is contended by the learned counsel for the Revenue that the matter now stands concluded by two judgments of the Hon'ble Supreme Court, in Commissioner of Income Tax, Coimbatore Vs. Lakshmi Machine Works, reported

in (2007) 11 SCC-126=290ITR-667, which judgment has subsequently been followed by the Hon'ble Supreme Court in Commissioner of Income Tax Vs. Catapharma (India) (P) Ltd. reported in (2007) 11 SCC-145. A look at the judgment in Lakshmi Machine's case shows, that therein it was clearly held, that the legislature intended to exclude items like commission and interest from deduction, on the ground, that they did not possess any element of "turnover", even though commission and interest emanated from exports. The words "total turnover" in Section 80-HHC have to be read as part of the formula, which sought to segregate the "export profits" from the "business profits". Therefore, the formula has to be read in entirety. In that formula the entire business profit is not given deduction. It is the business profit, which is proportionately reduced by the fraction/ratio of export turnover, ÷ total turnover which constitutes Section 80-HHC concession (deduction), and since Section 80 HHC(3) was a beneficial section, it was intended to provide incentives to promote exports. The incentive was to exempt profits relatable to exports. In the case of combined business of an assessee, having export business, and domestic business, the legislature intended to have a formula, to ascertain export profits, by apportioning the total business profits, on the basis of turnovers. Therefore, just as commission received by an assessee is relatable to exports, and yet it cannot form part of "turnover", excise duty and sales tax also cannot

form part of the "turnover", and were not includable in the "total turnover". It was held, that otherwise, the formula becomes unworkable. Moreover, excise duty and sales tax are indirect taxes, and they are recovered by the assessee on behalf of the Government. Therefore, if they are made relatable to exports, the formula under Section 80-HHC would become unworkable.

In our view, in view of this authoritative judgment, which has further been followed again in Catapharma(India) (P) Ltd.'s case, the question as framed is required to be, and is, answered against the Revenue, and in favour of the assessee.

Coming to the second question, the learned Tribunal in this regard has held, that the decision of the Hon'ble Supreme Court, in Brooke Bond India Ltd. Vs. CIT reported in 225 ITR-798 is not applicable to the facts of the instant case, because that was a situation in which expenditure on issue of shares was held to be ineligible for deduction, while the assessee has issued debentures for which Rs. 44.00 lacks was claimed as deduction, and it was considered, that this aspect is settled by several decisions of various High Courts, and it has been held by the Hon'ble Supreme Court, in India Cement Vs. CIT reported in (1996) 60 ITR-52, that a loan is not an asset, or advance of enduring nature, and the purpose of taking loan

is totally an irrelevant consideration, and hence the deduction on account of interest on loans cannot be denied. Then, the learned Tribunal also proceeded to rely upon another judgment of Jaipur Bench of the Tribunal, in the case of Rajasthan Financial Corporation Vs. Dy. C.I.T. Reported in (1997) TW-501, holding that the expenditure incurred for raising capital through bonds in business was revenue in nature, and it was held, that since in the present case the assessee had incurred expenses of Rs. 44.00 lakhs on issuance of debentures, being a loan, in our considered opinion, there is no basis for not allowing deduction for the entire sum, and thus this addition was deleted.

We have gone through the judgment in Brooke Bond India Ltd.'s case, and find, that that was a case where the registration fee to the tune of Rs. 1,50,000/- was paid to the Registrar of Companies for increasing share capital of the company, while in the case of India Cement, the matter related to the borrowing of Rs. 40 lakhs from a financial institution, which loan was secured by a charge on the fixed assets of the company. The Hon'ble Supreme Court in this judgment considered various aspects of the matter, including the previous English judgments, and couple of judgments of English Courts, based on English Income Tax Act, and proceeded to draw distinction between the Income Tax Law in England, and India. Not only this, the Hon'ble

Supreme Court further proceeded to examine number of cases decided by various High Courts like Kerala, Andhra Pradesh, Calcutta, Bombay etc., and had gone to the extent of holding, that some of the judgments were wrongly decided. Then, the Hon'ble Supreme Court proceeded to hold as under:-

"10. To summarise this part of the case, we are of the opinion that : (a) the loan obtained is not an asset or advantage of an enduring nature; (b) that the expenditure was made for securing the use of money for a certain period; and (c) that it is irrelevant to consider the object with which the loan was obtained.."

Thus it was held, that the expenditure incurred in procuring the loan was revenue expenditure within Section 10(2) (xv) of the old Income Tax Act, which corresponds to Section 37 of the present Act. By going through the said judgment it further transpires, that the Hon'ble Supreme Court also proceeded to examine the aspect of purpose of raising loan, and its immediate or subsequent utilisation for different purpose, and examined, that even if a loan is raised for purchasing raw material, and after raising the loan the company finds it un-necessary to bye raw material and spends the amount on capital asset, still it cannot be said to be capital expenditure, as it was held, that purpose for which the new loan was required was irrelevant to the question as to whether the expenditure for obtaining loan was revenue or capital expenditure. We are told, that relying on this judgment, many of the High Courts of the

country have consistently taken the view, that the expenditure incurred in issuing any debentures, and raising loan on debentures, is admissible, obviously because the debenture is also a loan.

At this stage it was contended by the learned counsel for the Revenue, that a distinction should be drawn between the convertible, and non convertible debentures, inasmuch as if the debenture is converted into shares, then it partakes the character of capital, and in that event, the expenditure would not be revenue expenditure, and would be capital expenditure. Learned counsel for the assessee informs, that though it has not come on record so far, but as a matter of fact the debentures issued were of convertible nature. Then, the learned counsel for the assessee argued, relying upon the judgment of Calcutta High Court, in C.I.T. Vs. East India Hotels, reported in 252 ITR-860, that the expenditure incurred, even in raising loan by convertible debenture would also be admissible as revenue expenditure. The Calcutta High Court had adopted the reasoning, that conversion of debentures results into repayment of loan, and issuance of shares. This is one aspect of the matter. In our view, the other more important aspect of the matter is, that the Hon'ble Supreme Court in India Cement's case has clearly excluded this aspect from consideration, by holding, that it is irrelevant to consider the object, with which the loan was obtained.

Admittedly the debentures when issued is a loan, and therefore, whether it is convertible, or non convertible, does not militate against the nature of the debenture, being loan, and therefore, the expenditure incurred would be admissible as revenue expenditure.

Thus, we do not find any error in the finding of the learned Tribunal on this aspect also. Consequently, question no. 2 also as framed, is required to be, and is, answered against the Revenue, and in favour of the assessee.

The appeal thus has no force, and is dismissed.

(KISHAN SWAROOP CHAUDHARI), J.

(N P GUPTA), J.

/Sushil/