

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO.7769 OF 2011
(Arising out of S.L.P. (C) No.9860 of 2010)

Commissioner of Income Tax, Mumbai ... Appellant (s)

versus

Reliance Industries Ltd Respondent (s)

With Civil Appeal. No.7770/2011 & S.L.P. (C) No.10431/2010
and Civil Appeal. No.7771/2011 @ S.L.P. (C) No. 23433/2011

ORDER

Civil Appeal. No.7769/2011 @ S.L.P. (C) No. 9860/2010 and
Appeal No.7771/2011 @ SLP (C) No. 23433/2011

Leave granted.

Having heard learned counsel on both sides, we are of the view that the High Court ought not to have dismissed the appeals without considering the following questions, which, according to us, did arise for consideration. They are formulated as under:

"(A) Whether on the facts and in the circumstances of the case and in law the Hon'ble Tribunal was right in holding that expenditure for earning dividend income cannot be estimated and therefore, cannot be allowed while computing book profits and also under the normal provisions of the Income tax Act?

(B) Whether on the facts and circumstances of the case and in law the Hon'ble Tribunal was right in disallowing u/s 43B of the Income tax Act the unpaid custom duty and excise duty included in closing stock?

(C) Whether on the facts and circumstances of the case and in law the Hon'ble Tribunal was right in holding that sales tax incentive is a Capital Receipt?"

Accordingly, the civil appeals are allowed, impugned orders are set aside and the cases are remitted to the High Court to decide the questions, formulated above, in accordance with law.

No order as to costs.

Civil Appeal No. 7770/2011 @ SLP. (C) No. 10431/2010:

Leave granted.

Having heard learned counsel on both sides, we are of the view that the High Court ought not to have dismissed the appeal without considering the following questions, which, according to us, did arise for consideration. They are formulated as under:

"(A) Whether on the facts and in the circumstances of the case and in law the Hon'ble Tribunal was right in holding that estimated expenditure for earning dividend income cannot be subject to disallowance while computing book profits as well as under the normal provisions of the Income tax Act?

(B) Whether on the facts and in the circumstances of the case and in law the Hon'ble Tribunal was right in holding that sales tax incentive is a Capital Receipt?

Accordingly, the civil appeal is allowed, impugned order is set aside and the matter is remitted to the High Court to decide the questions, formulated above, in accordance with law.

New Delhi,

September 09, 2011.

..... CJJ.

[S.H. KAPADIA]

..... J.

[K.S. RADHAKRISHNAN]

..... J.

[SWATANTER KUMAR]

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
Ordinary Original Civil Jurisdiction
Central Excise Appeal No.1299 of 2008

The Commissioner of Income Tax-3, Mumbai ...Appellant.
V/s.
M/s.Reliance Industries Ltd. ...Respondents.

Mr.Vimal Gupta , adv. for the Appellant.

Mr.J.D.Mistri with P.C.Tripathi & Mr.Raj Darak , advs. for
the Respondents.

CORAM: F.I.Rebello &
J.H.Bhatia, JJ.
DATE : 15th April, 2009.

P.C.:

1. Revenue is in appeal on the following substantial
questions of law:

"(A) Whether on the facts and in the circumstance
of the case and in law the Hon'ble Tribunal was
right in holding that expenditure for earning
dividend income cannot be estimated and therefore
cannot be allowed while computing book profits and
also under the normal provisions of the Income-Tax
Act ?

(B) Whether on the facts and in the circumstance
of the case and in law the Hon'ble Tribunal was
right in deleting the disallowance made by the
Assessing Officer of payments made by the Assessee
Company towards provident fund and superannuation
fund relating to Assessment Year 1997-1998 that
were claimed by the Assessee in 1998-1999 u/s 43B
of the Income-Tax Act ?

(C) Whether on the facts and in the circumstance
of the case and in law the Hon'ble Tribunal was

right in disallowing u/s. 43B of the Income-Tax Act the unpaid custom duty and excise duty including in closing stock ?

(D) Whether on the facts and in the circumstance of the case and in law the Hon'ble Tribunal was right in holding that sales tax incentive is a Capital Receipt ?

(E) Whether on the facts and in the circumstance of the case and in law the Hon'ble Tribunal was right in confirming the direction given by the CIT (Appeals) to the Assessing Officer to allow, for the purpose of computation of Book Profits u/s.115JA of the Income-Tax Act, the deduction u/s.80HHC on the basis of profits and gains as computed under Chapter IV of the Income Tax Act and not on the basis of Book Profit u/s 115JA ?

(F) Whether on the facts and in the circumstance of the case and in law the Hon'ble Tribunal was right in holding that pre-operative expenses and trial run expenses that have been capitalized in the book of account of the Assessee Company is revenue expenditure ?

2. So far as Question (A) is concerned, CIT (Appeals) held that certain administrative expenses are required to be incurred to keep track of receipt and accruals of dividend income and accordingly, it is not possible to accept that no expenditure has been incurred out of dividend income. Accordingly, it held that expenses of Rs.20 lakhs is sufficient to meet expenses. The Income Tax Appellate Tribunal in appeal observed that "The assessee has earned dividend income only from three companies. There is no fact of having incurred any expenditure for the purpose of earning the dividend income. The disallowance in our view is misconceived and the same is deleted in the

light of the same order." In our opinion, this is purely a finding of fact and, therefore, question (A) as framed would not arise.

3. So far as Question (C) is concerned, same is answered by the judgment of the Supreme Court in **Income Tax Reports Volume 266 [2004] 99** in the case of **Berger Paints India Ltd. v. Commissioner of Income-Tax**. Question (C), therefore, would not arise.

4. So far as Question (B) is concerned, the Tribunal relied upon the ITAT Mumbai Bench 'J' (SPECIAL BENCH) decision in the case of assessee itself in **Deputy Commissioner of Income-tax v. Reliance Industries Ltd.** We may gainfully reproduce the following portion:

"The Scheme framed by the Government of Maharashtra in 1979 and formulated by its Resolution dated 5-1-1980 has been analysed in detail by the Tribunal in its order in RIL for the assessment year 1985-86 which we have already referred to in extenso. On an analysis of the Scheme, the Tribunal has come to the conclusion that the thrust of the Scheme is that the assessee would become entitled for the sales tax incentive even before the commencement of the production, which implies that the object of the incentive is to fund a part of the cost of the setting up of the factory in the notified backward area. The Tribunal has, at more than one place, stated that the thrust of the Maharashtra Scheme was the industrial development of the backward districts as well as generation of employment thus establishing a direct nexus with the investment in fixed capital assets. It has been found that the

entitlement of the industrial unit to claim eligibility for the incentive arose even while the industry was in the process of being set up. According to the Tribunal, the Scheme was oriented towards and was subservient to the investment in fixed capital assets. The sale tax incentive was envisaged only as an alternative to the cash disbursement and by its very nature was to be available only after production commenced. Thus, in effect, it was held by the Tribunal that the subsidy in the form of sales tax incentive was not given to the assessee for assisting it in carrying out the business operations. The object of the subsidy was to encourage the setting up of industries in the backward area."

. Thus, it can clearly be seen that a finding has been recorded that the object of the subsidy was to encourage the setting up of industries in the backward area by generating employment therein. In our opinion, in answering the issue, the test as laid down by the Supreme Court in **Commissioner of Income-Tax v. Ponni Sugars and Chemicals Ltd.** [2008] 306 ITR 392 (SC) will have to be considered. The Supreme Court has held that the test of the character of the receipt of a subsidy in the hands of the assessee under a scheme has to be determined with respect to the purpose for which the subsidy is granted. The Court further observed that in such cases, what has to be applied is the purpose test. The point of time at which the subsidy is paid is not relevant. The source is immaterial. Form of subsidy is material. Court then proceeded to observe as under:

"The main eligibility condition in the scheme with which we are concerned in this case is that the

incentive must be utilized for repayment of loans taken by the assessee to set up new units or for substantial expansion of existing units. On this aspect there is no dispute. If the object of the subsidy scheme was to enable the assessee to run the business more profitably then the receipt is on revenue account. On the other hand, if the object of the assistance under the subsidy scheme was to enable the assessee to set up a new unit or to expand the existing unit then the receipt of the subsidy was on capital account."

Therefore, let us apply the purpose test based on the findings recorded by the Special Bench. The object of the subsidy was to set up a new unit in a backward area to generate employment. In our opinion, the subsidy is clearly on capital account. In that view of the matter, Question (D) as framed, would also not arise.

5. In the light of above, appeal is admitted only on the questions (B), (E) and (F).

(F.I.Rebello, J.)

(J.H.Bhatia, J.)