IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX REFERENCE NO. 149 OF 1996

Sandvik Asia Ltd, Pune ..Applicant

Vs.

Commissioner of Income-Tax,Pune ..Respondent

Mr. J. D. Mistry, Senior Advocate i/b M/s. Ramesh Makhija and Co, for the Applicant/Assessee.

Mr. Vimal Gupta, Senior Advocate i/b Mr. Vipul Bajpayee,for the Respondent.

CORAM :- **S.C. DHARMADHIKARI &**
B.P.COLABAWALLA, JJ.

Reserved on :- 23rd July, 2014.
Pronounced on :- 31st July, 2014.

JUDGMENT: [Per B. P. Colabawalla, J]

1. By this Income Tax Reference under Section 256(1) of the Income Tax Act, 1961 (for short "Act), the Income Tax Appellate Tribunal (hereinafter referred to as "Tribunal"), has referred the following questions of law for a decision of this Court and which read as under:-

2. *Whether, on the facts and in the circumstances of the case, the Tribunal erred in holding that the assessee was not entitled to deduction of interest of Rs.94,029/-, 186572, 186516/-,1,87,140/- 3,33,997/-, 3,57,684/- paid on the fixed deposits under Section 80V of the Act in computing its total income?*

3. *Whether on the facts and in the circumstances of the case, the Tribunal ought to have held that the interest of Rs. 94,029/- Rs. 1,86,572/-, 1,86,516/- 1,87,140/- Rs.3,33,997/-, Rs.3,57,684/- paid on the fixed deposits was an allowable deduction u/s 80V of the Act?*

4. *Whether the Tribunal ought to have held that a direct nexus between the fixed deposits raised and the payment of taxes was not necessary in order to claim the deduction u/s.80V?*

5. *Whether the Tribunal was right in holding that "it was not the case of the assessee that all the bank accounts it had was all along a overdraft account" when in fact it was specifically explained at the time of the hearing that its bank accounts were overdraft accounts and the same was demonstrated by reference to the assessee's printed accounts?*

6. *Whether the Tribunal was justified in refusing to follow the decision of the Andhra Pradesh High Court in 171 ITR 583 although the facts and circumstances of the assessee's case are identical to the facts and circumstances in the case before the High Court?*

7. *Whether the Tribunal's finding that the assessee is not entitled to the deduction u/s 80V of the Act is vitiated as it has taken into account the following irrelevant circumstances?*

   (a) that the assessee had not made the claim for deduction u/s 80V in the original return filed by it?
   (b) that the claim was raised for the first time after the decision in the case of Bakelite Hylam Ltd; and
   (c) that the assessee had sufficient profits in the year to pay the taxes.

8. *Whether the Tribunal's conclusion that the assessee's failure to make a claim for deduction u/s 80V of the Act showed that the loans were not raised for the purpose of payment of taxes is perverse?*

9. *Whether the Tribunal was right in holding that the claim for deduction u/s. 80V was made only after the decision in the case of Bakelite Hylam when the claim was made for the first time by a letter dated 18th February, 1980 and the decision of the Tribunal in Bakelite's case was rendered on 31.1.83 and the High Court judgment was pronounced on 4th February, 1988?*

10. *Whether the Tribunal was right in refusing to remand the matter to the lower authorities for fresh examination although the assessee had*

explained that the amount of fixed deposits had been deposited in its overdraft accounts and such deposits had gone to reduce the overdraft?

14. *Whether on the facts and in the circumstances of the case, the Tribunal erred in holding that the sales promotion expenses of Rs.1,95,188/- 1,76,218/-, Rs.2,61,115/-, 2,96,646/-, Rs.3,60,871/-, Rs.3,93,028/- were not allowable as a deduction?*

15. *Whether on the facts and in the circumstances of the case, the Tribunal ought to have held that the sales promotion expenses were allowable as a deduction in computing the assessee's income?*

16. *Whether the Tribunal ought to have held that the place where the customers were provided with refreshments would be "other place or work" of the employees and that therefore such expenditure relating to the employees would not be entertainment expenditure within the meaning of Explanation 2 to Section 37(2A)?*

17. *Whether the Tribunal failed to appreciate that during the course of business discussions the place where refreshments are provided become "other place of work" of the employees within the meaning of Explanation 2 to Section 37(2A)?*

18. *Whether the Tribunal was justified in distinguishing its own decision in Antifriction Bearing Corporation's case on the ground that Explanation 2 to Section 37(2A) was not considered when it is apparent on a proper reading of the said order that the Tribunal had borne in mind the said Explanation before coming to its conclusion?*

19. *Whether the Tribunal was justified in distinguishing the decision of the Karnataka High Court in the case of Mysore Minerals Ltd on the surmise that the expenses on the delegations must have been incurred in the office, factory or other place of work of the employees because the ITO himself had allowed 1/4th of the expenses incurred?*

2. Question No.1 was not referred as the same was covered by the decision of this Court. Questions Nos.11 to 13 were not pressed and with reference to Question No.20, the Tribunal came to a finding that the same no longer survived.

3. Questions Nos.2 to 10 reproduced above were dealt with by the Tribunal at paragraphs 3 to 8 of its appellate order. After recording the submissions of the Assessee as well as the Department, the Tribunal at paragraph Nos. 7 and 8 held as follows:-

> "7. *We have given our anxious and careful consideration to the materials on record facts and circumstances of the case in the light of the submissions made by the authorized representatives for the parties and the decisions cited by them. On such examination, we are of the opinion that in view of the facts involved in the case stated below it is not necessary to examine in detail whether the provisions of Sec.40A(8) override those of Sec.80V of the Act. It is sufficient to mention that in the case of Shree Sajjan Mills Ltd (supra) the S. C. was not dealing with the effect of Sec.40A(8) on Sec. 80V of the Act. For the limited purpose of this appeal we are of the opinion that interest on money borrowed for payment of loan is allowable u/s 80V of the Act and such interest cannot be disallowed u/s 40A(8) of the Act. But on the facts of the present case we agree with the D. R. that the assessee has failed to prove direct or indirect nexus between payment of taxes and the loans raised by it. At one state during hearing before us the authorized representative for the assessee had conceded that there was no direct nexus between the loans raised and the tax paid. But he contended that as the amounts of advance tax paid was more the amounts of loans raised it should be presumed that the loans were utilized for payment of taxes. We are unable to agree with him for the following reasons. In the original returns the assessee never claimed that the loans were raised for payment of taxes. On the other hand it itself added the amount of interest calculated @ 15% disallowable u/s 40A(8) of the Act. This could not have been done by the assessee had it not been aware of the fact that the loans wee not raised for the purpose of payment of taxes. Only after as we have stated earlier this claim was made only after the matter was raised in the case of Bakelite Hylam Ltd (supra). It has been rightly pointed out by the authorities below that in all these years the assessee had enough profits for each year to pay the taxes due from it. It is not the case of the assessee that all the bank accounts it has was all along a overdraft account as in the case of Bakelite Hylam Ltd (supra) earlier. In such an event we do not think that it would be possible to draw any inference that moneys were drawn by the company for payment of taxes from out of the deposits and loans raised by it and deposited in any of its accounts which had overdraft facilities. In this view of the matter, we agree with the D. R. that the prayer for setting aside the matter to the A. O. for fresh examination is of no practical use and would mean giving a second innings to the assessee, especially in*

view of the fact that it was never the case of the assessee that it had evidence on this point but for some reason or other failed to produce the same before the lower authorities. In our opinion we have already stated that the case of Bakelite Hylam Ltd (supra) does not apply. Similarly the case of Gopikrishna Murlidhar (supra) also does not apply because that related to the business carried on by an HUF which was also withdrawing money from the business for personal expenditure and the interest paid was on capital borrowed u/s 10(2) (iii) of the Indian Income-Tax Act, 1922 which is similar to the provisions of Section 36(i)(iii) of the present Act. It does not deal with the question as before us. From the order dated 17.09.83 of this Tribunal relied upon by the authorized representative for the assessee it does not seem that in the said case profits of the company was sufficient to pay taxes as in the present case. In the order dated 21.1.82 also there was no dispute "about inference of the first appellate authority when the borrowings were for purposes of payment of income-tax" (emphasis ours).

8. For all the reasons stated above we hold that the assessee failed to establish that the money was borrowed for the purpose of payment of taxes and as such the dis-allowance of interest u/s 40A(8) of the Act cannot be interfered with. The authorized representative for the assessee, however, submitted that there is some mistake in the calculation of the interest to be disallowed by the A.O. The assessee is permitted to raise the matter before and the A. O. shall verify the computation of interest to be disallowed. As such this ground in all the appeals is answered against the assesseee."

4. Since the issue arising out of this part of the Tribunal's order was one of law and there being no decision of this Court or of the Supreme Court directly on the subject, the Tribunal considered it necessary to refer the above Question Nos.2 to 10 for our consideration.

5. As far Question Nos. 2 to 10 are concerned, it is common ground before us that the issue raised therein is no longer *res-integra* and is subsequently answered by this Court in the case of ***Hindustan Cocoa***

Products Ltd v/s Commissioner of Income Tax reported in [1999] 236 ITR 140. In view of the judgment of this Court in *Hindustan Cocoa (supra)*, and noting that the said judgment squarely applies to the facts of the present case, we answer Questions Nos.2 to 10 in favour of the Revenue and against the Assessee.

6. As far as Question Nos.14 to 19 are concerned, they were dealt with by the Tribunal in paragraph Nos.12 to 14 of its appellate order, wherein the Tribunal Held:-

> *"12. Ground No.5 relates to disallowance of alleged sales promotion expenses. The facts relating to all the assessment years are similar and it is sufficient to quote the same for the a. y. 77-78 from the order of the IAC(Asstt):*
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> > *"The assessee has shown sales promotion expenditure of Rs.1,95,188/-. It appears from the records that this constitute entertainment partly customary and partly lavish. No broad break up has been given either about the nature or about the employee welfare expenses embedded in it. The decision of the Tribunal for the earlier years on this point has become the subject mater of reference. The amount of Rs.1,95,188/- is disallowed as not pertaining to sales promotion expenses allowable under the Act."*
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> *13. On appeal the CIT(A) declined to interfere with the order of the IAC (Asstt) in view of the provisions of sub.sec.32(2A) of the Act.*
>
> *14. The authorized representative for the assessee contended that these expenses were made on giving dinners and lunch to customers in the hotels and that the customers or guests were accompanied by equal number of the offers of the assessee company and as such 50% of the expenses should be allowed. In support of his contention he relied on the order of this Tribunal in the case of Antifriction Bearings Corporation Ltd Bombay v*

ITO, Com.Cir.V(3) Bombay ITA No.4563/Bom/82 for the assessment year 1976-77 in which this Tribunal allowed 50% of the expenses. He also placed reliance on the decision in the case of CIT v Mysore Minerals Ltd (1986) 162 ITR 562 (Kar). Opposing these contentions the D. R. contended that admittedly the expenses were incurred in hotels and not in office factory or other place of work of assessee's employees and as such the entire expenses are to be excluded in view of the provisions contained in Explanation II to sub-sec.2A of Sec.37 of the Act. We find from the order of this Tribunal in the case of Antifriction Bearings Corporation Ltd (supra) that the Explanation II to Sec.37(2A) was not considered in the said decision. The facts in the case of Mysore Minerals Ltd (supra) goes to show that the expenses on the delegations must have been incurred in the office factory or other place of work of the employees because the ITO himself had allowed ¼ of the expenses incurred. But in the instant case it is admitted that the expenses were incurred in hotels i.e. outside office factory or place of work of assessee's employees. Moreover the assessee has failed to show that the expenses were only on food and beverages and not on any other items. So we agree with the D. R. that the amounts claimed by the assessee cannot be allowed. As a result this ground in all the appeals fails."

(emphasis supplied)

7. Since Question Nos.14 to 19 arising out of the above findings of the Tribunal were mixed questions of law and fact, and there being no decision either of this Court or the Supreme Court, the Tribunal considered it necessary to refer the above Questions Nos.14 to 19 for the opinion of this Court.

8. Mr. Mistry, the learned Senior Counsel appearing on behalf of the Applicant/Assessee placed reliance on Explanation 2 to Section 37(2A)

of the Act, as it then stood. Explanation 2 reads as under:-

> "*Explanation 2 ---For the removal of doubts, it is hereby declared that for the purposes of this sub-section and sub-section (2B), as it stood before the 1st day of April, 1977, "entertainment expenditure" includes expenditure on provision of hospitality of every kind by the assessee to any person, whether by way of provision of food or beverages or in any other manner whatsoever and whether or not such provision is made by reason of any express or implied contract or custom or usage of trade, but does not include expenditure on food or beverages provided by the assessee to his employees in office, factory or other place of their work."*
>
> (emphasis supplied)

9. Mr. Mistry laid stress on the words "*or other place of their work"* and contended that this necessarily meant a place of work other than the Assessee's office or factory and could certainly include a hotel. He submitted that in the present case, the expenses were incurred for hosting dinner and lunches for the customers of the Assessee in the hotel and that an equal number of the employees of the Assessee Company also accompanied the said customers. He, therefore, submitted that 50% of such expenses ought to have been allowed as they were not related to entertainment expenditure.

10. In our view, Mr. Mistry is only partly correct in his submission. Whether expenses incurred in a hotel would fall within "*or other place of their work"* appearing in Explanation 2 to Section 37(2A) of the Act, would entirely depend on the facts of each case. There cannot be any

generalization in this regard. The key word in Explanation is *"work"*. There could be a scenario where in the given set of facts and circumstances it could be validly contended that a hotel was a place of the work of the employees of the Assessee Company, but the same has to be examined on a case to case basis. In the present case, the factual findings given by the authorities below and as can be discerned from paragraph Nos.12 to 14 of the Tribunal's Order, are against the Applicant/Assessee. Nothing has been brought to our notice to controvert those findings or to show that they are perverse or vitiated by any error of law apparent on the face of the record. It can hardly be argued that by the employees accompanying their customers for lunches and dinner, they were engaged in work and would therefore fall within "*other place of their work"* as contemplated in the said Explanation. In view of these factual findings of the authorities below, which are uncontroverted before us, we answer Question Nos.14 to 19 in favour of the Revenue and against the Assessee.

11. The Income Tax Reference is accordingly disposed of. No order as to costs.

(B. P. COLABAWALLA, J.) **(S. C. DHARMADHIKARI, J.)**