IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA-85-2016 (O&M)
Date of decision:- 29.09.2016

Haryana State Road & Bridges Development Corporation Ltd.

...Appellant

Versus

Commissioner of Income Tax, Panchkula and another

...Respondents

CORAM: HON'BLE MR. JUSTICE S.J. VAZIFDAR, CHIEF JUSTICE
HON'BLE MR. JUSTICE DEEPAK SIBAL

Present:- Mr. Salil Kapoor, Advocate,
Mr. Rishabh Kapoor, Advocate,
Mr. Saurabh Kapoor, Advocate,
and Mr. Sumit Lalchandani, Advocate,
for the appellant.

Mr. Yogesh Putney, Advocate,
for the respondents.

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S.J. VAZIFDAR, C.J. (ORAL)

This is an appeal against the order of the Tribunal dated 16.10.2015 in respect of the assessment year 2010-2011 confirming the order of the CIT (Appeals) which in turn had confirmed the disallowance of certain deductions.

2. The assessee filed its return on 15.10.2010 declaring a loss and a revised return on 25.03.2011 declaring the same income. The assessment was completed under Section 143(3) of the Income Tax Act, 1961 (for short the Act) after issuing the necessary notices.

3. The assessee claimed an amount of ₹ 96,91,000/- as a deduction under Section 37 of the Act being the commission paid by it to the State of Haryana in respect of a guarantee issued by the State of Haryana at the appellant's request in favour of the Housing Urban Development Corporation Limited (HUDCO).

4. The Assessing Officer disallowed the expenditure treating the same as capital expenditure. The Assessing Officer also disallowed an amount of ₹ 4,03,129/- under Section 40(a)(ia) on the ground that the appellant/assessee had failed to deduct tax at source in respect of certain payments.

5. The appeal is admitted on the following substantial questions of law:-

> "(a) Whether "Guarantee Fee" can be allowed deduction under Section 37 of the Income Tax Act?
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> (b) Whether in view of the facts and circumstances of the case, the Tribunal has erred in law and on facts in upholding the order of the assessing officer in disallowing Rs. 4,03,129/- u/s 40(a)(ia) of the Act when the same expenses have been paid by the appellant?"

6. The other questions of law raised in the appeal are part of these questions and are dealt with accordingly.

Re: Question (a)

7. The question that falls for consideration is whether the commission paid in respect of a guarantee is on revenue account or on capital account. In our view, this question is to be answered in favour of the assessee in view of a judgement of the Supreme Court upholding the judgement of the Madras High Court on this issue.

8. In Sivakami Mills Ltd. Vs Commissioner of Income Tax, [1979] 120 ITR 211, the Madras High Court held:-

> "The expenditure incurred for the purchase of the machinery was undoutedly capital expenditure; for it brought in an asset of enduring advantage. But the guarantee commission stands on a different footing. By itself, it does not bring into existence any asset of an

> enduring nature; nor did it bring in any other advantage of an enduring benefit. The acquisition of the machinery on installment terms was only a business exigency. If interest paid on a credit purchase of machinery could be held to be revenue expenditure, we fail to see how guarantee commission paid to a bank for obtaining easy terms for acquisition of the machinery could be regarded as capital payments."
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> (emphasis supplied)

9. The Supreme Court in Commissioner of Income Tax Vs Sivakami Mills Ltd. [1997] 227 ITR 465 held:-

> "Civil Appeal No. 6488 of 1983
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> 1. Heard learned counsel for the parties.
>
> 2. The short question that arises for our consideration in this appeal is whether the guarantee commission paid by the assessee is a revenue expenditure and hence allowable as deduction in computing the total income in the Assessment Year 1968-69. The High Court answered the question in favour of the assessee. It was held that the guarantee commission paid by the assessee was a revenue expenditure and hence allowable as a deduction in computing the total income. The Revenue has come in appeal.
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> 3. A similar question arose before the Andhra Pradesh High Court in CIT V. Akkamba Textiles Ltd. The Court held that the expenditure incurred is revenue in nature and so allowable as deduction. Civil Appeal No. 2832 of 1977 preferred against the said decision was dismissed by this Court. In view of the aforesaid decision we see no force in this appeal. Accordingly, this appeal is dismissed. There will be no order as to costs.
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> Civil Appeal No. 9542 of 1995

> 4. The question is regarding the deduction of interest on deferred payment and guarantee commission paid to the Bank. The High Court followed its earlier decision in Sivakami Mills Ltd. v. CIT and answered the question in favour of the assessee. It was held that both the payments are of revenue nature. We have dismissed the appeal preferred against the decision of the High Court rendered in Sivakami Mills Ltd. in Civil Appeal No. 6488 of 1983. In view of the said decision, this appeal is also dismissed. There will be no order as to costs."

10. It is clear, therefore, that the Supreme Court held that the guarantee commission paid by an assessee is a revenue expense and, therefore, allowable as a deduction in computing the total income. It is important to note that even in that case, the Madras High Court came to the conclusion that the purchase of machinery was a capital expenditure, but the guarantee commission stands on a different footing. We will assume that in the case before us also the guarantee was issued in respect of loans taken for acquiring capital assets. In view of the judgement of the Supreme Court, it would make no difference as far as the guarantee commission is concerned. As we mentioned earlier, the guarantee was issued by the State of Haryana at the assessee's request in favour of HUDCO.

11. Mr. Putney, however, relied upon the judgement of the Patna High Court in Chhabirani Agro Industrial Enterprises Ltd. Vs Commissioner of Income Tax [1991] 191 ITR 226. This judgement was prior to the judgement of the Supreme Court in Commissioner of Income Tax Vs Sivakami Mills Ltd. The Patna High Court dissented from the view taken by the Madras High Court in Sivakami Mills Ltd. Vs Commissioner of Income Tax. In that case also, the ITO disallowed the expenditure relating to

the bank guarantee commission on the ground that it was a capital expense. Mr. Putney relied upon the following observations of the Division Bench of the Patna High Court:-

> "At first, I would like to deal with the disallowance of the bank guarantee commission. Admittedly, this commission was paid to the Bank of Baroda in respect of its cost for securing their guarantee to the manufacturers of vanaspati plant. Therefore, the incurring of this expenditure is solely attributable to the acquisition of the plant as an asset of enduring benefit. In the case of Challapalli Sugars Ltd. v. CIT [1975] 98 ITR 167, at page 175, it has been held by the Supreme Court that:
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> "The accepted accountancy rule for determining the cost of fixed assets is to include all expenditure necessary to bring such assets into existence and to put them in working condition."
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> Since the bank guarantee commission in question was paid for the purpose of acquiring the plant, it has to be treated as an integral part of its cost.
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> Learned counsel for the company has placed reliance on a decision of the Madras High Court in the case of Sivakami Mills Ltd. v. CIT [1979] 120 ITR 211 in support of his contention that the bank guarantee commission is a revenue expenditure. In this case, the assessee-company had purchased some machinery on deferred payment terms and had obtained a guarantee from a bank in favour of the sellers of the machinery, in lieu whereof the bank charged certain commission. The High Court took the view that the payment of guarantee commission was a revenue expenditure. The reasons assigned are, (i) it is the option of the assessee to evolve the mode of capitalising the cost of the capital

asset, (ii) the rule of determining the cost of the capital assets laid down in Challapalli's case [1975] 98 ITR 167 (SC) will apply only for the period prior to the commencement of production, (iii) the bank guarantee commission was paid only, as a business exigency and as such was an integral part of the conduct of the business, and (iv) the guarantee commission per se does not itself bring into existence any asset of enduring nature.

With respect, I find myself unable to agree with this view. In view of the law laid down by the Supreme Court in Challapalli's case [1975] 98 ITR 167, laying down the mode of determining the cost of a capital asset, it is now no more open to evolve new principles in this regard. Once it has been authoritatively held that "all expenditure necessary to bring such assets into existence and put them in working condition" wil form part of the cost of the asset, it is wholly irrelevant whether the asset was acquired prior to the commencement of business or subsequent to such commencement. It is also fallacious to say that it is still at the option of the assessee to capitalize or not to capitalize the expenses directly incidental to the acquisition of such assets. I may also indicate here that all the expenses made for acquisition of a capital asset are always related to the conduct of the business, nonetheless such expenses are capital in nature.

In the present case, the bank guarantee commission was paid as an unavoidable incidence of bringing into existence the plant in question; therefore, this is necessarily an integral part of the cost of the capital asset in question. A similar view has been taken by the Gujarat High Court in the case of CIT v. Vallabh Glass Works Ltd. [1982] 137

> ITR 389. With respect, I entirely agree with this view. Consequently, I hold that the instant bank guarantee commission is a capital expenditure and is not admissible under section 37(1) of the Act."

The Patna High Court, therefore, disagreed with the view taken by the Madras High Court in Sivakami Mills Ltd. Vs Commissioner of Income Tax. However, thereafter, the Supreme Court upheld the view taken by the Madras High Court in Commissioner of Income Tax Vs Sivakami Mills Ltd. We are bound by the view taken by the Supreme Court in Commissioner of Income Tax Vs Sivakami Mills Ltd.

12. Question (a) is, therefore, answered in favour of the assessee. The appeal to that extent is allowed.

Re: Question (b)

13. If indeed the assessee was bound to deduct tax at source and did not do so, the assessment order disallowing the expenditure relating to the relevant payments must be upheld.

14. The assessee, however, alleges to have discovered later that it had in fact deducted the tax at source and paid the same to the government treasury. The assessee relies upon a challan in that regard and has produced the same in this appeal as Annexure A-9. The assessee sought to produce the same before the Tribunal, but the Tribunal did not permit it to do so. In our opinion, this was a fit case for the Tribunal to have exercised its powers under Rule 29 of the Appellate Tribunal Rules, 1963 requiring the production of the challan evidencing the payment of the tax deducted at source in the government treasury. All that was required was to direct the authorities to examine whether the challan was genuine and whether the amount was paid into the government treasury or not in accordance with law. The ends of justice certainly required the

same. Even if the assessee had contended before the Assessing Officer and the CIT (Appeals) that the amount was not payable, it would make no difference, if, in fact, the amount had been paid.

15. In these circumstances, question (b) is decided by quashing the order of the Tribunal refusing to allow the appellant to adduce additional evidence. On this issue, however, the Assessing Officer shall examine the challan and determine whether the requisite amount of tax was deducted at source and paid over to the government treasury or not in accordance with law. If the same has been done, the assessee shall be entitled to the deductions. If not, the disallowance shall stand.

16. The appeal is accordingly disposed of.

(S.J. VAZIFDAR)
CHIEF JUSTICE

(DEEPAK SIBAL)
JUDGE

29.09.2016
Amodh

Whether speaking/reasoned	√Yes/No
Whether reportable	√Yes/No