IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
Original Side

Present:

The Hon'ble Justice Girish Chandra Gupta
&
The Hon'ble Justice Arindam Sinha

Income Tax Appeal no. 265 of 2009

M/s Binani Cement Ltd., Kolkata
Vs.
Commissioner of Income Tax, Kolkata Central-I & Anr.

For the Appellant : Mr. R. N. Bajoria Sr. Adv. with Mr. Moloy Dhar, Adv., Mr. A.K. Dey Adv. and Mr. Akhilesh Gupta, Adv.

For the Respondent : Mr. R.N. Bandopadhyay, Adv. with Ms. Smita Das De, Adv.

Heard on : 15.01.15, 29.01.15, 09.02.15, 11.02.15,20.02.15, 25. 02.15 & 27.02.15

Judgment on : 23rd March, 2015

Arindam Sinha, J.

The subject matter of challenge in this appeal is a judgment and order dated 15th May, 2009 by which learned Tribunal allowed an appeal preferred by the Revenue against an order passed by CIT (A) by which the CIT (A) had held that when construction/acquisition of new facility is abandoned at the work-in-progress stage, the expenditure does not result in an enduring advantage and such expenditure, when the same is written off, has to be allowed under section 37 of the Income Tax Act, 1961. The learned Tribunal reversing the order of CIT (A) held that the

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expenditure incurred in the earlier years could not be deducted in the year under consideration.

Aggrieved by the order of the learned Tribunal, the assessee has come up in appeal. The following question of law was framed when the appeal was admitted.

"Whether the Tribunal substantially erred in law in disallowing the expenditure allegedly incurred by the assessee for preparation of the feasibility study report and capital-work-in-progress in the earlier years, but written off during the previous year corresponding to the assessment year 2002-03 since the proposed project was abandoned?"

Mr. Bajoria, learned Senior Advocate, appearing for the appellant submitted that the question is partly covered by the decision in ***CIT Vs. Graphite India Ltd.*** reported in (1996) 221 ITR 420 (Cal). The relevant question referred by the Tribunal to this court in that case was whether in the facts and circumstances of that case, the Tribunal was justified in holding that the expenditure incurred for the assessee's proposed petro-chemical project was revenue expenditure and to be allowed as a deduction? This court in answering the question, held as follows:-

"So far as question no.4 is concerned, the Tribunal recorded the finding that the assessee spent an amount of Rs.56,665 as project expenditure. The expenditure represented fees paid to Engineering India Ltd. in connection with the petro-chemical project report. The amount was paid by the assessee in order to explore the possibility of setting up of a petro-chemical project which could provide a captive plant for manufacture of raw material at the assessee's own factory which would help the assessee in getting continuous supply of raw material even during periods of acute shortage. In fact, the project did not materialise. The Income-tax Officer as well as the Commissioner of Income-tax (Appeals), therefore, held that the expenditure was capital in nature. However, the Tribunal found that the expenditure did not result in bringing into existence any capital asset of enduring

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in nature. The Tribunal further found that the decision of the Calcutta High Court in the case of Hindusthan Aluminium Corporation Ltd. v. CIT [1986] 159 ITR 673 was applicable and following that decision held that the expenditure was allowable as incurred wholly and exclusively for the purpose of the assessee's business. Therefore, the Tribunal deleted the disallowance. The case relied upon by the Tribunal was subsequently followed in the case of Asiatic Oxygen Ltd. v. CIT [1991] 190 ITR 328 (Cal). This court in the said case reiterated the view taken in Hindusthan Aluminium Corporation Ltd.'s case [1986] 159 ITR 673 (Cal).

According to us, question no.4 in this reference stands concluded by the aforementioned two decisions. We, accordingly, answer question no.4 in the affirmative and in favour of the assessee and against the Revenue."

Mr. Bajoria further relied on two decisions of the Supreme Court being respectively the decision in ***CIT Madras Vs. Gajapathy Naidu*** reported in (1964) 53 ITR 114 (SC) and ***CIT Madhya Pradesh Nagpur and Bhandara Vs. Swadeshi Cotton and Flour Mills Pvt. Ltd.*** reported in (1964) 53 ITR 135 (SC). In ***Gajapathy Naidu*** on the question of power of the Income Tax Officer to relate back an income the Apex court was of the following view:-

"When an Income-tax Officer proceeds to include a particular income in the assessment, he should ask himself, inter alia, two questions, namely: (i) what is the system of accountancy adopted by the assessee, and (ii) if it is the mercantile system, subject to the deeming provisions, when has the right to receive accrued? If he comes to the conclusion that such a right accrued or arose to the assessee in a particular accounting year, he should include the said income in the assessment of the succeeding assessment year. No power is conferred on the Income-tax Officer under the Act to relate back an income that accrued or arose in a subsequent year to another earlier year, on the ground that that income arose out

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of an earlier transaction. Nor is the question of reopening of accounts relevant in the matter of ascertaining when a particular income acccrued or arose."

In ***Swadeshi Cotton and Flour Mills Pvt. Ltd***. on a similar question the said court held:-

"The system of re-opening of accounts does not fit in with the scheme of the Income-tax Act. As far as receipts are concerned there can be no re-opening of accounts, and the position is the same in respect of expenses".

Mr. R.N Bandopadhyay, learned Advocate appearing on behalf of the Revenue relying upon the decision in ***Delhi Tourism and T.D.C Ltd. Vs. CIT*** reported in (2006) 285 ITR (Delhi) submitted that the expenditure was rightly disallowed by the learned Tribunal as it was made and related to earlier years.

We accept Mr. Bajoria's submission regarding the expenditure made for construction/acquisition of new facility subsequently abandoned at the work-in-progress stage was allowable as incurred wholly or exclusively for the purpose of assessee's business as covered by the decision in ***Graphite India Ltd.*** (supra). The issue whether such expenditure could be allowed in the relevant assessment year is however yet to be resolved.

The CIT (A) in his order had found as follows:-

"The company claimed as allowable the expenditure on this abandoned project. While it was found to be unviable, the expenditure on it was for the purpose of business. It was not claimed or allowed earlier as business expenditure because it was of capital nature entitled to depreciation after completion and on commencement of its use for business. But since that stage is not reached – no asset having come into existence – the capital-work-in-progress had to be written off as such."

There was no challenge to such finding on facts before the learned Tribunal or even before us.

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The decision in ***Delhi Tourism and T.D.C. Ltd.*** is distinguishable on facts in as much as in that case the Delhi High Court had held that the electricity charges for power consumed was a known expenditure and the assessee, on the basis of average, could make a provision for that expenditure in every year of assessment even if no bill was received in a particular year of assessment.

Following the judgment in the case of ***Gajapathi Naidu*** (supra) the question to be asked is when did the expenditure claimed by way of deduction arise? There would have been no occasion to claim the deduction if the work-in-progress had completed its course. Because the project was abandoned the work-in-progress did not proceed any further. The decision to abandon the project was the cause for claiming the deduction. The decision was taken in the relevant year. It can therefore be safely concluded that the expenditure arose in the relevant year.

Reference in this regard may be made to the decision in the case of ***CIT Vs. Indian Mica Supply Co. P. Ltd.*** reported in (1970) 77 ITR 20 (SC) wherein the Supreme Court in considering a claim for deduction on arrear lease rents, ascertained subsequently consequent to a compromise arrived in the suit and paid in the relevant assessment year held, inter alia, as under:-

"The Tribunal, in the present case, had clearly found that it was only as a result of the compromise that the respondent became entitled to remain in possession of the demised land. Its liability also became ascertained only at that point of time. It cannot be disputed that the respondent in incurring the expenditure had acted in the interest of and for the purpose of its business. The expenditure was not laid out for any purpose other than that of carrying on the business. The deduction was properly admissible under section 10 (2)(xv) of the Act and the matter being self-

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evident the High Court was fully justified in declining to accede to the prayer made under section 66 (2) of the Income-tax Act, 1922."

Section 10 (2) (xv) of the old Act corresponds to section 37 (1) of the present Act. Our above conclusion is fortified by the view expressed by the Supreme Court in the said decision. For the aforesaid reasons the question is answered in the affirmative in favour of the assessee. The appeal is thus allowed.

I agree. **(Girish Chandra Gupta, J.)**

(Arindam Sinha, J.)

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