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

Present :- **Hon'ble Mr. Justice I.P.Mukerji**
Hon'ble Justice Amrita Sinha

(1)ITA No.600 of 2004
Peerless General Finance & Investment Co.
Vs.
Commissioner of Income Tax, Kolkata – 1

(2)ITA No.601 of 2004
Peerless General Finance & Investment Co.
Vs.
C. I. T , Kolkata – 1

(3)ITA No.246 of 2005
Peerless General Finance & Investment Co.
Vs.
C. I. T , Kolkata – 1

(4)ITA No.248 of 2005
Peerless General Finance & Investment Co.
Vs.
C. I. T , Kolkata – 1

For the Appellant in ITA 600 of 2004 ITA 601 of 2004 ITA 246 of 2005 ITA 248 of 2005	**:-**	**Mr. Abhijit Chatterjee, Sr. Adv. Mr. GOpal Ram Sharma,**
For the Respondent ITA 600 of 2004	**:-**	**Md. Nizamuddin**
For the Respondent ITA 601 of 2004	**:-**	**Mr. S. N. Dutta**
For the Respondent ITA 246 of 2005	**:-**	**Mrs. Soma Chatterjee Misra**
For the Respondent ITA 248 of 2005	**:-**	**Mr. R. N. Bandyopadhyay Mrs. Soma Chatterjee Misra**
Judgment On	**:-**	**08.08.2018**

I.P. MUKERJI, J.:-

(1) ITA No.600 of 2004

This is an appeal under Section 260A of the Income Tax Act, 1961.

On 23rd December, 2010 the Division Bench of this Court presided over by Mr. Justice K. J. Sengupta admitted this appeal on the following substantial questions of law relating to the assessment year 1998-99 of the assessee:

i) *"Whether the Tribunal erred in declining to allow the depreciation in the sum of Rs.32,64,692/- in entirety in respect of the long-term leasehold properties including the one for perpetuity and restricting the depreciation only with regard to capital expenditure for any structure by way of addition and/or alteration ?*

ii) *Whether on the facts and in the circumstances of the case the Tribunal erred in affirming the disallowance of Rs.1,31,002/- being the liabilities for business expenditure on the ground that they relate to earlier previous year, even when the assessee undeniably received the relevant bills during the next previous year relevant to instant assessment year?*

iii) *Whether the Tribunal should have held that the Reserve Bank of India's regulatory Directions requiring investment of the assessee's surplus fund in securities, stocks, specified bonds etc. as the 2 precondition for the licence to carry on the business as a Residuary Non-banking Financial Company rule out the part disallowance of business expenditure by ad hoc estimate at Rs.8,86,266/- under Section 14A of the I.T. Act deeming it as incurred in relation to earning exempt dividend income and further that the Proviso to that section precludes such disallowance of expenditure?*

iv) *Whether the Tribunal should have held that the assessee's plea for a direction for alternative relief to the extent of the deferred liability for excess collection of processing charges in the sum of Rs.325,15,18,102/- debited in the yearly account of instant year is legitimate and necessary to meet the contingency in the event of success of the Revenue's appeal under Section 260A of the Act and reversal of the Tribunal's order allowing the cumulative liability of*

Rs.613.20 crore on that account for assessment year 1996-97 instead of spread over?"

Mr. Abhijit Chatterjee learned Senior Advocate appearing for the appellant assessee, at the outset, stated that he was not pressing questions i) and iv).

In question ii), the case of the assessee simplified is that they claimed business expenditure of Rs.1,31,002/- for a particular previous year. The contention of the revenue was that this expenditure was incurred the year previous to that. The assessee's reply was that they received the bills and made payments for them in the following previous year which was relevant to the assessment year in question.

On examination of the assessing officer's order dated 31st March, 2001 we find that he held that no evidence was produced by the assessee to show that the expenditure was Rs.1,31,002 was incurred in the relevant previous year. The assessing officer opined that it related to the previous year. We do not find any submission of the assessee to the contrary recorded in the said order. Neither is there any reference to any bill that would show that the demand resulting in such expenditure was raised in the relevant previous year. However, the Commissioner of Income Tax (Appeals) on 5th March, 2002, deleted, this addition made by the assessing officer. The Commissioner of Income Tax (Appeals) accepted the plea made by the assessee that those bills were not raised on them in the year previous to the relevant previous year but had been raised belatedly in the previous year in question.

The tribunal, however, by its order dated 16th April, 2004 reversed the finding of the Commissioner (Appeals) on the ground that the assessing officer had spoken about crystallising of expenditure during the year previous to the relevant previous year. This was on the basis of the accounting practice followed by the assessee. The factum of receipt of bills did not matter according to the tribunal.

We are of the view that the tribunal had taken a plausible view. The issue involves more questions of fact and principles of accounting than law. We do not find that any substantial question of law has been raised by the assessee.

With regard to question (iii), from time to time, the Reserve Bank of India made directions upon the assessee compelling them to invest a specified amount in security, stocks, specified bonds etc. This was one of the conditions for continuance of their licence to carry on the business as a residuary non-banking financial company. The income tax department made an estimate of Rs.8,86,266 as business expenditure to earn exempt dividend income under Section 14A of the Income Tax Act, 1961 and disallowed it. The question was whether Section 14A and the proviso thereto precluded this disallowance.

The above sum of ten per cent of the business expenditure, which the assessing officer attributed to earning exempt income, was a thumb rule. This was reduced to one per cent by the Commissioner of Income Tax (Appeals). The decision of the Commissioner of Income Tax (Appeals) was affirmed by the tribunal.

Mr. Chatterjee, learned Senior Advocate for the assessee contended that his client was a non-residuary non-banking company. They received funds from investors. These funds were inturn invested by the assessee and out of the earnings from such investments stipulated amounts were paid to the investors as interest, profit etc. Therefore, the source of the income was business. Even if the return that the assessee got was in the form of dividend it should not be taken as dividend but as business income. Hence, the entire business expenditure claim of the assessee ought to have been allowed.

Mr. Chatterjee cited **Commissioner of Income Tax Vs. Cocanada Rashaswami Bank Ltd.** reported in **(1965) 57 ITR 306 (SC).** In that case the Supreme Court was considering Section 24 (2) of the Income Tax Act, 1922. The question was whether income from securities which formed part of the assessee's trading asset was part of its business income. The Supreme Court held that under Section 24(2) of the said Act the income from securities which formed part of the assessee's trading assets was part of its business income and hence the loss incurred in its business in the earlier year could be set off against that income in the succeeding year.

In **Commissioner of Income Tax Kolkata – 2 Vs. GKK Capital Markets (P) Ltd.** reported in **(2017) 78 Taxman.com 341 (Cal)** a division bench of our High Court treated the income of a company engaged in share trading as business income. The shares were considered as stock-in-trade.

It was also argued on behalf of the assessee that at any rate an approximation could not be made of the expenses incurred by the assessee in earning the dividend income. The disallowance could be made, only on actuals.

First of all, it does not seem that the point the income from shares, securities etc., was business income was raised before the tribunal. At least, the order of the tribunal does not discuss this point at all. It has been raised before us. We can distinguish the two cases cited above by stating that in those cases the shares, securities etc. were used for trading. They were used as trading assets. We reject the contention of the assessee. In this case, these shares, securities etc. on which dividend income was earned, were purchased compulsorily by the assessee in obedience to the direction of the Reserve Bank of India and were different from those which are bought and sold for the purpose of profit making. These assets of the assessee could not be considered as its trading assets.

But none the less investment in shares, securities etc. was so much an integrate part of the business of the assessee, that the business expenditure could not be segregated into parts representing expenses for earning dividend and other expenses.

We are also of the opinion that if for convenience and speedy disposal of cases one per cent of the expenses is deducted as attributable to earning exempted income it cannot be said that it is a bad practice. At times, even damages are computed on the basis of approximation and accepted by the Court. The calculation of the exact expenses incurred for earning dividend may not be theoretically possible. Therefore, computation on the basis of one per cent of the total business expenditure is reasonable in our view. This point also fails.

This Section 260A appeal is accordingly disposed of.

(2) ITA No.601 of 2004

On 23rd December, 2010 this appeal was admitted by the same division bench of our Court to be heard on the following substantial questions of law which related to the assessment year 1999-2000 of the assessee.

(1) *Whether the Tribunal erred in declining to allow the depreciation in the sum of Rs.30,10,323/- in entirety in respect of the long-term leasehold properties including the one for perpetuity and restricting depreciation only with regard to capital expenditure for any structure by way of additions and/or alterations?*

(2) *Whether the Tribunal should have held that the Reserve Bank of India's regulatory Directions requiring investment of the assessee's surplus fund in securities, stocks, specified bonds etc. as the precondition for carrying on the business as a Residuary Non-banking Financial Company rule out the part disallowance of business expenditure by ad hoc estimate at Rs.5,17,029/- under Section 14A of the I.T. Act deeming it as incurred in relation to earning exempt dividend income?*

(3) Whether the Tribunal should have held that the assessee's ground for a direction for alternative relief to the extent of the deferred liability 2 for excess collection of processing charges in the sum of Rs.65,00,00,000/- debited in the yearly account of instant year is legitimate and necessary for remedy in the event of success of the Revenue's appeal under Section 260A of the Act and reversal of the Tribunal's order allowing the cumulative liability of Rs.613.20 crore on that account for assessment year 1996-97 instead of spread-over?

(4) Whether on the facts and in the circumstances of the case, the Tribunal's affirmation of the disallowance of Rs.3,00,000/- under Section 43B of the I.T. Act for delay in payment of employees' contribution to provident fund runs counter to the principle laid down in Allied Motors (P) Ltd. (1997)224 ITR 677 (SC) as regards retrospectively of the amendment to the first Proviso of Section 43B for its curative or remedial nature, ruling out in the wake of the amendment the disallowance of payments delayed not beyond the due date for filing the return under Section 139(1)?

As far as question No.1 is concerned, Mr. Chatterjee, learned Senior Advocate for the appellant submitted that he was not pressing it inasmuch as his client had got relief that they wanted.

As far as question No.2 is concerned, it is identical to one of the question raised in ITA 600 of 2004. This question was answered against the assessee in that appeal. We answer the question similarly in favour of the revenue against the assessee.

The third question is also identical to the one raised in ITA 600 of 2004. In that appeal this issue was not raised. This was for the reason that the appellant got the relief it wanted. In the notes of argument submitted by the appellant in this matter they have said that their argument in this appeal is similar to the one in ITA 600 of 2004. So we take it that this ground is not pressed in this appeal also.

The fourth ground is most interesting. Section 43B of the said Act lays down that notwithstanding anything contained elsewhere in the Act, any deduction allowable by the Income Tax Act, 1961 as contribution to any provident fund or to an employees' welfare fund shall be allowed in the previous year in which the sum is actually paid. This provision is to be read with 36 (1) (va) which says that the assessee would be entitled to deduction in respect of any sum received by the assessee from his employees on account of, inter alia, provident fund, if such sum is credited by the assessee to the employees' account in the relevant fund on or before the due date.

Two provisos to Section 43B were added by the Finance Act, 1987 with effect from 1st April, 1988. The second proviso was amended with effect from 1st April, 1989. The first proviso read: *"Provided that nothing contained in this section shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return".*

The second proviso was omitted with effect from 1st April, 2004. Prior to its omission it was as follows *"Provided further that no deduction shall, in respect of any sum referred to in clause (b), be allowed unless such sum has actually been paid in cash or by issue of a cheque or draft or by any other mode on or before the due date as defined in the Explanation below clause (va) of sub-section (1) of section 36, and where such payment has been made otherwise than in cash, the sum has been realised within fifteen days from the due date.".*

Section 43B was inserted with effect from 1st April, 1984 to include the employers' contribution to the provident fund or any other fund for welfare of the employees. The first proviso was inserted to enable the assessee to take the benefit if the sum was paid within the time to furnish the assessee's income tax return under Section 39(1) of the said Act. However, the second proviso after its insertion with effect from 1st April, 1989 prevented this. It was omitted from 1st April, 2004. This amendment Mr. Chatterjee rightly argued was made to mitigate the rigours of the second proviso read with Section 36 (1) (va) which required that in order to claim deduction the payment had to be made within the due date for such payment. That year had to be taken as the previous year.

The appellant assessee paid its provident fund contribution beyond the due date but before filing their return. Mr. Chatterjee argued that the deduction should have been allowed.

In **Commissioner of Income Tax Vs. Alom Extrusions Ltd.** reported in **(2009) 185 Taxman 416 (SC)**, the Supreme Court said that the finance Act, 2003 with effect from 1st April, 2004 would be retrospective with effect from 1st April, 1988.

Now, what is the effect of this amendment? Under Section 36(1) (va) any sum received by the assessee from his employee under Section 2 (24)(x) could be claimed as deduction if deposited in the relevant fund before the due date. Under Section 43B any sum payable by the assessee as an employer by way of his contribution to any provident fund can be claimed as a deduction in the previous year in which the sum was actually paid by him by the first proviso. Time to make such payment is extended by the first proviso till the filing of the return of income tax under Section 139(1) of the said Act in respect of the previous year in which the liability to pay such sum was incurred. Hence, by using the expression liability incurred the legislature permitted the assessee to deposit the money with the return for the year in which the liability was incurred irrespective of the fact whether payment was made or not in that previous year. In **Commissioner of Income Tax Vs. Alom Extrusions Ltd.** reported in **(2009) 185 Taxman 416 (SC)** and **Commissioner of Income-Tax, Circle –I, Kolkata Vs. Vijay**

Shree Ltd. reported in **(2014) 43 Taxman.com 396 (Calcutta),** the Court has allowed the deduction on provident fund contribution made beyond the due date for its deposit but made before the due date for filing the assessee's return for the previous year when the liability was incurred.

Thus, the order of the tribunal relating to the above questions is erroneous and is set aside. The matter is remanded to the assessing officer to make a computation in terms of the observations made in this judgment and order and determine the income of the appellant for the assessment year 1999-2000, within three months of this order. The rest of the order of the tribunal is not interfered with. This appeal is accordingly disposed of.

(3) ITA 246 of 2005

This appeal is under Section 260A of the Income Tax Act, 1961 relating to the assessment year 2000-2001 of the appellant assessee was admitted by this Court by its order dated 10th September, 2014 read with the order dated 29th September, 2014 on the following substantial questions of law:

"Whether the Tribunal erred in affirming the disallowance on ad hoc estimate @ 1% of the different income, out of the assessee's overall expenditure, under Section 14A and failed to appreciate that Section 14A in relation to dividend income is not relevant, where the investment in securities is not for earning dividend but for the purpose of carrying on the business in compliance with the directions and regulatory control of the Reserve Bank of India over the business of the assessee as a Residuary Non-Banking Financing Company?"

In this case also as in ITA 600 of 2004 relating to the assessee the assessing officer made an approximation of 10% of the business expenditure which could be attributed to earning the dividend income of the assessee and ordered deduction of that amount from the business expenditure. The Commissioner of Appeals reduced this percentage to one per cent which was affirmed by the tribunal. The appellant assessee is aggrieved even by this approximation and wants a case to case exact determination of such expenses.

For the reasons we have given in our judgment and order made today in ITA 600 of 2004 relating to the assessee, for the assessment year 1998-99 we uphold the order of the tribunal by saying that there is no infirmity in it.

This appeal is accordingly disposed of.

(4) ITA 248 of 2005

This appeal is under Section 260A of the Income Tax Act, 1961 relating to the assessment year 2001-02 of the appellant assessee was admitted by this Court by its order dated 23rd December, 2010 on the following substantial questions of law:

"1. "Whether the Tribunal erred in affirming the disallowance on ad hoc estimate @ 1% of the dividend income, out of the assessee's overall expenditure, under Section 14A and failed to appreciate that Section 14A in relation to dividend income is not relevant, where the investment in securities is not for earning dividend but for the purpose of carrying on the business in compliance with the directions and regulatory control of the Reserve Bank of India over the business of the assessee as a Residuary Non-Banking Financing Company?"

2. Whether on the facts and in the circumstances of the case the Tribunal failed to appreciate that the assessee's alternative claim for deferred liability of Rs.195.68 crore for excess collection of processing charges relatable to the instant year's account out of the total liability of Rs.613.20 crore, which the Tribunal had allowed in the Assessment Year 1996-1997, is reasonable in view of the said Order of the Tribunal for Assessment Year 1996-1997 being in contest by the Department under Section 260A of the Act."

The second question was not pressed by learned Counsel for the appellant for the same reasons it was not urged in ITA 600 of 2004.

As far as the first question in concerned, in this case, also as in ITA 600 of 2004 relating to the assessee the assessing officer made an approximation of 10% of the business expenditure which could be attributed to earning the dividend income of the assessee and ordered deduction of that amount from the business expenditure. The Commissioner of Appeals reduced this percentage to one per cent which was affirmed by the tribunal. The appellant assessee is aggrieved even by this approximation and wants a case to case exact determination of such expenses.

For the reasons we have given in our judgment and order made today in ITA 600 of 2004 relating to the assessee, we uphold the order of the tribunal by saying that there is no infirmity in it.

This appeal is accordingly disposed of.

Certified photocopy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

I agree.

(Amrita Sinha, J.) **(I.P. MUKERJI, J.)**