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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.1302 OF 2014

The Commissioner of Income Tax ..Appellant
Versus
M/s. Glenmark Pharmaceuticals Ltd. ..Respondent

....

Mr. Suresh Kumar for the Appellant.
Mr. J. D. Mistri, Senior Advocate, a/w Mr. Atul Jasani for the Respondent.

....

CORAM: M. S. SANKLECHA &
A. K. MENON, JJ.

DATE : 2nd FEBRUARY, 2017

P.C.

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 13th November, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2008-09.

2. This appeal raises the following questions of law for our consideration :-

> *"(i) Whether on the facts and in the circumstances of the case and in law the Tribunal is justified in deleting the addition of Rs.11,51,24,333/- to the income of the Assessee Company made by the Assessing Officer on account of guarantee commission chargeable to its Associate Enterprises?*

(ii) Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in deleting the interest charged under Section 234B of the Act in view of the Supreme Court decision in JCIT v/s. Rolta India Ltd. (330 ITR 470)?

(iii) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in deleting the addition made by the Assessing Officer amounting to Rs.6,88,842/- on account of outstanding creditors under Section 41(1) of the Income Tax Act even though these liabilities had been outstanding for more than three years and had ceased to exist?"

3. **Regarding question no.(i):-**

(a) We note that the impugned order of the Tribunal while allowing the assessee's appeal holding that the Arms Length Price of Corporate Guarantee cannot be determined on the basis of comparison with Bank Guarantee and relied upon the decision of its Co-ordinate bench in the case of ***M/s. Everest Kento Cylinders Ltd. (ITA no.542/Mum/2012-A.Y. 2007-08)***. Mr. Suresh Kumar, the learned counsel appearing for the Revenue very fairly states that being aggrieved with the above order in M/s. Everest Kento Cylinders Ltd., the Revenue had filed an appeal to this Court raising an identical issue viz. Income Tax Appeal No.1165 of 2013 (CIT v/s. M/s. Everest Kento Cylinders Ltd.). By an order dated 8th May, 2015 the above appeal was not entertained.

(b) As no distinction in facts and/or law has been shown to us in this appeal which would warrant taking a different view on this very issue from that taken by this Court in M/s. Everest Kento Cylinders Ltd. (supra), we follow the same.

(c) Accordingly, question no.(i) as proposed does not give rise to any substantial question of law for the reasons indicated in our order dated 8th May, 2015 in CIT v/s. M/s. Everest Kento Cylinders Ltd. (supra). Therefore not entertained.

3. <u>Regarding question no.(ii):-</u>

(a) It is an undisputed position that issue arising herein was a subject matter of consideration by this Court in ***CIT v/s. JSW Energy Ltd. 379 ITR 36.*** In the above decision this Court held that there would be no liability to pay interest under Section 234B of the Act in view of a retrospective amendment made to Section 115JB of the Act. This on the ground that at the time of making the payment of advance tax the respondent was under no obligation to pay advance tax and the same arose only on account of retrospective amendment to the law which came post the conclusion of the previous year relevant to the subject assessment year. The aforesaid decision of this Court in JSW Energy Ltd. (supra) followed and approved the decision of the Calcutta High Court in ***Emami Ltd. v/s. CIT 337 ITR 470*** wherein it was held that the decision of the Supreme Court in ***JCIT v/s. Rolta India Ltd. 330 ITR 470*** would not apply. This on the ground that the Apex Court in Rolta (India) Ltd. (supra) would not apply to the facts in Emami Ltd. (supra) as observed therein, "whether an assessee can be said to be defaulter in payment of advance tax, if he had no liability to make payment of such tax on the last date of the final year preceding the relevant Assessment year....". The liability to interest under Section 234B of the Act would only arise as a consequence of failure to pay advance tax.

(b) In the above view, as question no.(ii) stands concluded by the decision of this Court in JSW Energy Ltd. (supra), no substantial question of law arises. Thus not entertained.

4. <u>Regarding question no.(iii):-</u>

(a) We note that the impugned order of the Tribunal dismissed the Revenue's appeal on this issue by following its order in respect of the same respondent-assessee for the assessment year 2005-06.

(b) Mr. Suresh Kumar, the learned counsel appearing for the Revenue very fairly states that the Revenue accepted the order of the Tribunal adverse to it on this issue for the assessment year 2005-06. However for the assessment year 2006-07 in respect of the same respondent, the Tribunal on this very issue follow its order for the assessment year 2005-06 and held in favour of the respondent by order dated 27th July, 2012. However the Revenue preferred an appeal from the order of the Tribunal dated 27th July, 2012 relating to assessment year 2006-07 being Income Tax Appeal no.321 of 2013 to this Court. By an order dated 4th February, 2015 this Court did not entertain the appeal on an identical question as raised herein. No distinction in facts and/or in law in this Assessment Year to that existing in A.Y. 2005-06 and 2006-07 has been shown to us which would require taking a different view.

(c) Therefore for the reasons recorded in our order dated 4th February, 2015 Income Tax Appeal No.321 of 2013 (CIT v/s. Glenmark Pharmaceuticals Ltd.) this question is not being entertained.s

(d) The question as raised does not give rise to any substantial question of of law. Thus not entertained.

5. Appeal dismissed. No order as to costs.

(A. K. MENON, J.) **(M. S. SANKLECHA, J.)**