

**HIGH COURT OF JUDICATURE FOR RAJASTHAN BENCH AT
JAIPUR**

D.B. Income Tax Appeal No. 733 / 2008

Commissioner of Income Tax, Kota.

----Appellant

Versus

M/s. Mangalam Cement Ltd., Aditya Nagar, Morak, Kota.

----Respondent

For Appellant(s) : Ms. Parinitoo Jain

For Respondent(s) : Mr. Sanjay Jhanwar

HON'BLE MR. JUSTICE K.S. JHAVERI

HON'BLE MR. JUSTICE VINIT KUMAR MATHUR

Judgment

Per Hon'ble Jhaveri J.

04/01/2017

1. By way of of this appeal, the appellant has challenged the judgment and order of the Tribunal whereby the Tribunal has dismissed the appeal of the revenue.

2. This court while admitting the appeal on 08.12.2008 has framed the following substantial questions of law:

"1. Whether on the facts and circumstances of the case, the learned ITAT committed serious illegality and error of judgment in holding that the interest paid on the borrowings utilized for setting up a new unit of cement plant constituted revenue expenditure ignoring the fact and that the plant had not yet commenced production?

2. Whether the findings of the Tribunal are perverse in upholding the order of the CIT(A) by allowing interest of

Rs.13,16,39,997 u/s 36 (1)(iii), specifically when the interest was paid on borrowed capital to set up a new unit and also capitalized in the books of accounts?

3. Whether the findings of the Tribunal are perverse in upholding the order of the CIT(A) by allowing interest of Rs.10,72,55,713/- under section 369(1)(iii), specifically when the interest was paid on borrowed capital to set up a new unit and also capitalized in the books of accounts?"

3. The facts of the case are that the assessee company is engaged in the business of manufacturing of cement. The tax audit report alongwith form No.3-CA and 3-CD has been furnished alongwith the return of income. During the course of examination of accounts, following facts have emerged. As per the Tax Audit Report, the guest house expenses have been worked out at Rs.3,64,336/- which includes depreciation of Rs.1,11,281/- on building, plant & machinery and furniture used in the guest Houses. Further as per note given in annexure-E to the TAR, expenditure on repairs of building and other assets has been made to the premises at Delhi, which is used as guest house and 1/3rd of the rent of the premises at Jaipur used at Guest House Rs.22,080/- have not been included in the details of maintenance of accommodation in the nature of guest house. The assessee, in the computation of income furnished alongwith the return of income has added the guest house expenses u/s 37(4) only at Rs.2,53,055/-. On this question, it was stated by the assessee that the repairs and rent of the guest house properties are not covered under section 37(4) in view of the decision of the Bombay

High Court in the case of CIT vs. Chase Bright Steel Ltd. 177 ITR 128 and also the judgment of ITAT in assessee's own case. The ITAT Jaipur in RA No.8-9/JP/96 dated 24.02.1997 has rejected the reference application of the Department filed for Assessment year 1990-91 and 1992-93 on this issue relying on the decision of the jurisdictional High Court in the case of M/s. Mangal Chand Tubes (P) Ltd. 208 ITR 729. On the basis of above, the assessee submitted that no disallowances should be made on this account. The contention of the assessee has been examined and in the light of the decision cited supra, no further additions on account of depreciation, rent and repairs of the guest house are called for u/s 37(4). In the tax audit report in form No.3-CD, the auditors have pointed out that a sum of Rs.28,423/- is in excess of the limit laid down under rule 6B, but the assessee has not included the same in the total income on the ground that the presents/gifts were not in the nature of advertisement in view of the decision of the ITAT for Asst. year 1986-87 in assessee's own case. The contention of the assessee is not acceptable as the decision of the ITAT on this issue has been the disallowance of Rs.28,423/- is made under Rule 6B. During the course of assessment proceedings, the assessee furnished the details of Rs.2,81,988/- which were disallowed in the Asst. year 1996-97 on the ground that the expenditure had been crystallised in the financial year 1996-97 relevant to asst. year 1997-98. The assessee argued that this expenditure should be allowed in this asst. year/ Perusal of the records reveals that the contention of the assessee is acceptable

and accordingly the amount of Rs.2,81,988/- is allowed in this year (as appearing in schedule No.15). During the year relevant to asst. year 1997-98, the assessee has claimed expenditure of Rs.2,82,693/- (Revised to Rs.3,41,240/-). On examination, it was noticed that the expenditure was booked by the assessee during the financial year 1997-98 relevant to asst. year 1998-99. Since the assessee failed to prove that the expenditure was allowable during the financial year 1996-97 relevant to asst. year 1997-98 and the liability had actually crystallised during the period relevant to assessment year 1998-99. The same can not be allowed and accordingly the claim of Rs.3,41,240/- is disallowed. The assessee has claimed deduction of Rs.2,04,16,092/- u/s. 43B in respect of interest paid to public financial institutions for the financial year 1993-94 out of the disallowed amount of deferred interest of Rs.14,31,47,894/- in the asst. year 1994-95. The interest relates to the borrowings obtained in respect of the new unit M/s. Neer-Shree Cement. It was contended by the assessee that such payment for the new unit in respect of the existing business was allowable deduction. This legal issue is pending before the ITAT and considering the past history of the case, interest payment of Rs.2,04,16,092/- is disallowed u/s 43B.

4. The questions in this appeal are covered by the decision of this Court in the case of Commissioner of Income tax, Jaipur Vs. M/s Manglam Cement Ltd. decided on 04.10.2016 along with two other appeals, which reads as under:

"1. By way of this appeal, the department has challenged the order of the Tribunal whereby the Tribunal has dismissed the appeal of the Department and confirmed the order of the CIT (Appeals).

2. This Court has framed following questions of law in Tax Appeal No.80/2002. "Whether in the facts and circumstances of the case and in law, the learned ITAT was justified in holding that the expenditure amounting to Rs.2,20,435/- spent on gifts and presentations did not constitute expenditure by way of advertisement and thereby do not attracting the limitation contained in Rule-6B of the Income Tax Rules, 1962?

Whether on the facts and circumstances of the case, the learned ITAT committed serious illegality and error of judgment in holding that the interest paid on the borrowings utilised for setting up a new unit of cement plant constituted revenue expenditure ignoring the fact that the plant had not yet commenced production?"

3. In other two appeals, the question no.2 above is the only question.

4. The first issue is covered by the decision of this Court in the case of Commissioner of Income Tax Vs. M/s Mangalam Cement Ltd., Kota- D.B. Income Tax Reference No.10/1999 decided on 17.10.2002, where the issue was answered against the assessee and in favour of the department.

5. In that view of the matter, the first issue will be governed by the decision of this Court in D.B. Income Tax Reference No.10/1999. Therefore, the issue no.1 is answered in favour of the Department against the assessee.

5.1 On second issue, as relied upon by the Tribunal in para 8, the decision of Tata Chemicals Ltd. Vs. DCIT as confirmed by the Bombay High Court in Commissioner of Income Tax Vs. Tata Chemicals Ltd. 256 ITR 395, against which SLP was dismissed, has held in para 8 as under:

"As far as question (a) is concerned, it is not in dispute that this question was not raised before the Tribunal. Mr. Desai submitted before us that under S.260A(6)(a), it is

permissible for the High Court to determine any issue which is not determined by the Tribunal. Gthe careful reading of section will show that the High Court can decide only that question which was raised but not determined by the Tribunal. Therefore, it is necessary that the question sought to be raised ought to have been raised before the Tribunal and then if it has not determined it, one can say that it has not been determined by the Tribunal and, therefore, the High Court should look into it. In the present case, we do not find that this issue had been raised before the Tribunal. It is also not the case of the Revenue that the issue or question was raised but not decided by the Tribunal. In the circumstances, we do not propose to dwell on this question."

6. In that view of the matter, the issue no.2 in Appeal no.80/2002 and the only question in Appeal No.69/2005 and 319/2005 requires to be answered in favour of the assessee and against the Department.

7. All the three appeals stand disposed of accordingly.

5. Therefore, the issues are answered in favour of the assessee and against the department.

6. The appeal stands disposed of.

(VINIT KUMAR MATHUR)J.

(K.S. JHAVERI)J.

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