

ITA 440 OF 2006
IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

C.I.T., KOLKATA-III, KOLKATA
Versus
M/S. BRITANNIA INDUSTRIES LTD.

BEFORE:

The Hon'ble JUSTICE GIRISH CHANDRA GUPTA

The Hon'ble JUSTICE ARINDAM SINHA

Date : 24th April, 2015.

For Appellant/Revenue : Mr. M.P. Agarwal, Advocate
For Assessee/Respondent : Mr. B.K. Murarka, Advocate
Ms. Sutapa Roychowdhury, Advocate

The Court: The appeal is directed against a judgement and order dated 19th May, 2006 passed by the learned Income Tax Appellate Tribunal pertaining to the assessment year 1998-1999. The revenue has come up in appeal. The following questions were formulated at the time of admission of the appeal:-

" I. Whether, on the facts and circumstances of the case, the Income Tax Appellate Tribunal has erred in allowing expenditure of Rs.46,26,552/- on development of machineries as revenue expenditure though the machineries developed were neither used for the business of the assessee nor sold ?

II. Whether, on the facts and circumstances of the case, the Income Tax Appellate Tribunal has erred in failing to adjudicate upon the question of allowance of provision of Rs.21,70,93,280/- for advertisement under the erroneous impression that it was covered by the remand report submitted by the Assessing Officer ?

III. Whether, on the facts and circumstances of the case, the Income Tax Appellate Tribunal has erred in allowing bank charges of Rs.1,78,08,000/- paid to guard against fluctuations in the foreign exchange rate for payment of loan taken for import of machineries as revenue expenditure contrary to the specific provisions of Explanation 3 to section 43A of the Income Tax Act, 1961 ? "

In so far as the first question is concerned the undisputed facts and circumstances are that four several machines were developed by the assessee at a cost of Rs.46,26,552/-. However, after the machines were developed the assessee found that the technology used had already become obsolete. Therefore, the machines were not put to use of manufacturing purposes.

The assessee decided not to sell the machine as a scrap because doing so might enable the competitors to know technical knowhow developed by the assessee. Therefore, they decided to use the parts of the machines so developed by way of spare parts in future. This explanation was not acceptable to the assessing officer. He was of the opinion that the claim was not allowable for the following reasons:-

"The assessee submitted that the machinery were not sold in the market. It may cause damage to their business. It is explained in para-3 of the letter of the assessee dated 08/03/2001 that this machineries were dismantled and spare parts were used wherever possible so that it does not fall in the hands of the competitors.

Taking the above explanation of the assessee in consideration, the question remains that the user of spare parts in the regular business activities of the assessee is also the user of the machineries for the business activities of the assessee did not furnish any details to show what are the spare parts used in the possible way in the business of the assessee, what is the value of such spare parts and what is the actual amount of infructuous capital assets."

In an appeal preferred by the assessee, the CIT (Appeals) was, however, of the opinion that the expenses were allowable under section 37. The following reasons were advanced.

"Therefore, the project was abandoned and the cost of such abandoned project was an allowable revenue expense as per decision of the B. Nagireddy v. CIT reported in 194 ITR 451. The sale of spare parts were not possible in the market since the assessee company did not want the technology information to its competitors. It is submitted that the A. O. has not disputed the expenses being incurred. He has made the disallowance merely because the details of spare parts used back in the business has

not been furnished before him. It is submitted that separate charges for the value of these parts has not been made in the accounts and therefore, the original expense is allowable in full as per decision cited above.

I have duly considered the submissions made. It is not the claim of the A.O. that the expenses have been doubtfully accounted for or that the expenses have not been incurred."

The learned Tribunal has upheld that order of the CIT(Appeals).

The question basically is a question of fact and when the learned Tribunal has concurred with the views expressed by the CIT (Appeals), we do not want to interfere with the said view as the view taken by them is a possible view. Therefore, the question no. (I) is answered in the negative and against the revenue.

The second question itself suggests that it is directed against that part of the order by which the learned Tribunal remanded the matter to the assessing officer. Mr. Agarwal, learned advocate for the appellant/revenue has not pressed this question before us since it is only a question of remand. Therefore, the question need not be answered. The assessing officer is directed to expedite the process considering that the matter has already been delayed.

So far as the third question is concerned, Mr. Agarwal, learned advocate for the appellant/revenue submitted that the expenditure should be added to the cost of acquisition of the capital assets under section 43A. He in support of his submission relied on Explanation 3 to section 43A which reads as follows:-

"Explanation 3.- Where the assessee has entered into a contract with an authorised dealer as defined in section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999), for providing him with a specified sum in a foreign currency on or after a stipulated future date at the rate of exchange specified in the contract to enable him to meet the whole or any part of the liability aforesaid, the amount, if any, to be added to, or deducted from, the actual cost of the asset or the amount of

expenditure of a capital nature or, as the case may be, the cost of acquisition of the capital asset under this section shall, in respect of so much of the sum specified in the contract as is available for discharging the liability aforesaid, be computed with reference to the rate of exchange specified therein. "

Mr. Agarwal in support of his submission has also relied on a judgement of the Apex Court in the case of *Assistant Commissioner of Income Tax v. Elecon Engineering Co. Ltd.* reported in (2010) 322 ITR 20 (SC). Mr. Murarka, learned advocate appearing for the assessee/respondent drew our attention to a judgement of the Andhra Pradesh High court in the case of *CIT v. Akkamamba Textiles Ltd.* reported in (1979) 117 ITR 294 wherein it was held that guarantee commission paid by the assessee was a revenue expenditure. Mr. Agarwal in reply submitted that the bank charges which are sought to be treated as revenue expenditure is not on account of a guarantee commission. Therefore, the judgement of Andhra Pradesh High Court has no manner of application.

The revenue preferred an appeal against the aforesaid judgement of Andhra Pradesh High Court but the SLP was dismissed.

We have heard rival contentions and are of the opinion that Explanation 3 relied on by Mr. Agarwal, quoted above, contemplates only the addition or deduction to the actual cost of the asset. The Explanation does not touch the point as regards the fee payable or the consideration payable to an authorized dealer under Section 2 of the Foreign Exchange Regulation Act, 1947 which was the provision as it stood at the relevant time.

The entire section 43A has undergone a change with effect from 1st April, 2003.

It is not in dispute that the factual background is as follows, as would appear from the impugned judgement:-

"The CIT has disallowed a sum of Rs.1,78,08,000/- being bank charges paid by the assessee company in connection with repayment of a loan of US \$ 10 million. The assessee company took a foreign currency loan of US\$ 10 million in the year 1995. The loan was utilized for incurring capital expenditure for acquisition of plant and machinery. The loan was to be repaid in two installments with interest. In order to ensure availability of foreign currency at a pre-determined rate the assessee entered into a forward contract to the bank to obtain the foreign currency on a specific date at a specified rate. For obtaining this facility the sum in question was paid to the State Bank of India and has been debited as bank charges in the accounts of the assessee."

In the light of the aforesaid facts, the judgement, cited by Mr. Agarwal far from helping him, militates against the proposition sought to be advanced by him as would appear from the following views expressed by the Apex Court:-

"Roll over charges represent the difference arising on account of change in foreign exchange rates. Roll over charges paid/received in respect of liabilities relating to the acquisition of fixed assets should be debited/credited to the asset in respect of which liability was incurred. However, roll over charges not relating to fixed assets should be charged to the profit and loss account."

We are, in this case, not concerned with the difference arising on account of change in foreign exchange rates. We are, on the contrary, concerned with consideration payable/paid to the authorized dealer for obtaining protection against change of the foreign exchange rates.

The Apex Court opined that roll over charges not relating to fixed asset should be charged to the profit and loss account. Herein lies the answer. The

bank charges claimed by the assessee are not relatable to the fixed assets. Bank charges are payable in consideration of the risk undertaken by the bank. Therefore, it is in the nature of a fee for the guarantee provided by the banker which was considered by Andhra Pradesh High Court. What had happened before Andhra Pradesh High Court is as follows.

The assessee, in that case imported machinery from two concerns in Japan on deferred payment basis. The deferred payments were guaranteed by banks and insurance companies. The assessee agreed to pay guarantee commission to the guarantors and claimed it as a business expenditure which was disallowed on the ground that the expenditure was of a capital nature.

The Andhra Pradesh High Court held as follows:-

"The guarantee commission paid by the assessee in the year of account of the relevant assessment year, Rs.10,242/- must be treated as revenue expenditure and not as capital expenditure. Hence, this expenditure of Rs.10,242/- is an admissible deduction as an expenditure under Section 37(1) of the I.T.Act, 1961."

The Hon'ble Supreme Court did not interfere in the SLP preferred by the revenue.

We are of the opinion that the consideration paid by the assessee to the authorized dealer of foreign exchange, which is the bank in this case, in order to obtain protection from fluctuation of foreign exchange rates is a revenue expenditure and the view taken by the learned Tribunal is correct. Therefore, the third question is answered in the negative and against the revenue.

The appeal is, thus, dismissed.

(GIRISH CHANDRA GUPTA, J.)

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(ARINDAM SINHA, J.)