
(2012) 11 DEL CK 0231

In the Delhi High Court

Case No : ITR 121 of 1997

CIT (Central-I)

APPELLANT

Vs

M/s. Dalmia Cement (Bharat) Ltd.

RESPONDENT

Date of Decision : 19-11-2012

Acts Referred:

Companies Act, 1956 — Section 294, 294AA(3)

Income Tax Act, 1961 — Section 256(1), 36(1)(iii), 37(1), 40A(8), 80VV

Citation : (2013) 5 AD 444

Hon'ble Judges : S. Ravindra Bhat, J; R.V. Easwar, J

Bench : Division Bench

Advocate : Abhishek Maratha, Standing Counsel with Ms. Anshul Sharma, for the Appellant; R.M. Mehta with Ms. Yogita Sunaria, for the Respondent

Final Decision : Disposed Off

Judgement

R.V. Easwar, J.—This is a reference u/s 256(1) of the Income Tax Act, 1961 ("Act", for short) relating to the assessment year 1985-86 for which the previous year ended on 31.3.1985. The assessee is a public limited company deriving income from the following units.

- i) Cement Division at Dalmiapuram
- ii) Dalmia Magnesite Corporation at Salem
- iii) Dalmia International at Hospet
- iv) Govan Travels with Head Officer at New Delhi
- v) Dalmia Electronics Corporation at Ballabhgarh

The questions of law referred by the Tribunal to this Court for opinion are as follows :

(1) Whether on facts and in circumstances of the case the Tribunal was correct in law in holding that in appointing the field organizers, there was no infraction of

law regarding establishment of sole selling agency system and thereby deleting the addition of Rs. 27,48,773/- paid to the field organizers?

(2) Whether on facts and in circumstances of the case the Tribunal was correct in law in holding that the deposits received after 1.3.78 were to be treated as secured loans within the meaning of sub-clause (1) of clause (b) of the Explanation to section 40A(8) of the Income Tax Act, 1961?

(3) Whether on facts and in circumstances of the case the Tribunal was correct in law in holding that the expenses of Rs. 1,80,399/- incurred by the assessee company on account of Pooja were meant for business purpose?

(4) Whether on facts and in circumstances of the case the Tribunal was correct in law in holding that the retainership of Rs. 45,000/- paid to tax consultant was not covered u/s 80VV of the Income Tax Act, 1961?

(5) Whether on facts and in circumstances of the case the Tribunal was correct in law in confirming the order of CIT (Appeals) by holding that the water distribution system was entitled for depreciation at the rate of plant and machinery even though it is to be taken as a part of the building as per the depreciation schedule?

(6) Whether on facts and in circumstances of the case the Tribunal was correct in law in holding that the telephone exchange system installed by the assessee was not an office appliance and was entitled for Extra Shift Allowance, additional depreciation and investment allowance?

2. We shall proceed to answer the questions in the succeeding paragraphs.

3. So far as the first question is concerned, the brief facts are as follows. In the course of the assessment proceedings, it was noticed by the assessing officer that an amount of Rs. 27,48,773/- was claimed in the return as remuneration to field organizers/sales organizers. When asked to justify the claim the assessee submitted that the field organizers were appointed for the purpose of sale of non-levy cement for which they were allowed commission for services rendered by them on the basis of agreements (with them). The assessing officer, on the ground that similar expenditure was not allowed in the earlier years, disallowed the claim. On appeal, the CIT(Appeals) noticed that the sale of cement was decontrolled by the Government on 27.2.1982 and thereafter the field agents/sales organizers were appointed to create a network for the sale of the non-levy cement in order to procure orders from the dealers as well as the consumers directly and to keep the assessee consistently apprised of the fluctuations in the demand and supplies. The field/sales organizers were also to keep the assessee company regularly informed about the developments in the trade and suggest means of promoting the sales of the company, to create consumer awareness and brand loyalty, to enquire into complaints against the company, to liaise with the railways, and to submit periodical reports in the prescribed forms in connection with the sale of cement. He further noted that it was not the case of

the assessing officer that the field organizers did not contribute to the business activities of the assessee company or that the payments to them were not genuine. In these circumstances, he held that the expenditure was incurred wholly and exclusively for the purpose of assessee's business and directed the assessing officer to allow the same as a deduction. On appeal by the revenue, the Tribunal following its orders for the earlier years in which the issue was discussed at length, confirmed the decision of the CIT (Appeals).

4. We have considered the matter. It appears that the findings of the appellate authorities are findings of fact which have not been challenged as perverse. It has been found that the assessee created a network of field/sales organizers, who rendered specific services under agreements entered into with them. This was after the sale of cement was decontrolled. The assessing officer has neither doubted the genuineness of the payments nor held that the field organizers did not render any services as per the agreements. If these facts are not disputed, it follows that the expenditure was rightly allowed by the CIT (Appeals) as business expenditure and his decision was rightly affirmed by the Tribunal. The sales/field organizers were many in number and were appointed from all over the country as the details given in the order of the CIT (Appeals) would show. They were spread over Madras, Tiruchi, Salem and Tuticorin in Tamilnadu, Bangalore and Maharashtra. They cannot be called sole-selling agents within the meaning of Section 294 of the Companies Act, 1956. Moreover, a letter dated 10.11.1989 was issued by the Department of Company Affairs, Government of India to the assessee which is as follows:

Gentlemen,

I am directed to refer to your letter No. HD/8Y/3303 dated 18.10.1989 on the subject mentioned above and to say that having regard to the subject mentioned above and to say that having regard to the submissions made by you this Board agrees to the view that the Sales Organisers appointed by the Company for the sale of Non-levy Cement was not Sole Selling Agents within the meaning of Section 294 of the Companies Act, 1956 and as such Central Government approval was not required u/s 294AA(3) of the said Act. Yours faithfully,

Sd/-

(K.H. Gupta)

Under Secretary to the Govt. of India.

The letter clinches the issue in favour of the assessee's claim. We accordingly answer the question of law in the affirmative, in favour of the assessee and against the revenue.

5. The second question relates to the provisions of Section 40A(8) of the Act. The assessee disallowed interest of Rs. 13,22,296/- under the said Section in the return. According to the assessing officer the disallowance should have been Rs. 39,61,260/-. This was because he considered the interest paid on fixed deposits

also as subject to disallowance u/s 40A(8). The assessee explained that fixed deposits to the extent of Rs. 1.5 crores were secured by a floating charge and therefore, the interest paid on them was not considered for disallowance. The assessing officer, relying on the earlier assessments, held that 15% of the interest of Rs. 39,61,260/- paid on the fixed deposits of Rs. 1.5 crores should also be disallowed. He accordingly, disallowed Rs. 5,94,189/-. On appeal, the CIT(Appeals) found that the fixed deposits amounting to Rs. 1.5 crores were secured by a floating charge on specific assets of the company and that the fixed deposits should therefore be considered as secured deposits, falling outside Section 40A(8). He accordingly, deleted the disallowance. On appeal by the revenue to the Tribunal the decision of the CIT(Appeals) was affirmed following the previous order of the Tribunal.

6. We have considered the matter. In the following judgments, the Madras High Court, in similar circumstances, has held that fixed deposits secured by a floating charge on specific assets of the company amounts to secured fixed deposits and therefore the interest paid on them cannot be disallowed to the extent of 15% u/s 40A(8): (1) L.G. Balakrishnan and Brothers Limited Vs. Commissioner of Income Tax, , (2) Super Spg. Mills Ltd., Coimbatore Vs. The Commissioner of Income Tax, Coimbatore, . They are therefore, secured loans and interest paid on them is allowable in full u/s 36(1)(iii) without being regulated by Section 40A(8) read with Explanation (b)(i). We are in agreement with the view taken by the Tribunal, which is supported by two judgments of the Madras High Court. Accordingly, we answer the question of law in the affirmative in favour of the assessee and against the revenue.

7. So far as the third question is concerned, it is seen from the order of the CIT (Appeals) that the expenses were incurred on the maintenance and puja of the colony temple at Dalmiapuram, Salem and the Hospet works. It appears from para 6.1 of the order of the CIT(Appeals) that he visited the factory at Dalmiapuram to verify the fact that the temple was located inside the factory of the assessee company. He found that it was a small village where the factory was located and predominantly the local people were employed, whose sentiments were respected by building a temple so that they can offer worship which was one of the important aspects of their lives. This, according to the CIT(Appeals), kept the workers happy and contented, which is very important for the smooth functioning of the company. On these findings, the CIT(Appeals) allowed the expenditure as business expenditure and his decision was affirmed by the Tribunal.

8. In our opinion, the Tribunal has taken the correct view having regard to the inclusive nature of the expression "for the purpose of the business" appearing in Section 37(1) of the Act and as explained by the Supreme Court in the case of Commissioner of Income Tax, Kerala Vs. Malayalam Plantation Ltd., . We accordingly answer the question of law in the affirmative, in favour of the assessee and against the revenue.

9. As regards the fourth question of law referred to us, the brief facts are like this. In the return the assessee did not admit any disallowance u/s 80VV of the Act. According to the assessing officer, the retainership fee paid to Hariharlal, Advocate in the amount of Rs. 45,000/- should have been considered for the disallowance under the above Section. The assessee contended that the fees was not in respect of any proceedings before the income tax authorities but represented payment of retainership fee for advise in various matters. It was pointed out that the advocate was a retired Commissioner of income tax and the fees was paid on retainer basis and not for services in connection with assessment proceedings. These contentions were rejected by the assessing officer, who brought the fees paid to the said advocate within the purview of Section 80VV of the Act and calculated the disallowance accordingly. On appeal the CIT(Appeals) noted that the company took advice from Hariharlal on matters relating to company law, property law, employees provident fund law, sales tax law etc and separate fees were paid to him for attending the proceedings before the income tax authorities. He therefore, directed the assessing officer not to include the retainership fee for the purpose of disallowance u/s 80VV. The decision of the CIT(Appeals) was affirmed by the Tribunal.

10. We have considered the matter and we find that having regard to the finding of fact, not challenged before us, that the retainership paid to Hariharlal, Advocate was not in connection with income tax proceedings but for general advice relating to other laws, the provisions of Section 80VV of the Act are not attracted. The Section as it stood at the relevant time was applicable only in respect of the expenditure incurred in pursuing income tax assessment proceedings or proceedings before the authorities under the Act. It did not apply to retainership fees paid to consultants or advocates. In this view of the matter we answer the question of law in the affirmative, in favour of the assessee and against the revenue. Questions No. 5 and 6 can be taken together since they relate to the claim for depreciation on water distribution system and the claim for extra shift allowance, additional depreciation and investment allowance on telephone exchange system. We notice that the assessment year involved is 1985-86. The matter is thus more than 25 years old. In the case of the water distribution system, the controversy is whether it is entitled for depreciation at the rate of plant and machinery or it is to be taken as part of the building for the purpose of depreciation. In the case of the telephone exchange system the controversy is whether it is an office appliance which was entitled to investment allowance, additional depreciation and extra shift depreciation allowance. The controversy is only about the rates of depreciation allowable in respect of the assets in question. It was rightly pointed out on behalf of the assessee that even if a lesser rate of depreciation is allowable on the assets, having regard to the long period of time that has elapsed the assets would have now been written off and it is not worth the trouble to recompute the figures of written down value. We see the merit in the submission. After such a long lapse of time even if we hold that only a lesser rate of depreciation is allowable on the assets as claimed

by the revenue, the whole exercise would only be academic. We therefore, return the reference of these two questions unanswered. We may note that the assessee has pointed out in the chart filed by its advocate that ITR No. 167/1989 on this question was returned unanswered.

In the result the first four questions of law are answered in favour of the assessee and against the department and question Nos. 5 and 6 are returned unanswered. The reference is disposed of accordingly. No costs.