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(2014) 12 GUJ CK 0115

In the Gujarat High Court

Case No : Tax Appeal Nos. 222, 1153, 505 and 142 of 2007

Joint Commissioner of Income Tax — APPELLANT

Vs

Bell Ceramics Ltd. — RESPONDENT

Date of Decision : 18-12-2014

Acts Referred:
Income Tax Act, 1961 — Section 32, 35, 36(1)(ii), 36(1)(iii), 36(1)(viia)

Citation : (2014) 12 GUJ CK 0115

Hon'ble Judges : Kaushal Jayendra Thaker, J;K.S. Jhaveri, J

Bench : Division Bench

Advocate : K.M. Parikh, Nitin Mehta and Mauna Bhatt, Advocates for the Appellant; B.S. Soparkar and Swati Soparkar, Advocates for the Respondent

Judgement

K.S. Jhaveri, J.—Being aggrieved and dissatisfied with the impugned judgment and order passed by the Income Tax Appellate Tribunal, Ahmedabad Bench (hereinafter referred to as ''the ITAT''), the revenue has preferred the present Tax Appeals assailing the following orders

2. This Court while admitting these matters framed the following substantial question of law for consideration:

TAX APPEAL NO. 222 OF 2007

Whether the ITAT was right in law and on facts in deleting the disallowance of RS. 65,81,918/- being interest on borrowings payable by the assessee holding that the amount was revenue expenditure allowable u/s. 36(1)(iii) of the IT Act 1961?

TAX APPEAL NO. 142 OF 2007

(A) Whether the Appellate Tribunal is right in law and on facts in confirming the order passed by the CIT(A) deleting the disallowance of Rs. 31,61,423/- holding that the interest expenses are allowable u/s. 36(1)(iii) of the Act? (B) Whether the Appellate Tribunal is right in law and on facts in confirming the above disallowance despite clear provisions of Explanation 8 to Section 43(1) of the Act?

TAX APPEAL NO. 505 OF 2007

(A) Whether the Appellate Tribunal is right in law and on facts in confirming the order passed by the CIT(A) deleting the disallowance of Rs. 39,55,584/- being capitalised interest claimed as revenue expenditure by the assessee u/s. 36(1)(iii) of the Act? (B) Whether the Appellate Tribunal is right in law and on facts in allowing the claim of the assessee for the deduction of the said amount of Rs. 39,55,584/- u/s. 36(1)(iii) of the Act, when the interest attributable till the asset is put to use for the first time is required to be included in the actual cost as per Section 43 of the Act?

TAX APPEAL NO. 1153 OF 2007

Whether the Appellate Tribunal was right in law and on facts in confirming the order passed by the CIT(A) deleting the disallowance of Rs. 18,51,681/- towards interest expenditure claimed u/s. 36(1)(iii) of the Act?

3. The gist of the facts in these appeals is that the assessees while filing their returns of income had claimed capitalised interest expenses as revenue expenditure. It was observed by the Assessing Officer that the said expenditure was towards acquisition of a capital expenditure and therefore not entitled to deduction as revenue expenditure. On appeal the CIT (Appeals) deleted the disallowance. On appeal before the ITAT by the revenue, by impugned order, ITAT confirmed the order of CIT(A) and dismissed the appeals filed by the revenue.

4. Being aggrieved and dissatisfied with the impugned orders passed by the ITAT, the revenue has preferred the present Tax Appeals for consideration of the aforesaid substantial questions of law.

5. Mr. Soparkar, learned Counsel appearing on behalf of the respondent-assessees has submitted that as such the questions of law raised in the present Tax Appeals are now not res integra in view of the decision of the Hon''ble Supreme Court in the case of Deputy Commissioner of Income Tax, Ahmedabad Vs. Core Health Care Ltd., wherein the Hon''ble Supreme Court has held as under.

"Before concluding on this point we may state that in this batch of civil appeals we are concerned with the assessment years 1992-93, 1993-94, 1995-96 and 1997-98. A proviso has since been inserted in Section 36(1)(iii) of the 1961 Act. That proviso has been inserted by Finance Act, 2003 w.e.f. 1.4.2004. Hence, the said proviso will not apply to the facts of the present case. Further, in our view the said proviso would operate prospectively. In this connection it may be noted that by the same Finance Act, 2003 insertions have been made by way of proviso in Section 36(1)(viia) by the same Finance Act which is also made with effect from 1.4.2004. Same is the position with regard to insertion of a sub-section after Section 90(2) and before the Explanation. This insertion also operates w.e.f. 1.4.04. In short, the above amendments have been made by Finance Act, 2003

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and all the said amendments have been made operational w.e.f. 1.4.04. Therefore, the proviso inserted in Section 36(1)(iii) has to be read as prospectively and w.e.f. 1.4.04. In this case, we are concerned with the law as it existed prior to 1.4.2004. As stated above, we are not concerned with the interpretation or applicability of the said proviso to Section 36(1)(iii) w.e.f. 1.4.04 in the present case. In the case of Challapalli Sugars Ltd. (supra) this Court observed that interest paid on the borrowing utilized to bring into existence a fixed asset which has not gone into production, goes to add to the cost of installation of that asset. It was further observed that if the said borrowing was not "for the purpose of business" inasmuch as no business had come into existence, it must follow that it was made for the purpose of acquiring an asset which could be put to use for doing business, and hence interest paid on such borrowing would go to add to the cost of the assets so acquired.

In our view the above observations have to be confined to the facts in the case of Challapalli Sugars Ltd. (supra). It was a case where the company had not yet started production when it borrowed the amount in question. The more appropriate decision applicable to the present case would be the judgment of this court in the case of India Cements Ltd. Vs. Commissioner of Income Tax, Madras, in which it has been observed that, for considering whether payment of interest on borrowing is revenue expenditure or not, the purpose for which the borrowing is made is irrelevant. In our view, Section 36(1)(iii) of the 1961 Act has to be read on its own terms. It is a Code by itself. Section 36(1)(iii) is attracted when the assessee borrows the capital for the purpose of his business. It does not matter whether the capital is borrowed in order to acquire a revenue asset or a capital asset, because of that the section requires is that the assessee must borrow the capital for the purpose of his business. This dichotomy between the borrowing of a loan and actual application thereof in the purchase of a capital asset, seems to proceed on the basis that a mere transaction of borrowing does not, by itself bring any new asset of enduring nature into existence, and that it is the transaction of investment of the borrowed capital in the purchase of a new asset which brings that asset into existence. The transaction of borrowing is not the same as the transaction of investment. If this dichotomy is kept in mind it becomes clear that the transaction of borrowing attracts the provisions of Section 36(1)(iii). Thus, the decision of the Bombay High Court in Calico Dyeing & Printing Works (supra) and the judgment of the Supreme Court India Cements Ltd. (supra) have been given with reference to the borrowings made for the purposes of a running business, while the decision of the Supreme Court in Challapalli Sugars Ltd. (supra) was given with reference to the borrowings which could not be treated as made for the purposes of business as no business had commenced in that case. Therefore, there is no inconsistency between the above decisions."

5.1. It is submitted that in the aforesaid decision the Hon''ble Supreme Court has held that an assessee is entitled to claim interest paid on borrowed capital provided that the capital is used for business purpose irrespective of what may

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be the result of using the capital which the assessee has borrowed and that ''actual cost'' of an asset has no relevancy in relation to section 36(1)(ii).

5.2. It shall be relevant to peruse Sections 36(1)(iii) as well as 43(1) of the Act which read as under:

"... (iii) the amount of the interest paid in respect of capital borrowed for the purposes of the business or profession. Explanation.-Recurring subscriptions paid periodically by shareholders, or subscribers in Mutual Benefit Societies which fulfil such conditions as may be prescribed, shall be deemed to be capital borrowed within the meaning of this clause;" "Section 43(1) in The Income-Tax Act, 1995(1) "actual cost" means the actual cost of the assets to the assessee, reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by any other person or authority:

Provided that where the actual cost of an asset, being a motor car which is acquired by the assessee after the 31st day of March, 1967, 2 but before the 1st day of March, 1975,] and is used otherwise than in a business of running it on hire for tourists, exceeds twenty-five thousand rupees, the excess of the actual cost over such amount shall be ignored, and the actual cost thereof shall be taken to be twenty-five thousand rupees.]

Explanation 1-Where an asset is used in the business after it ceases to be used for scientific research related to that business and a deduction has to be made under clause (ii) of subsection (1)] of section 32 in respect of that asset, the actual cost of the asset to the assessee shall be the actual cost to the assessee as reduced by the amount of any deduction allowed under clause (iv) of subsection (1) of section 35 or under any corresponding provision of the Indian Income-tax Act, 1922 (11 of 1922).

Explanation 2.-Where an asset is acquired by the assessee by way of gift or inheritance, the actual cost of the asset to the assessee shall be the actual cost to the previous owner, as reduced by-

(a) the amount of depreciation actually allowed under this Act and the corresponding provisions of the Indian Income-tax Act, 1922 (11 of 1922), in respect of any previous year relevant to the assessment year commencing before the 1st day of April, 1988; and

(b) the amount of depreciation that would have been allowable to the assessee for any assessment year commencing on or after-the 1st day of April, 1988, as if the asset was the only asset in the relevant block of assets.]

Explanation 3.-Where, before the date of acquisition by the assessee, the assets were at any time used by any other person for the purposes of his business or profession and the Assessing] Officer is satisfied that the main purpose of the transfer of such assets, directly or indirectly to the assessee, was the reduction of a liability to income tax (by claiming depreciation with reference to an enhanced cost), the actual cost to the assessee shall be such an amount as the

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Assessing] Officer may, with the previous approval of the Deputy] Commissioner, determine having regard to all the circumstances of the case. Prior to the substitution, Explanation 2 read as under:" Explanation 2.-Where an asset is acquired by the assessee by way of gift or inheritance, the actual cost of the asset to the assessee shall be the written down value thereof as in the case of the previous owner for the previous year in which the asset is so acquired or the market value thereof on the date of such acquisition, which is the less.

"Explanation 4.-Where any asset which had once belonged to the assessee and had been used by him for the purposes of his business or profession and thereafter ceased to be his property by reason of transfer or otherwise, is re-acquired by him, the actual cost to the assessee shall be-

(i) the actual cost to him when he first acquired the asset as reduced by-(a) the amount of depreciation actually allowed to him under this Act or under the corresponding provisions of the Indian Income-tax Act, 1922 (11 of 1922), in respect of any previous year relevant to the assessment year commencing before the 1st day of April, 1988; and (b) the amount of depreciation that would have been allowable to the assessee for any assessment year commencing on or after the 1st day of April, 1988, as if the asset was the only asset in the relevant block of assets; or

(ii) the actual price for which the asset is reacquired by him, whichever is less.]

Explanation 5.-Where a building previously the property of the assessee is brought into use for the purpose of the business or profession after the 28th day of February, 1946, the actual cost to the assessee shall be the actual cost of the building to the assessee, as reduced by an amount equal to the depreciation calculated at the rate in force on that date that would have been allowable had the building been used for the aforesaid purposes since the date of its acquisition by the assessee.

Explanation 6.-When any capital asset is transferred by a holding company to its subsidiary company or by a subsidiary company to its holding company, then, if the conditions of clause (iv) or, as the case may be, of clause (v) of section 47 are satisfied, the actual cost of the transferred capital asset to the transferee-company shall be taken to be the same as it would have been if the transferor company had continued to hold the capital asset for the purposes of its business.]

Explanation 7.-Where, in a scheme of amalgamation, any capital asset is transferred by the amalgamating company to the amalgamated

Explanation 8.-For the removal of doubts, it is hereby declared that where any amount is paid or is payable as interest in connection with the acquisition of an asset, so much of such amount as is relatable to any period after such asset is first put to use shall not be included, and shall be deemed never to have been included, in the actual cost of such asset;]"

6. Learned advocates on behalf of the Department are not in a position to

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dispute the above and are not in a position to show and/or point out any decision taking a contrary view as applicable to the facts pleaded and proved in these appeals.

7. Having heard learned Counsel appearing on behalf of the Department and learned advocate appearing on behalf of the assessee and the questions posed for consideration before this Court reproduced hereinabove and considering the decision of the Hon''ble Supreme Court in the case of Core Health Care Ltd. (Supra), the questions which are raised in the present appeals are required to be answered in favour of the assessees as the facts are akin in these appeals and the said decision will inure to the benefit of the assessees. We are not giving further elaborate reasons for the same as in the case of Core Health Care Ltd. (Supra) it is held by the Hon''ble Supreme Court that section 36(1)(ii) of the Act makes no distinction between money borrowed to acquire a capital asset or a revenue asset and that all that the section requires is that that the assessee must borrow capital and the purpose of borrowing must be for business which is carried on by the assessee in the year of account.

8. In view of the above, the questions raised for consideration in the present appeals are answered in the affirmative i.e. in favour of the assessees and against the revenue. We hold that the Tribunal was justified in deleting the disallowance being interest on borrowings payable by the assessee holding that the amount was revenue expenditure allowable u/s. 36(1)(iii) of the IT Act 1961 and further in allowing the claim of the assessee for the deduction of the said amount u/s. 36(1)(iii) of the Act, when the interest attributable till the asset is put to use for the first time is required to be included in the actual cost as per Section 43 of the Act. Consequently, the impugned orders passed by the ITAT are confirmed. Hence, the present Tax Appeals are dismissed.

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