IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1206 OF 2008

Commissioner of Income Tax-3, Mumbai … Appellant

v/s

M/s.Fitwell Real Estate Pvt. Ltd. … Respondent

Mr.P. C. Chhotaray for the appellant.

Mr.Atul K. Jasani for the respondent.

CORAM: M.S. SANKLECHA &
N.M. JAMDAR, JJ.

DATED : 22ND JULY, 2015

P.C.:

This appeal by the revenue challenges the order dated 18 July 2007 passed by the Income Tax Appellate Tribunal (the Tribunal). The Assessment Year involved is 1998-99.

2 This appeal by the revenue was dismissed on 21 October 2008 for default of appearance on the part of the revenue. The appellant took out a notice of motion seeking recalling of the order dated 21 October 2008 dismissing the appeal for default. Thereafter, the revenue did not move to have the matter urgently circulated. The above notice of motion taken out by the revenue

came up for hearing on 17 July 2015. At which time we allowed the notice of motion and placed the appeal for admission. It is in the above circumstances that the appeal of 2008 has come up for admission in 2015.

3 The appellant revenue has raised the following question of law for our consideration :-

"Whether on the facts and in the circumstances of the case the Tribunal was justified in law in confirming the order of the Commissioner of Income Tax (Appeals) in directing to allow interest on borrowed capital amounting to Rs.18.37 lacs as allowable under Section 36(1)(iii) of the Act ?"

4 The respondent-assessee carries on business as a Real Estate Developer and also as a Real Estate Agent. The Assessing Officer disallowed the interest paid by the respondent-assessee amounting to Rs.18.37 lacs holding the same to be non-business expenditure. In appeal, the Commissioner of Income Tax (Appeals) deleted the same after recording a finding that the funds were borrowed for the purpose of business. In particular, it held that the appellant had borrowed capital which was used for the purpose of business. The borrowed funds were used in order to repay the loans already taken from the Directors and were also utilized for other business purpose. Under the circumstances, the claim of the respondent for deduction under Section 36(1)(iii) of the Act was allowed.

5 The aforesaid finding of fact was confirmed by the Tribunal in the impugned order by *inter alia* upholding the finding of the Commissioner of Income Tax (Appeals).

6 In the above facts, it is submitted on behalf of the respondent assessee that the issued stands concluded in its favour by the decision of the Apex Court in the case of ***Dy. C.I.T. v/s Core Health Club Ltd.***, reported in ***(2008) 298 ITR 194 (SC).*** Thus, the appeal be dismissed.

7 However, Mr. Chhotaray, learned counsel appearing for the revenue does not agree. It is submitted that the respondent-assessee was carrying on business of construction adopting the project completion method. Therefore, this interest if at all could be deducted at the time when the project is completed. It is further submitted by Mr.Chhotaray that there was no substantial business was carried out as an agent by the respondent-assessee and in the facts and circumstances, the findings of the authorities showing that the amount has been utilized for the purposes of business is not justified. It is submitted that, in view of the judgment of the Apex Court in the case of ***Challapalli Sugars Ltd. v/s Commissioner of Income Tax (Central)***, reported in ***98 ITR 167,*** this amount of interest cannot be allowed as expenditure as the business had not commenced.

8 We find that the submission made by Mr.Chhotaray on behalf of the revenue would require investigation into facts when these points were not urged by the revenue before the Tribunal as is evident from the grounds of appeal filed by the revenue before the Tribunal, which read as under :

"1(a). On the facts and circumstances of the case and in law, the learned C.I.T.(A) erred in deleting the disallowance of interest, amounting to ₹18,37,245/-.

1(b). On the facts and circumstances of the case and in law, the learned C.I.T. (A) erred in not appreciating that the assessee was following Project Completion Method of accounting and accordingly no expenses including interest expenses can be claimed till the project was completed. Since during the year the project was incomplete, the interest required to be debited to the project account."

9 From the above it is noticed that it was not the case of the revenue that the finding of the Commissioner of Income Tax (Appeals) that the borrowed money was utilized for the purpose of business, is not correct and/or perverse. Similarly, in the present appeal challenging the impugned order of the Tribunal no ground challenging the factual finding of the activities has been urged in the appeal memo.

10 In view of the above, it is not open to the revenue to urge

investigation into facts which were not disputed by it before the Tribunal or even when the memo of appeal filed in 2008 in this Court. The jurisdiction under Section 260A of the Act is to entertain substantial questions of law arising in the case. In the present facts, both the Commissioner of Income Tax (Appeals) as well as the Tribunal, have reached a finding of fact that the interest was paid on amounts borrowed and used for the purposes of business. The issue stands covered by virtue of a decision of the Apex Court in the case of ***Core Health Club Ltd.***, (supra). The decision cited by Mr.Chhotaray in the case of ***Challapalli Sugars Ltd.*** (supra) would have no application to the present facts. In this case there is concurrent finding of fact that the amounts have been utilized in the carrying on business and one of the business carried out by the respondent-assessee was that of a Estate Agent.

11 In the above circumstances, no substantial question of law arises for our consideration. Accordingly, appeal is dismissed. No order as to costs.

(N. M. JAMDAR, J.) ***(M.S. SANKLECHA, J.)***