IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA No.4 of 2009
Date of decision: 17.9.2015

Commissioner of Income Tax, Faridabad

......Appellant

M/s Nuchem Limited

.....Respondent

CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE RAMENDRA JAIN

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr. Tajender K.Joshi, Advocate for the appellant.

Mr. P. C.Goyal, Advocate for the assessee.

Ajay Kumar Mittal, J.

1. This order shall dispose of ITA Nos.4 of 2009 and 898 of 2008 as according to the learned counsel for the parties, the issues involved in both the appeals are identical. However, the facts are being extracted from ITA No.4 of 2009.

2. ITA No.4 of 2009 has been preferred by the revenue under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 22.2.2008, Annexure A.III passed by the Income Tax Appellate Tribunal, Delhi Bench 'B' New Delhi (in short, "the Tribunal) in ITA No.3237/DEL/1996 for the assessment year 1992-93, claiming following substantial questions of law:-

"1. Whether on the facts and in the circumstances of the case, the Hon'ble ITAT is right in law in confirming the order of the learned CIT(A) deleting the addition of ₹ 11,61,00,407/- made by the Assessing Officer on account of disallowance of depreciation of MDF Division, Tohana disregarding the serious defects pointed out by the Assessing Officer in the evidence furnished by the assessee to prove that the commercial production had started on 30.3.1992?

2. Whether on the facts and in the circumstances of the case, the Hon'ble ITAT is right in law in confirming the order of the learned CIT(A) deleting the addition of ₹ 1,13,53,888/- made by the Assessing Officer on account of expenses in respect of MDF Division, Tohana disregarding the serious defects pointed out by the Assessing Officer in the evidence furnished by the assessee to prove that the commercial production had started on 30.3.1992?

3. Whether on the facts and in the circumstances of the case, the Hon'ble ITAT is right in law in holding that the revenue had not filed appeal before the Hon'ble ITAT on the same point in the assessment year 1988-89 and therefore accepting the findings of the learned CIT(A) for the said year, disregarding the settled law that each assessment year is a separate year?

4. Whether on the facts and in the circumstances of the case, the Hon'ble ITAT is right in law in upholding the order of the learned CIT(A) deleting the addition made by the Assessing Officer on account of interest on interest free loans amounting to ₹ 4,99,196/- given to sister concern or persons covered under section 40A(2) of the Income Tax Act in contradiction with the judgment of jurisdictional High Court in CIT, Ludhiana vs. Abhishek Industries Limited, 286 ITR 1 (P&H)?"

In ITA No.898 of 2008, the revenue has claimed the following substantial questions of law:-

> "1. Whether on the facts and in the circumstances of the case, the Hon'ble ITAT is right in law in confirming the learned CIT (A)'s order deleting the addition of ₹ 12,95,645/- made by the Assessing Officer on account of disallowance of huge expenses alleged to be incurred for commercial production, disregarding the serious defects pointed out by the Assessing Officer in the evidence furnished by the assessee to prove that the commercial production had started on 30.3.1992?
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> 2. Whether on the facts and in the circumstances of the case, the Hon'ble ITAT is right in law in reversing the order of the learned CIT(A) sustaining the addition made by the Assessing Officer on account of interest on interest free loans given to sister concern or persons covered under Section 40A(2) of the Income Tax Act in contradiction with the judgment of jurisdictional High Court in CIT, Ludhiana vs. Abhishek Industries Limited, 286 ITR 1 (P&H)?"

3. A few facts relevant for the decision of the controversy involved as narrated in ITA No.4 of 2009 may be noticed. The assessee company filed its return on 31.12.1992 declaring loss of ₹ 12,58,75,530/- which was revised to ₹ 12,54,22,870/- vide revised return filed on 31.3.1993. The assessee filed second revised return on 21.12.1993 declaring loss of ₹ 12,21,73,800/- and third revised return on 22.12.1993 declaring loss of ₹12,10,86,890/-. Assessment under section 143(3) of the Act was completed on 30.3.1995, Annexure A.I at total income of ₹ 1,35,75,290/-. The Assessing Officer inter alia held that the commercial production in the MDF Division, Tohana had not started within the period relevant to the assessment year and, therefore, all expenses claimed under this division were disallowed. The proportionate expenses for two days debited under

various heads in respect of this division were also capitalized. Accordingly, an amount of ₹ 11,61,00,407/- was disallowed on account of depreciation of MDF Division, Tohana and ₹ 1,13,53,888/- (₹ 1,00,58,243/- on account of deferred revenue expenses plus ₹ 12,95,645/- as proportionate expenses for two days of the said division) on account of expenses related to MDF Division, Tohana. Besides, an amount of ₹ 11,93,328/- was disallowed on account of interest free loans to persons specified under Section 40A(2)(b) of the Act. The Commissioner of Income Tax (Appeals) [CIT(A)] vide order dated 31.1.1996, Annexure A.II accepted the assessee's appeal in part. Both the assessee and the department filed cross appeals before the Tribunal. The Tribunal vide combined order dated 22.2.2008, Annexure A.III allowed both the appeals in part. The issues on which the Tribunal dismissed the department's appeal are as under:-

i) The Assessing Officer disallowed ₹ 11,61,00,407/- on account of depreciation of MDF Division, Tohana by holding that no business was done by the MDF Division. On appeal, the CIT(A) directed the Assessing Officer to allow the depreciation after holding that the production was started on 30.3.1992 in the MDF Division. The Tribunal dismissed the appeal of the revenue and upheld the order of the CIT(A) observing that the discrepancies pointed out by the Assessing Officer stood explained by the assessee and the mistake was clerical one.

ii) The Assessing Officer disallowed ₹ 1,13,53,888/- (₹ 1,00,58,243/- on account of deferred revenue expenditure + ₹ 72,95,645/- as proportionate expenses for two days) on account of expenses related to MDF Division by holding that no business was done by the MDF Division during the year under consideration. The CIT(A) directed to allow the expenses on proportionate basis for the period from January 1992 to March 1992. The Tribunal directed the Assessing Officer to allow actual expenses of two days in respect of MDF Division after the commencement of commercial production as deduction after verification.

iii)The Assessing Officer made disallowance of ₹ 11,93,328/- on account of interest on interest free loans given inter alia to M/s Southern Synthetics Limited which was worked out at ₹ 4,99,196/-. On appeal, the CIT(A) allowed relief in respect of loan given to M/s Southern Synthetics Limited which worked out at ₹ 4,99,196/-. The department filed further appeal before the Tribunal which was dismissed.

Hence the instant appeals by the revenue.

4. We have heard learned counsel for the parties.

5. With regard to question No.3, the same is general in nature and calls for no consideration because the matter has been adjudicated by us on merits.

6. As regards question Nos.1 and 2, the Assessing Officer disallowed ₹ 11,61,00,407/- on account of depreciation of MDF Division, Tohana and ₹ 1,13,53,888/- as expenses in respect of MDF Division, Tohana holding that no business was done by the MDF Division as the commercial production had not started within the period relevant to the assessment year. The Assessing Officer recorded as under:-

> "8. As per director, it was alleged that commercial production was started in MDF Division on 30.3.1992 and this division was formerly inaugurated on 12.11.1992 by Shri H.R. Bhardwaj, the Minister of state for Planning and Programme Ministry, Government of India. With the original return of income the assessee company filed certificate for commencement of commercial production form Shri

V.S.Talwar, Chartered Accountant, vide certificate dated 10.12.1992. The above certificate was given on the basis of invoices, bill of Rishi Road Lines Haryana), Gate Pass for removal of goods under excise rules and material dispatched and daily production slip. From the perusal of these documents the following defects have been noted:-

i) The total weight as per invoice of 160 boards is 4.320 tonnes whereas as per Rishi Road Lines (Haryana) goods consignment note, the weight is 46600 kgs. and as per audit report is 4.7 tonnes.

ii) M/s Rishi Road Lines Bill No.1001 dated 31.3.1992 reveals that the freight has not been stated to be billed at Tohana. This indicates that the goods consignment note has been prepared some where else than Tohana on 31.3.1992. Whether the goods have been actually transported on 31.3.1992 is very much doubtful.

Iii) As per gate pass serial No.0001, the assessee company was supposed to give serial number and date of debit entry of duty in RG 23-A-II. The serial number has been given as 14 and date has been given as 31st March, 1992. As this related to the first production, the serial number in RG 23A-II should have been one and not 14.

iv) In the daily production slip serial No.1 dated 30.3.1992 RG-1, page number has not been mentioned.

v) There is no documentary evidence for the payment of excise duty. Moreover, if the excise duty is payable as on 31.3.1992 the same is not appearing in the details of payments to be made before the filing of the return as per the provisions of section 43B of the IT Act, 1961.

vi) There is no mention on the bill of the Rishi Road Lines, Haryana of any telephone number. Therefore, it is doubtful whether the transporter has any office at Tohana.

vii) as per the details of the travelling, none of the directors seems to be present on the day of trial production/first dispatch being auspicious occasion for the company concerned.

viii) there are no separate details of expenses under various heads but proportionate expenses for two days has been claimed and the balance has been capitalized. From the details available on record, there is no indication that any expense has been incurred or function has been held for the commencement of the trial production/production for a project which is undergoing since 1988.

8.1 Considering the above facts, I am of the firm opinion that commercial production had not started within the period relevant to this assessment year. As such all the expenses claimed under this division are disallowed. The proportionate expenses for two days debited under various heads will also be capitalized accordingly."

7. We proceed to examine Question Nos.(1) and (2) together as both are inter-mixed and dependent upon the fact as to when the commercial production was commenced. The CIT(A) accepted the assessee's appeal and directed the Assessing officer to allow depreciation and also allow the expenses on proportionate basis for the period from January 1992 to March 1992 and also actual expenses of two days after holding that the production was started on 30.3.1992 in the MDF Division. The Tribunal concurred with the findings recorded by the CIT(A). It was recorded as under:-

"57. The second ground is that the CIT(Appeals) erred in allowing depreciation of ₹ 11,61,00,407/- in respect of the MDF Division, Tohana. The ground on which depreciation was denied was that the assessee did not commence any commercial production in the relevant accounting year in this division. It may be noted that it was on this very same ground that the Assessing Officer had disallowed the proportionate expenses of ₹ 12,95,645/- for two days namely 30th and 31st March 1992. This disallowance formed the subject matter of the assessee's ground No.3. Similarly, for this reason, inter alia, the Assessing Officer had also disallowed the expenditure of ₹ 1,00,58,243/-. In respect of both these grounds, the CIT(Appeals) had accepted the assessee's claim that the commercial production had started on 30.3.1992. However, it is while dealing with the assessee's claim of depreciation in respect of the assets of the MDF Division that the CIT(Appeals) has discussed the issue quite elaborately in paragraph 6 from pages 9 to 20 of his order. The Assessing Officer does not appear to have discussed this issue separately or in detail. In the computation of the income, however the assessee's claim for depreciation has not been allowed. We may however take it that the Assessing Officer has discussed this issue impliedly in para 8 of his order where he has held that commercial production did not start in the year of account and that all the expenses claimed under the MDF Division are disallowed. Apparently, this included the claim of depreciation also. We had already noticed (while discussing ground No.3 of the assessee's appeal) that the Assessing Officer had given eight reasons in the assessment order for not allowing the expenses of the MDF Division including depreciation. These reasons have been dealt with elaborately by the CIT(Appeals). To cut short a long matter, the Assessing Officer had pointed out some discrepancies in the transportation bills to show that the assessee could not have started commercial production as claimed. He has also pointed out some discrepancies in the R.G.registers maintained under the Central Excise Rules. The explanation of the assessee with regard to these two matters has been noted by the CIT(Appeals) in paragraph 6.3 of his order. After going through the same minutely, the CIT(Appeals) has held as under:-

a) As regards the transportation of the goods though the Assessing Officer has pointed out two discrepancies in the weight of the goods, the assessee was able to tally the number of boards which tallied. The weight given by the transporter was only an approximation;

b) The Central Excise department has not raised any doubt about the assessee's claim on the point of production. Even the assessee's claim for modvat credit was allowed;

c) The photo copies of the receipt of payment of octroi had been filed;

d) The transporter, namely, Rishi Roadline is still existing at Hisar Road, Tohana and Assessing Officer could have made enquiries from that company;

e) From the material on record, it is clear that production was commenced on 30.3.1992 and some goods were sent to the dealer at Jalandhar on 31.3.1992.

On the basis of the above findings, the CIT(Appeals) has held that the assessee is entitled to the depreciation.

58. On a careful consideration of the matter, we are of the view that no strong grounds have been made out to disturb the findings of the CIT(A). The CIT(Appeals) has elaborately referred to the assessee's explanation for the alleged discrepancies in the transportation records and the central excise registers but we find that these discrepancies have been satisfactorily explained by the assessee and rightly accepted by the CIT(A). For instance, the assessee explained the discrepancy in the weight of the boards transported by saying that the weight mentioned in the consignment note of the transporter, Rishi Headlines, was 46,600 Kgs. Which is the same mentioned in the audit report where the weight is mentioned as 4.7 tons. In the invoice, the weight is not mentioned but only the number of boards was mentioned as 160. thus, there is no discrepancy as alleged by the assessing Officer. As regards the RG registers maintained by the assessee, it was

pointed out that the number of boards mentioned in R.G.register tallied with the number mentioned in the invoice. It was further pointed out that so far as the alleged discrepancy in the serial number in R.G.I register is concerned, the assessee has been purchasing raw material since February 1992 and since the goods were excisable it was entitled to modvat credit and therefore entries were made in RG 23A Part II. In this register sl.nos.1 to 13 relate to purchase of raw material from different divisions of the assessee on which MDF Division was eligible for the credit. The entries pertaining to serial nos. 1 to 13 relate to 4.2.1992 to 28.2.1992. On these purchases, the assessee was given MODVAT credit. The assessee was to pay excise duty of ₹ 5685/- which was mentioned on the debit side of the register in serial no. 14. thus, there is no discrepancy in the R.G. registers. The only mistake committed by the assessee which according to it, was only a clerical mistake, was of not mentioning the page number of RG 1 register. In this way, the assessee has sought to clarify the alleged discrepancies pointed doubt by the Assessing Officer in the assessment order, the assessee had also raised a point before the CIT(Appeals) that no opportunity was given by the Assessing Officer to explain the defects. This was also taken note of by the CIT(Appeals) while holding in favour of the assessee. In this background, the objection of the learned CIT DR that the CIT (Appeals) has not recorded clear findings does not appear to us to be accurate though there does appear to be a little force therein. However, if we read the submissions of the assessee before the CIT(Appeals) and the way in which he has proceeded to record them and deal with them and in the light of the examination of the evidence adduced by the assessee, it seems to us that the essential finding recorded by him was that the commercial production did start on 30.3.1992 and that the objections of the Assessing Officer, though may afford a starting point for further enquiry, are not conclusive of the issue against the assessee. We are therefore satisfied that there is no serious factual or legal infirmity in the decision of the CIT(Appeals) which is hereby affirmed and the ground is dismissed."

Nothing could be shown by learned counsel for the revenue that the concurrent finding of fact recorded by CIT(A) and the Tribunal that commercial production was started in MDF Division, Tohana on 30.3.1992 was erroneous or perverse. It is a pure finding of fact based on appreciation of material and evidence on record in which no perversity could be shown by learned counsel for the revenue. Accordingly, Question Nos. 1 and 2 are answered against the revenue.

8. As regards the question qua addition on account of interest on interest free loans to sister concern or persons covered under section 40A(2) of the Act, which is common in both the appeals (i.e. Question No.4 in ITA No.4 of 2009 and Question No.2 in ITA No.898 of 2008), it may be noticed that the Assessing Officer added ₹ 11,93,328/- as notional interest on interest free advances given by the assessee. The assessee contended on appeal before the CIT(A) that the loans were taken in the earlier years and thus they could not be said to have been diverted for non business purposes during the present year and no notional interest could be added. The CIT (A) upheld the addition to the extent of ₹ 6,94,132/- and allowed relief of ₹ 4,99,196/- on account of interest free loans given to M/s Southern Synthetics Limited. The revenue and the assessee filed appeals to the Tribunal. The appeal of the revenue was dismissed on this ground whereas on the appeal of the assessee, the Tribunal further deleted the interest disallowance referable to the amount advanced to Novica investments since no nexus between the borrowed funds and the amounts advanced to the above said concern without interest was proved by the department.

However, in the absence of any evidence on behalf of the assessee, the disallowance in respect of the other four concerns was sustained. The relevant findings recorded by the Tribunal read thus:-

> "7. Ground No.6 is directed against the disallowance of interest relating to loans. The Assessing Officer added ₹ 10,57,660/- as notional interest on interest free advances given by the assessee. On appeal, the CIT(Appeals) upheld the addition to the extent of ₹ 6,03,234/-. He has discussed this issue in paragraph 10 of his order. The contention of the assessee before us is that all the loans were taken in earlier years and therefore, they cannot be said to have been diverted for non business purposes during the present year and therefore, no notional interest can be added. Our attention is drawn to the judgment of the Karnataka High Court in CIT vs. Sridevi Enterprises 192 ITR 165 and the judgment of the Supreme Court in SA Builders 288 ITR 1. On the other hand, the learned CIT DR drew our attention to the judgment of the Hon'ble Delhi High Court in CIT vs. MGF 254 ITR 449 in support of the disallowance.
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> 8. We have carefully considered the facts and the rival contentions. As per the details given in page 601 of the paper book, the parties to whom the assessee advanced interest free loans are M/s Novica Investments, Nuchem Investments Pvt. Limited, M/s SCDC Katha Industries Pvt. Limited, M/s RCA Leasing Pvt. Limited and M/s Ratan Chand Harjas Rai. The total amount of interest free advances was ₹ 66,10,378/-. According to the Assessing Officer, the assessee has charged interest from some of the debtors and not from all of them. According to him, the assessee had borrowed monies on interest and the interest was claimed as deduction and therefore the assessee cannot advance interest free monies. He estimated the interest at 16% on the amount advanced to the above concerns, which came to ₹ 10,57,660/-. Before the CIT(Appeals), the assessee submitted that it had its own funds from share capital reserves and surpluses which stood at ₹ 20,50,29,858/- as on 31.3.1991 and that

interest free advances came out of the reserves and surpluses and not from interest bearing funds. As regards the amounts advanced to Southern Synthetics Limited, it was stated that the principal itself was doubtful of recovery and therefore, no interest can be added.

9. The CIT (Appeals) accepted the assessee's submission with regard to Southern Synthetics Limited but with regard to give parties named in the preceding paragraph, he did not accept the assessee's submission that the Assessing Officer could not prove any nexus between the borrowed funds and the amounts advanced to these concerns without interest. He noted that the assessee himself was unable to explain the sources from which it advanced the monies to these five concerns. As regards the contention based on the capital and reserves, the CIT(Appeals) found that they were already invested in the fixed assets and were therefore, not available to the assessee for making interest free advances. He noted that the assessee's interest liability was ₹ 4,64,33,153/- which was quite substantial which indicated that surplus funds were not available to the assessee for making interest free advances. He therefore, agreed with the Assessing Officer in principle but held that the disallowance of interest will be restricted to amount advanced as interest free to the five concerns mentioned earlier.

10. On a careful consideration of the matter, we find that so far as Novica Investment is concerned, the Tribunal has already accepted the assessee's contention that no nexus was proved by the department in ITA No.7204/Del/92 for the assessment year 1988-89 (paragraphs 48 to 51). Therefore, the interest disallowance referable to amount advanced to Novica Investments is deleted. However, with regard to the other four concerns, namely, Nuchem Investments Pvt. Limited, M/s SCDC Katha Industries Pvt. Limited, M/s RCA Leasing Pvt. Limited and M/s Ratan Chand Harjas Rai, we are unable to delete the disallowance in the absence of any evidence adduced on behalf of the assessee to support the ground. The assessee was not able to displace the finding of the CIT(Appeals) that the share capital and reserves having been invested in fixed

assets were not available to the assessee for being advanced interest free to these four concerns. The availability of interest free funds including share capital and reserves,is a matter to be proved on the basis of the facts and figures and not theoretically or in the abstract. There is no material placed before us on behalf of the assessee to show that interest free funds in any form were available to the assessee to be advanced to these four concerns. The assessee's submission based on the decision of the Supreme Court in S.A.Builders (supra) cannot be accepted because there is no evidence to show that the amounts were advanced for the purposes of the assessee's business. Further, this is a new plea taken before us which is required to be proved by evidence. For these reasons, we sustain the disallowance of the interest in respect of the interest free advances given to the four concerns named above. The ground is thus partly allowed. The Assessing Officer will rework the disallowance accordingly."

Nothing could be pointed out that the aforesaid finding of fact recorded by the CIT(A) and the Tribunal was erroneous or perverse in any manner. Thus, question No.4 in ITA No.4 of 2009 and question No.2 in ITA No.898 of 2008 is answered against the revenue.

9. Now adverting to Question No.1 in ITA No.898 of 2008 relating to expenses of ₹ 12,95,645/-, we find that the Tribunal had only remitted the matter back to the Assessing Officer to allow actual expenses incurred by the assessee in the MDF Division after the commencement of the commercial production on 30.3.1992 as deduction with the following observations:-

"38. We have carefully considered the rival contentions. There are two main disputes. The first is that whether commercial production has started on 30th March 1992 and the second is that if that is so, whether the method of claiming expenses adopted by the assessee is right. The Assessing Officer has raised several points. We have gone through them carefully. The goods manufactured by the assessee are excisable goods. The assessee has maintained RG 23A-II and other registers under the excise rules. These have not been found to be defective in any manner by the excise authorities. Further, the assessee has shown the sales of ₹ 78,087/-. There is no clinching evidence to show that the sales figures are fictitious and the sales were infact not effected. On this basis, it is held that the commercial production actually started on 30th March 1992. As regards the question whether the assessee's method of claiming the manufacturing expenses is correct or not, it is seen that the assessee has divided the total expenses by the number of days to give the average expenditure per day and multiplied the average by "2" so as to claim expenditure for the last two days of the accounting year. It is not the case of the Assessing Officer that the expenditure claimed is not genuine. Once the commercial production has started, the expenditure incurred thereafter has to be allowed as a deduction irrespective of the quantum thereof. However, we are unable to approve of the method followed by the assessee in claiming the expenditure. It is only the actual expenditure incurred after commencement of the production that can be claimed as deduction. There is no room for estimating the same especially where accounts are maintained and audited. The direction of he CIT(Appeals) to the Assessing Officer to estimate the expenditure on a certain basis cannot also be approved. While therefore upholding in principle the assessee's claim for deduction of the expenses for the two days, we set aside the direction of the CIT(Appeals) to the Assessing Officer and direct the Assessing Officer to allow only the actual expenses incurred by the assessee in MDF division after the commencement of the commercial production as deduction. For this purpose, he may call for the books of account and other evidence from the assessee and decide the

> quantum of expenses to be allowed in accordance with law and after giving adequate opportunity of being heard to the assesee. With these directions, we restore the issue to the file of the Assessing Officer. Thus, the ground taken by the assessee as well as by the department are deemed to be allowed for statistical purposes."

Learned counsel for the revenue was unable to establish that the direction of the Tribunal is erroneous or is legally unsustainable. Accordingly, we do not find any justification to interfere in the said conclusion.

10. In view of the above, the substantial questions of law as claimed by the revenue are answered against the revenue and in favour of the assessee. The appeals stand dismissed.

(Ajay Kumar Mittal)
Judge

September 17, 2015 **(Ramendra Jain)**
'gs' **Judge**