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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.2402 OF 2013

Commissioner of Income Tax 10 ..Appellant
Versus
Infrastructure Leasing & Financial
Services Ltd. ..Respondent

....

Mr. Arvind Pinto for the Appellant.
Mr. Sameer Dalal for the Respondent.

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CORAM: M. S. SANKLECHA &
A. K. MENON, JJ.

DATE : 21ST MARCH, 2016

P.C.:

1. This Appeal filed by the Revenue under Section 260A of the Income Tax Act, 1961 (the "Act") takes exception of the order dated 10th July, 2013 passed by the Income Tax Appellate Tribunal ("Tribunal"). The impugned order dated 10th July, 2013 relates to Assessment Year 1997-98.

2. The Revenue has urged the following questions of law for our consideration:-

> "(1) Whether on the facts and circumstances of the case and in law, the Tribunal was correct in allowing as revenue expenditure fees paid to Clubs, whereas the said expenditure

cannot said to be wholly and exclusively for the purposes of business?

(2) Whether on the facts and in the circumstances of the case and in law, the Tribunal was correct in upholding the deductibility of interest payments ignoring the fact that these payments were capitalized in the books of the company?

(3) Whether on the facts and in the circumstances of the case and in law, the Tribunal was correct in deciding that accessories to a windmill also qualify for 100% depreciation whereas most of these items are not related to the functioning of the windmill?"

3. **Regarding Question no.1**

(i) Mr. Arvind Pinto, the learned counsel for the Revenue very fairly states that the issue of membership fees paid to the Club being allowed as Revenue expenditure stands has concluded against the Revenue and in favour of the Respondent-Assessee by the decision of this Court in ***Otis Elevator Co.(India) Ltd. V/s. Commissioner of Income Tax (1992) 195 ITR 682.***

(ii) In the above view, question no.1 as formulated does not give rise to any substantial question of law. Thus not entertained.

4. Regarding Question no.2

(a) The Respondent-Assessee in its return of Income had claimed interest expenditure of Rs.10.85 crores as deduction under Section 36(1)(iii) of the Act. This was interest expenditure incurred on purchase/acquisition of capital asset. The Assessing Officer disallowed the interest of Rs.10.85 crores paid on borrowings for purchase of capital asset as according to him the interest paid went into the computation of cost of capital asset.

(b) Being aggrieved, the Respondent-Assessee preferred an Appeal to the CIT(A). In Appeal, the addition of Rs.10.85 crores made by the Assessing Officer on account of interest payment for purchase of capital asset was deleted. Appeal of the Respondent-Assessee was allowed.

(c) Being aggrieved, the Appellant-Revenue preferred an Appeal to the Tribunal. In Appeal the Tribunal by its impugned order dismissed the Appellant-Revenue's Appeal. The impugned order of the Tribunal relied upon its orders passed for A.Ys. 1993-94 and 1994-95 upholding the claim for deduction of interest paid for acquisition of capital asset under Section 36(1)(iii) of the Act.

(d) Mr. Pinto, learned counsel for the Revenue is unable to show any distinguishing features in the present case which would warrant taking a view different from one taken by the Tribunal in its orders for the A.Ys.1993-94 and 1994-95. Moreover we find that the order of the Tribunal for the A.Y. 1994-95 inter alia rely on the decision of this Court in ***Calico Dyeing and Printing Works V/s. CIT [1958] 34 ITR 265 and of the Apex Court in India Cement V/s. CIT 60 ITR 52.*** In the above cases it is held that the interest paid on borrowed capital is allowable as deduction and the purpose for which the borrowing is made was irrelevant while considering the allowing of interest expenditure as deduction under Section 36(1)(iii) of the Act.

(e) In any view, the proviso to Section 36(1)(iii) of the Act which prohibits claiming interest expenditure in respect of amounts borrowed for acquisition of capital assets till such time as it is first put to use has to be capitalized was introduced into the Act by Finance Act 2003 with effect from 1st April, 2004. We are concerned with assessment year 1997-98 i.e. much before the proviso to Section 36(1)(iii) of the Act was introduced. Thus there was no prohibition to claiming of interest paid on funds borrowed for acquisition/purchase of capital asset till such time it is first put to use in the subject assessment year.

(f) In the above view, the question of law as formulated being covered by the decision of this Court, no substantial question of law arises. Thus not entertained.

5. Regarding Question no.3

(a) The Respondent-Assessee had in its return of income claimed depreciation on windmills at 100%. The Assessing Officer allowed depreciation on windmills at 25%. On further appeal, the CIT(A) did not disturb the findings of the Assessing Officer.

(b) On further appeal by the Respondent-Assessee to the Tribunal, the impugned order of the Tribunal allowed the claim for depreciation at 100% in respect of windmill by relying upon a decision of its Co-ordinate Bench in MET Developers and Builders (Income Tax Appeal No.1705/Pn/2011) wherein on identical facts the claim for depreciation was allowed. Mr. Pinto, learned counsel for the Revenue is unable to point out and/or state whether any appeal from the decision of the Tribunal in MET Developers (supra) has been filed to this Court. Moreover no reason is forthcoming for not filing any appeal. Therefore this would conclude the issue in favour of the Respondent-Assessee.

(c) Besides we find that all the items i.e.(1) Temporary approach Road (2) Central Control Room/Store (3) 33 KV Transformer Yard (4) 33 KV Grrid

Line (5) Metering Yard (6) Vacuum Circuit Breakers (7) Addl. Meeting Yard and (8) Earth Pit, were found as fact by the Tribunal as being necessary for the setting up and running of the windmill.

(d) The Temporary approach Road is the one item on which Mr. Pinto states that no depreciation could be allowed. According to Mr. Dalal this claim has been allowed by the Tribunal as it would be necessary for setting up a windmill and would be included in the cost of the windmill. In fact the impugned order of the Tribunal recorded a finding of fact to the above effect. Further this Court on almost identical facts in CIT V/s. CTR Manufacturing Industries Ltd. (Income Tax Appeal No.2125 of 2013 rendered on 1st March, 2016) has dismissed the Revenue's Appeal from the order of the Tribunal allowing the claim for depreciation at the full rate on windmills. In the above view, the question as formulated does not give rise to any substantial question of law as it is essentially a finding of fact which is not shown to be perverse. Thus the question is not entertained.

6. Accordingly the Appeal is dismissed. No order as to costs.

(A. K. MENON, J.) **(M. S. SANKLECHA, J.)**

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