

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.03.2017

CORAM

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER

And

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

T.C.A.No.661 of 2008

The Commissioner of Income Tax,
Tamil Nadu – III, Chennai.

... Appellant

Vs.

M/s.Sathyam Infoway Ltd., Tidel Park,
No.4, Canal Bank Road, Chennai – 600 113.

... Respondent

Prayer: Appeal filed under Section 260-A of the Income Tax Act, 1961, against the order dated 22.08.2007 passed in I.T.A.No.1339/Mds/2003 by the Income Tax Appellate Tribunal, "C" Bench, Chennai.

For Appellant : Mr.J.Naresh Kumar
For Respondent : Mr.Vijaya Raghavan
for M/s.Subbaraya Aiyar

J U D G M E N T

(Judgment of the Court was delivered by RAJIV SHAKDHER,J.)

1. This is an appeal filed under Section 260 A of the Income Tax Act, 1961 (in short, the Act), against the judgement and order of the

Income Tax Appellate Tribunal, dated 22.08.2007.

2.This appeal was admitted on 22.07.2008, when, the following question of law, was framed for consideration, by this Court:

"Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in deleting the penalty of Rs.3,66,57,057/- levied under section 271 (1)(c) of the Income Tax Act, 1961, relates to the assessment year 1998-99, is valid?"

3.By virtue of the impugned judgement, the Tribunal has dismissed the appeal of the Revenue, against the order of the Commissioner of Income Tax (Appeals) [in short, CIT(A)], whereby, penalty imposed by the Deputy Commissioner of Income Tax, vide order dated 27.09.2002, in the sum of Rs.3,66,57,057/- was deleted.

3.1. A perusal of the penalty order dated 27.09.2002 would show that penalty was imposed on the Assessee, upon alleged failure to furnish true particulars in the return, filed under Section 139 of the Act.

4.The record shows that the Assessee had filed the return for

assessment year (in short, AY) 1998-99, on 27.11.1998, whereat, it had declared loss of Rs.10,12,37,470/-. This return was processed under Section 143(1) of the Act, on 27.09.1999.

4.1.Since, the Assessee's case was taken up for scrutiny, an assessment order under Section 143(3) of the Act was passed on 14.03.2001.

4.2.Via, the said assessment order, the loss returned by the Assessee in the sum of Rs.10,12,37,470/- was disallowed and interest received in the sum of Rs.34,96,979/- from short term deposits made over to financial institutions, was added to its total income, albeit, under the head "Income from other sources".

4.3. To be noted, the record also shows that the Assessee had raised moneys for its project, apparently, in the form of unsecured loans and via redeemable-non-convertible debentures. Evidently, since, funds so garnered, were not required immediately, the Assessee invested the same, as indicated above, in interest bearing short term deposits.

5.It is a common ground before us, that the Assessee preferred an appeal in so far as the addition was made by the Assessing Officer, with respect to the interest income.

5.1.Evidently, the CIT(A) vide order dated 27.02.2002,

confirmed the assessment order and the matter was not carried further by the Assessee, by way of an appeal.

6. The rationale given in the penalty order dated 27.09.2002 as to why penalty had to be imposed, briefly, is that the loss returned in the sum of Rs.10,12,37,470/-, which factored in the income from interest received on short term deposits, would not have come to light had the Assessee not been confronted with these aspects during the course of scrutiny. In the context of these two facets, the penalty order makes the following two fold observations :

6.1. First, that in the return filed, a loss in the sum of Rs.10,12,37,470/- was claimed, when, the Assessee had not commenced commercial operations during the relevant previous year. This aspect was sought to be buttressed by placing reliance on the fact that for the relevant period, a profit and loss account had not been prepared, and therefore, when, during scrutiny, a show cause notice was issued and explanation was sought, it was indicated by the Assessee that the claim had been made erroneously.

6.2. Second, in so far as the interest income from short term bank deposits was concerned, the Assessee had attempted to treat this income as business receipts, as against income from other sources, contrary to the well-stated legal position.

7. In so far as this aspect was concerned, the Assessee's stand was that, since, the interest income was inextricably linked with its business activity, it was entitled to treat the same as business receipt. As a matter of fact, the Assessee had set off interest payable on debentures, against interest received on short term deposits. Since, the amount payable by way of interest on debentures was more than what was received by way of interest on deposits, nothing could be offered to tax.

7.1. The Assessing Officer, however, had other thoughts, and therefore, relying upon the judgment of the Supreme Court in ***Tuticorin Alkalies, Chemicals and Fertilizers Limited, 227 ITR 172***, added the aforementioned interest income to the total income of the Assessee under Section 56 of the Act.

8. To be noted, the Assessee, both before the Assessing Officer and the CIT(A) had cited the judgments of the Supreme Court in ***CIT Vs. Bokara Steel Limited, 236 ITR 315*** and ***Godhra Electricity Co. Vs. CIT, 225 ITR 746***, to contend to the contrary, albeit, unsuccessfully.

9. The Deputy Commissioner of Income Tax, though, while passing the penalty order, in a sense re-examined the very same defence offered by the Assessee, during assessment proceeding and came to the conclusion that there was both concealment of particulars of income and inaccurate particulars of income had been furnished.

9.1. It was, specifically, concluded by the Deputy Commissioner of Income Tax, that the judgement of the Supreme Court in ***CIT Vs. Bokara Steel Limited, 236 ITR 315***, was not applicable and therefore, qua interest received on the short term deposits, the Assessee had concealed and/or furnished inaccurate particulars of income.

9.2. Based on the aforesaid reasoning, as indicated at the outset, the conclusion was drawn in the penalty order, that there was a concealment of income, to the extent of Rs.10,47,34,449/- (Rs.10,12,37,470/- towards loss claimed and Rs.34,96,979/- towards interest).

9.3. Accordingly, penalty equivalent to 100% of tax on income concealed to the extent of Rs.3,66,57,057/- was levied.

10. The appellant carried the matter in appeal.

10.1. The CIT(A), as indicated above, allowed the appeal and deleted the penalty.

10.2. In so far as the aspect of furnishing of inaccurate particulars, qua, interest income was concerned, the CIT(A) came to the conclusion that it was a legal issue and therefore, addition had been made on legal grounds.

11. In so far as the other aspect was concerned, that the Assessee had wrongfully returned a loss, when, it had not commenced its business, CIT(A) relied upon the judgment of the Supreme Court in ***CIT Vs. Prithipal Singh, 249 ITR 670***, which, *inter alia* held that no penalty could be returned, if there was no taxable income or tax assessed for payment, during a particular year.

12. In other words, the Supreme Court, in that judgment, has held that question of evasion and consequent levy of penalty, would only arise, if at the end of the day, the Assessee was required to pay tax.

12.1. We may note here that the judgement in the case **Prithipal Singh's case**, no longer holds the field in view of subsequent judgements of the Supreme Court in the matter of : **CIT V. Unipol Chemicals Intermediates Ltd., [2012] 27 taxmann.com 87 (SC)**, and **CIT V. Gold Coin Health Food (P) Ltd., [2008] 304 ITR 308**.

12.2. Continuing with narration of facts, the Revenue being aggrieved, carried the matter in appeal to the Tribunal. The Tribunal vide the impugned judgement, dismissed the appeal preferred by the Revenue.

13. In support of the appeal, Mr. Narayanasamy contended that the view taken by the Tribunal was not sustainable for the following reasons:

13.1. That admittedly, it was a case of concealment of particulars of income and/or furnishing inaccurate particulars, in as much as, the Assessee had filed a loss return, even when, it had not commenced business and had not prepared a profit and loss account.

14. Learned counsel submitted that, it was only, when, the Assessee was confronted, that the said aspect emerged and that too, after a show cause notice was issued and during the course of scrutiny. As regards interest income, it was submitted that, since, it had no connection with business activity, it could have only been treated as income from other sources and not capitalised, as was sought to be done by the Assessee.

15. Therefore, Mr. Narayanasamy said that there was both

concealment of material particulars of income, as also an attempt on the part of the Assessee to furnish inaccurate particulars of income.

16. Mr.Vijaya Raghavan, on the other hand, submitted that while the Assessee had set up its business in the relevant previous year, it had not commenced commercial production. The learned counsel submitted that the date of setting up the business and commercial production were two different dates and, therefore, during this period, certain expenses were incurred, as also, income had been earned by the Assessee.

16.1. The learned counsel further submitted that the details of income earned and expenses incurred, were provided to the Assessing Officer, which formed part of the balance sheet, prepared as on 31.03.1998.

17.To be noted, while the learned counsel conceded that a profit and loss account had not been prepared, it was stressed that it was not a case where material particulars had not been furnished.

17.1. In so far as the interest income was concerned, according to Mr.Vijaya Raghvan, it was treated by the Revenue, as income from other sources, even while the Assessee continued to contend that it required to be capitalised and had, accordingly, been set off against

pre-operative expenses.

18. In sum, Mr.Vijaya Raghavan, submitted that whether or not interest income could be capitalised, was a debatable issue pivoted on the reading of the judgment of the Supreme Court rendered in : ***CIT Vs. Bokara Steel Limited, 236 ITR 315.***

18.1.Furthermore, learned counsel submitted that the loss returned, amounting to Rs.10,12,37,470/- factored in the interest earned equivalent to Rs.38.09 Lakhs.

18.2.The details with respect to these aspects according to Mr.Vijaya Raghavan were available, on record and, therefore, it was not a case where, relevant particulars were not furnished to the Assessing Officer.

19.In support of his submission, Mr.Vijaya Raghavan relied upon the judgment of the Supreme Court in ***Commissioner of Income Tax Vs. Reliance Petroproducts (P) Limited, (2010) 322 ITR 0158.***

20.We have heard the learned counsels for the parties and perused the record.

21. According to us, the charge levelled against the Assessee, which forms the basis of the penalty is pivoted on two grounds:

21.1. First, that the Assessee had filed a loss return in the sum of Rs.10,12,37,470/-, when, commercial production had not taken place and, consequently, profit and loss account had not been prepared.

21.2. Second, the manner in which interest receipt was treated by the Assessee. The Assessee had treated the interest received on short term deposits as business receipt, whereas, the Revenue was of the view that it ought to have been treated as income from other sources.

22. A perusal of the impugned judgment of the Tribunal would show that the Tribunal appears to have completely glossed over the first aspect of the matter, related to the loss returned by the Assessee amounting to Rs.10,12,37,470/- during the pre-production period.

23. Mr. Vijaya Raghavan, has contended, before us, that all material particulars were available on the record, which, if examined, would have demonstrated that even before the commercial production had been commenced the Assessee had already set up its business, and therefore, incurred not only expenses, but also earned income.

24.The learned counsel submits that it is well settled that expenses incurred after the business is set up, can be claimed as revenue expenditure.

24.1.For this purpose, the learned counsel relied upon the judgement of the Delhi High Court in ***Commissioner of Income Tax Vs. Samsung India Electronics Limited, (2013) 356 ITR 0354 (Delhi)*** and another judgement of the Delhi High Court in ***Commissioner of Income Tax Vs. ESPN Software India Private Limited, (2008) 301 ITR 368 (Delhi)***.

24.2.Therefore, it was submitted that this was a debatable issue, which, the Tribunal ought to have examined.

25.In so far as the treatment of interest income by the Revenue as income from other sources was concerned, it was clearly the stand of the Assessee that it was a debatable issue.

25.1.This aspect, as a matter of fact was accepted both, by the CIT(A) as well as by the Tribunal.

25.2.For the sake of convenience, the relevant paragraph from the impugned judgment is extracted herein below:

"4.In regard to the interest income we have noted that the assessee had made arrangement with Citibank, by

which the said bank subscribed to the debentures of the assessee company to the extent of Rs.12.20 crores at floating rate, but subject to the floor rate of 14.5%. The arrangement was subject to the conditions stipulated in clause V, which reads as under:- "The net proceeds received from the issue of debentures to the bank shall be utilized towards financing a part of the project expenses including procurement of equipment and software, office infrastructure and product promotion". The loan was guaranteed by Satyam Computer Services Ltd., a sister concern of the assessee, which also is a promoter of the assessee company. The assessee paid interest to the said bank. During the relevant assessment year the assessee also received interest. The assessee did reflect in the accounts the net amount of interest on debentures after setting off interest received on short term deposits under the caption: "net of interest on short term deposits Rs.38.09 lakhs.

5.It was submitted before us that interest payable exceeded the amount of interest received. The assessee treated it as income from business and as such it

was not offered for taxation. It was submitted before us that the assessee was under a bonafide belief that interest is exigible to tax under the head business only and since the amount of interest paid is more than the amount of interest received, there will be no taxable income on this count."

26. Having examined the record and the impugned judgement, we are of the view that the Tribunal's conclusion with regard to the treatment of interest income cannot be found fault with. The reason for the same is that not only was the issue debatable, but also there was no attempt to either conceal the particulars of the said income, or, to furnish inaccurate particulars as alleged or at all. That the issue is debatable is also apparent upon reading of the judgement in the matter of **Indian Oil Panipat Power consortium Limited, New Delhi V. Income Tax Officer, (2009) 315 ITR 255 (Delhi)**.

26.1. As would be evident from the aforesaid extract of the impugned judgement of the Tribunal and the balance sheet on record, that the Assessee had, in fact, clearly, adverted to the fact that it had set off the interest received on short term deposits against interest payable on debentures. Therefore, as rightly concluded by the Tribunal, no penalty could have been levied, in so far as this aspect of

the matter is concerned.

26.2. However, as regards, the loss returned by the Assessee is concerned, to our minds, that aspect of the matter needs re-examination by the Tribunal, as there is no discussion qua that aspect of the matter.

26.3. As to whether the Assessee was entitled to book losses, when commercial production had not commenced, though, business had been set up - was an issue, which had to be examined, in the light of the facts obtaining in the matter and the judgements on the point, including the judgements rendered in **CIT V. Samsung India Electronics Limited, (2013) 356 ITR 0354 (Delhi)** and **CIT V. ESPN Software India Private Limited, (2008) 301 ITR 368 (Delhi)**. The Tribunal should have held one way or the other as to whether, the issue was debatable; an aspect which has not been satisfactorily dealt with by the Tribunal.

27. The appeal, therefore, for the foregoing reasons, is partially allowed. The Tribunal, will re-examine, as to whether based on the loss returned by the Assessee, a conclusion could have been reached that there was concealment of particulars of income and/ or a case was made out that inaccurate particulars had been furnished by the Assessee, in the background of what is stated above.

28. Given the result and the facts of the case, parties will bear their own costs.

[R.S.A.,J.] [R.S.K.,J.]
13.03.2017

pri/gg
Speaking order / Non Speaking order

Index: Yes / No
Internet: Yes / No

To

The Income Tax Appellate Tribunal,
"C" Bench, Chennai.

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AND
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