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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
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\+ **ITA 597/2017**

PR. COMMISSIONER OF INCOME TAX-11 ..... Appellant
Through: Mr. Ashok K. Manchanda, Senior Standing Counsel with Mr. Raghvendra Singh, Advocate

Versus

INDIAN FARMERS & FERTILIZERS CO-OPERATIVE LTD. ... Respondent

Through: Mr. Vaibhav Kulkarni, Advocate

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE PRATHIBA M. SINGH

O R D E R
% **02.08.2017**

CM 27418/2017 (delay)

1. For the reasons stated in the application, the delay of 30 days in re-filing the appeal is condoned. The application is disposed of.

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2. This is an appeal filed by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act') against the order dated 19th September, 2016 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 2487/Del./2016 for the Assessment Year ('AY') 2010-2011.

3. Although, in the memorandum of appeal, the Revenue has urged as many

as 21 questions of law, only one question arises for consideration. The first and the central question pertains to the exercise of jurisdiction by the Principal Commissioner of Income Tax ('Pr CIT') under Section 263 of the Act by the order dated 29th March, 2016 restoring the assessment for the AY in question to the file of the Assessing Officer ('AO') for making a *de novo* assessment.

4. The Pr CIT sought to order a *de novo* assessment on two issues. One pertained to the tax credit claimed by the Respondent/Assessee in respect of the dividend income received by its branch in Oman from Fertilizer Company SAOC ('OMIFCO') under the laws of Oman. The other question concerned the capitalization of interest in terms of the proviso to Section 36 (1) (iii) of the Act.

5. The case of the Revenue is that the order of the AO, for the AY in question, was erroneous and prejudicial to the interest of the Revenue and, therefore, in terms of Section 263 of the Act and, more particularly, in view of the Explanation-2 inserted in the said provision with effect from 1st June, 2015, the Pr CIT was justified in passing the order dated 29th March, 2016 under Section 263 of the Act.

6. This Court has heard the submissions of Mr. Ashok K. Manchanda, learned Senior Standing Counsel for the Revenue and Mr. Vaibhav Kulkarni, learned counsel for the Respondent/Assessee and has perused the record.

7. As regards the issue concerning the Assessee having claimed tax credit on account of deemed dividend taxable in Oman, the categorical findings of the ITAT is that the Revenue had consistently permitted the Assessee to avail tax credit on the deemed dividend during AYs 2006-07 to 2009-10. The ITAT after going through the entire record came to the following conclusion that "in respect of the current assessment year i.e. AY 2010-11 which is the subject matter of revision and appeal before us the Assessing Officer has adopted the same view in consonance with the view adopted in the past years and for which detailed queries and inquiries were raised and conducted by the Assessing Officer." The ITAT perused the queries raised by the AO and the reply given thereto by the Assessee, in respect of the dividend income received from OMIFCO. Therefore, the contention of the Revenue that no adequate enquiries in respect of the above issue were made was held to be 'completely misplaced'.

8. Further, on this very issue, the finding of the ITAT in para 14.2 of the impugned order reads as under:

> "(a) That. detailed inquiries were made by the Assessing Officer at the time of the original assessment proceedings with regard to the tax credit on deemed dividend which would have been payable in Oman but for the exemption granted the assessee had filed detailed replies in response to the query which were duly considered by the Assessing Officer before allowing tax credit.
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> (b) That. such credit was allowed by the Revenue for all the earlier years i.e. A.Ys.2006- 07 to 2009·'10, therefore, we have no hesitation in holding that there was complete application of mind on the part of the Assessing Officer and that the Assessing Officer has adopted a view consistent with the preceding years and, therefore, the Assessing

> Officer having taken a plausible view after full application of mind, the view of the learned Pro CIT cannot substitute his view by assuming jurisdiction u/s.263 of the Act.”

9. The Court, therefore, is not prepared to accept the plea of the Revenue that in respect of the above issue, the Pr CIT was justified in exercising the power under Section 263 of the Act.

10. As regards the issue concerning the capitalization of interest, the Court finds again that the ITAT took note of the fact that detailed enquires were made by the AO in regard to the major additions to the fixed assets, capital work in progress, the manner in which the depreciation was claimed and the details of both secured as well as unsecured loans. The audited financial statements of the Assessee were also compiled, for the earlier AYs including the AY in question, and placed before the AO. The ITAT also took note of the Significant Accounting Policies in the Auditor’s Report and the synopsis filed before the AO. It is only after such an elaborate exercise that it was concluded by the ITAT in the impugned order as under:

> “16. We have carefully considered the submissions and arguments made by the learned counsel of the assessee as well as the learned CJT(O.R.) and heard both the parties at length. We find that the Assessing Officer had made detailed inquiries and examined the entire block of fixed assets. A brief note on capital work in progress was also filed and queries regarding the manner in which the depreciation was claimed was also raised. Further the assessee is following a settled accounting policy/principle for capitalization of expenses including interest expenses to both the fixed assets as well as capital work in progress. This method was forming part of the audited financial statements which were filed before the Assessing Officer as well. We also find that the free reserves were also more than sufficient to cover up the investment in fixed assets/capital work

in progress. Further the assessee society has generated sufficient internal cash flows to meet with the cost of fixed assets as well as capital work in progress. In spite of this fact the assessee has capitalized a sum of Rs.7.09 crores in the books of accounts. The learned Pr. CIT has also not disputed that the total investments were merely 10% of the interest-free funds available with the assessee society. We also find that a consistent view has taken by all the judicial authorities that in the event of availability of interest-free funds a presumption would be that investments would be out of interest assessee. In this respect, reliance was placed on the decision of the Bombay High Court in the case of ***CIT v. Reliance Utility and Power Ltd. 313 1TR340***.

16.1 In light of the above discussions as well as factual matrix, we have no hesitation in holding that the order passed by the learned Pr. CIT is bad in law for the following reasons: -

(a) That, as discussed above, detailed inquiries were made by the Assessing Officer with regard to the capitalization of interest to fixed assets as well as capital work in progress.

(b) That, even on the facts of the case the assessee had sufficient interest-free funds to meet with ·the capital expenditure and, therefore, following the ratio of the decision of the Hon'ble Bombay High Court in Reliance Utility and Power Ltd. (supra), no disallowance u/s.36(1)(iii) is called for.

(c) That, the assessee had already discharged its onus of proving non-diversion of funds borrowed for working capital towards capital work in progress and fixed assets by submitting a certificate of an independent statutory auditor and proved availability of own funds and internal accruals which was not rebutted by Ld. Pr.CIT."

11. Lastly, it was urged by Mr. Manchanda that the ITAT failed to note the changed position as a result of the insertion of Explanation-2 in Section 263 of the Act with effect from 1st June, 2015. However, on this aspect, the

ITAT has specifically held in para 17 of the impugned order as under:

> "17. Before concluding we would also like to deal with the recent insertion, of Explanation 2 to Section 263 of the Act. We have already held above that in respect of both the issues i.e. allowing credit of deemed taxes paid on dividend in Oman as well as capitalization of interest u/s 36 (1) (iii) detailed enquiries as well as verification have been made by the AO. Further it is also not the case of the Ld. Pr. CIT that the order is not in accordance with any instruction direction issued by the Board or is not in accordance with any decision of Hon'ble Delhi High Court or the Apex Court of India. Accordingly the order passed by the AO cannot be regarded as deemed to be erroneous or prejudicial to the interest of the Revenue under Explanation 2 of the Act."

12. For the above reasons, this Court is of the considered view that no substantial question of law arises for consideration from the impugned order of the ITAT. The appeal is, accordingly, dismissed but in the circumstances, with no orders as to costs.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

AUGUST 02, 2017
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