

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

INCOME TAX APPEAL NO.488 OF 2016

Pr.Commissioner of Income Tax, Central-1. ... Appellant

V/s.

Spanco Ltd. ... Respondent

Mr.Suresh Kumar for the Appellant.

**CORAM : AKIL KURESHI AND
M.S.SANKLECHA, JJ.
DATE : NOVEMBER 26, 2018.**

P.C.:-

1. This appeal is filed by the Revenue challenging the judgment of income Tax Appellate Tribunal ("the Tribunal" for short) dated 9th September, 2015.

2. Following questions were argued before us :

"i. Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT is justified in deleting the addition of Rs.6,05,86,500/- representing the forfeiture of warrants u/s 28(iv) of the Act?

ii. Whether on the facts and circumstance of the case and in law, the Hon'ble ITAT is justified in

directing the Assessing Officer to recompute the average investments relying upon CIT(A)'s order for A.Yrs.2005-2006 and 2006-2007?”

3. During the course of arguments of the learned counsel for the Revenue we found that in the impugned judgment in the context of the first question, the Tribunal had referred to and relied upon its decision in case of Gracious Hospatality Limited. Learned counsel for the Revenue fairly brought to our notice the fact that such decision of the Tribunal was challenged by the Revenue before the High Court in Income Tax Appeal No.431 of 2016 and such appeal was dismissed by an order dated 21st August, 2018. Following observations were made:

“4. The Tribunal held that a remission of loan liability to the extent of Rs. 2,10,73,487/- is on capital account and not chargeable to tax. Mr. Suresh Kumar, the learned counsel appearing in support of this Appeal for Revenue fairly invites our attention to the latest judgment of the Hon'ble Supreme Court rendered in Commissioner v/s Mahindra and Maindra Limited in Civil Appeal Nos. 6949 to 6950 of 2004 and others decided on April 24, 2018.

5. The Hon'ble Supreme Court held that on a plain reading of Section 28 (iv) of the Income Tax Act, it appears that for the applicability of the said provision, the income which can be taxed shall arise from the business or profession. Also, in order to invoke this provision, the benefit which is received

has to be in some other form rather than in the shape of money. If that is because of the remission loan liability as in this case, then, this section would not be attracted. That is how the conclusions are summarized in paragraph 17 of the Supreme Court judgment.

6. We are of the firm view that the issue raised in this Appeal stands answered in favour of the Assessee and against the Revenue by this judgment. The Appeal is not raising any substantial question of law. Accordingly, it is dismissed. There will be no order as to costs.”

4. Under the circumstances, question No.1 is not required to be considered.

5. Second question pertains to the disallowance under section 14A of the Act read with Rule 8D of the Income Tax Rules, 1961. The facts on record would suggest that the assessee had made investments which yielded tax free dividend. In the opinion of the Assessing Officer, the expenditure in relation to investment which yielded such tax free income was required to be disallowed in terms of Section 14A r/w Section 8D of the Rules. The issue eventually reached the Tribunal. The Tribunal noted that in the earlier years the Commissioner (Appeals) and the Tribunal had come to the conclusion that no interest bearing funds were

utilized for making investments in the shares which resulted into tax free income. The Tribunal, therefore, directed the Assessing Officer to restrict the disallowance under Section 14A along the same line as was done in earlier assessment years.

6. Learned counsel for the Revenue strenuously argued that in the earlier assessment years, Rule 8D had no applicability. It was therefore, that the Tribunal had deleted the disallowance of interest expenditure. In the present case which pertains to the assessment year 2009-10, Rule 8D was applicable. The Tribunal, therefore, committed a serious error in ignoring such statutory provision.

7. It appears to be a consistent view of the CIT Appeals and the Tribunal in the earlier assessment years as well as the present one that the investment in shares was made by the assessee from its own funds and not from interest bearing borrowed funds. In this context, Division Bench of this Court in case of **Commissioner of Income-Tax Vs. HDFC Bank Limited**¹

¹ (2014)366 ITR 505(Bom)

has observed as under :

“We find that the facts of the present case are squarely covered by the judgment in the case of Reliance Utilities and Power Ltd.(supra). The finding of fact given by the Income-tax Appellate Tribunal in the present case is that the assessee's own funds and other non-interest bearing funds were more than the investment in the tax-free securities. This factual position is not one that is disputed. In the present case, undisputedly the assessee's capital, profit reserves, surplus and current account deposits were higher than the investment in the tax-free securities. In view of this factual position, as per the judgment of this court in the case of Reliance Utilities and Power Ltd. (supra), it would have to be presumed that the investment made by assessee would be out of the interest-free funds available with the assessee. We, therefore, are unable to agree with the submission of Mr.Suresh Kumar that the Tribunal had erred in dismissing the appeal of the Revenue on this ground. We do not find that question (A) gives rise to any substantial question of law and is therefore rejected.”

8. In view of such facts even the question No.2 is not required to be entertained. Learned counsel for the Revenue may be correct in pointing out that in the context of present case which concerns the assessment year 2009-10, Rule 8D was already brought in the statute. However, a pre-condition to applicability to Rule 8D is that as per Sub-section 2 of Section 14A, the

Assessing Officer having regard to the accounts of the assessee is not satisfied with the correctness of the claim of the assessee in respect of the expenditure in relation to income which does not form part of the total income under the Act. When we find that consistently it is a finding of the fact in case of assessee over a period of time that the assessee had own sufficient funds for making investments in shares, the disallowance of interest expenditure under Section 14A of the Act cannot be made. In the result, Tax Appeal dismissed.

(M.S.SANKLECHA,J.)

(AKIL KURESHI,J.)

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