

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

INCOME TAX APPEAL NO.1346 OF 2016

Shri Nandkishor Motilal Shah
Ramtanay, Shantishila Society, Erandavane,
Law College Road, Pune – 411004. Appellant

versus

The Commissioner of Income Tax, I
PMT Building, Shankarsheth Road,
Swargate, Pune – 411037. ... Respondent

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- Mr.V. Sridharan, Senior Counsel a/w Paras Savla a/w Mr.Ravi Sawana a/w S. Sriram i/b. Ashok Gade, Advocate for Appellant.
- Mr.Sham Walve, Advocate for Respondent.

**CORAM : AKIL KURESHI &
SARANG V. KOTWAL, JJ.
DATE : 13th MARCH, 2019.**

JUDGMENT : (PER : AKIL KURESHI, J.)

1. This Appeal is filed by the assessee to challenge the judgment of Income Tax Appellate Tribunal. Following questions are presented for our consideration;

“1. Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT erred by

confirming the action of the Ld. CTD(A) that the amount got forfeited during the course of carrying on of the business was capital expenditure and not allowable as Revenue Expenditure in the absence of any concrete asset acquired by the appellant ?

2. Whether on the facts and circumstances of the case and in law, the Hon'ble Tribunal erred in holding that it was capital expenditure without appreciating the legal position that when assessee incurs a liability under a contract (Abandoned project) or in pursuance of contract, no amount is receivable the assessee is entitled to claim said amount incurred as expeditious in implementing contract S. 37(1) r.w.s 28(1) ?”

2. Brief facts are as under;

The Appellant is an individual. The Appellant had filed the return of income for the year 2009-2010, in which the assessee had claimed deduction of a sum of Rs.90,00,000/-. This claim arises in following background;

3. The assessee had entered into an agreement titled as Memorandum Of Understanding dated 27/08/2008 with one

Sunshine Enterprises for purchase of Suzlon-made Windmill along with land on which the same was situated. This entire asset i.e. the land along with installed windmill thereon, was referred in the said MOU as the 'project'. We shall take note on various terms of this MOU at a later stage. For the time being sufficient to record that the total sale consideration agreed between the parties was Rs.5.71 Crores which comprised of Rs.50,000/- towards the land and rest towards the cost of windmill and its accessories and parts. The assessee had to make payment in the installments. In the meantime, the assessee was to be put in possession of the asset and would be able to generate the electricity from the same. No separate rental charges for this purpose were envisaged. This MOU contained clause (10) providing for cancellation of the contract and forfeiture for a sum of Rs.90,00,000/-, if the assessee did not make full payment towards purchase price as per the schedule.

4. After making initial payment of a sum of Rs.1 Crore, the assessee defaulted in making further payments, upon which the said MOU dated 27/08/2008 was cancelled. The parties

executed a further deed of cancellation of MOU on 28/02/2009. The seller forfeited the sum of Rs.90,00,000/- and returned the rest to the assessee. The assessee contended that the sum of Rs.90,00,000/- was his revenue loss. The Assessing Officer held that the loss was a capital loss. The Tribunal in the impugned judgment observed that the payment was made pursuant to the said MOU, which was by way of advance for acquisition of Windmill. The assessee entered into new business of generation of power. The advance was therefore in the nature of capital advance or capital investment. The loss in the present case did not arise during the course of business but from the investment in capital asset.

5. In background of such facts, Mr. V. Sridharan, the Counsel appearing for the Appellant raised following contentions;

- (i) The MOU in question was in nature of agreement to sale;
- (ii) The assessee was put in possession of the asset

pursuant to such MOU. No separate rent was charged from the assessee.

- (iii) The assessee had already commenced operation of generating power. In fact receipt from such activity was offered to tax. In such circumstances if as per the agreement, the title can be seen to have been vested in the assessee. The depreciation on such capital asset ought to have been granted, whether the assessee claimed it or not. The cancellation of MOU, can be seen as sale of capital asset, at which time by virtue of the provision for balancing allowance, adjustment towards written down value and the sale price would be adjusted. On the other had, if the agreement in question is seen as one under which the title has not passed to the assessee, the amount of Rs.90,00,000/- must be treated as rental charges, clearly a revenue expenditure.

6. In this context, the learned Counsel relied on following judgments -

(i) In the case of *Commissioner of Income-Tax Vs. Anjani Kumar Co. Ltd., reported in [2003] 259 ITR 114 (Raj.)*, in which Division Bench of Rajasthan High Court had examined a case where the assessee had written off a sum of Rs.52,489/- on account of advance made to agriculturist for purchase of land. The intention of the assessee was to acquire the land to set up a boiler factory. This however did not materialize and the agriculturist refused to return the amount. When the assessee claimed such amount by writing it off in the books of accounts, the Assessing Officer rejected the claim, the Tribunal allowed the claim of the assessee on the ground that since a new project had never matured, the expenditure was in the nature of revenue expenditure. The High Court confirmed the view of tribunal.

(ii) In case of *I. B. M. World Trace Corporation Vs. Commissioner of Income-Tax, reported in*

[1990] 186 ITR 412 (Bom.), in which Division Bench of Bombay High Court considered a case where the assessee had entered into an agreement with one person, who undertook to construct the factory and lease it to the assessee. To facilitate such construction, the assessee had advanced a sum of Rs.1,08,088/- to the landlord. In the meantime, the person undertaking the construction went bankrupt and the assessee lost the entire advance and claimed it as a business loss. The High Court allowed the claim of the assessee on the ground that the lease would not give advantage of enduring nature and in any case what is to be seen is, whether the advantage of enduring nature is in the capital field.

(iii) Reference was made to the decision of Supreme Court in the case of ***Commissioner of Income-tax Vs. Mahalaxmi Textile Mills Ltd.*** reported in **[1967] 66 ITR 710 (SC)**, to contend that if a claim of the assessee can be granted under a provision different from one on which such a claim is made, the same should be allowed.

7. We may first summarize the relevant facts. The assessee desired to start a new business of generation of power through windmill. For such purpose, the assessee entered into an agreement with the seller for acquiring a windmill plant situated on a plot of land. For such purpose, assessee would pay a total sum of Rs.5.71 Crores. This agreement envisaged a payment schedule, under which assessee would pay a sum of Rs.30,00,000/- immediately on execution of the agreement and the balance in installments as provided in the agreement. The assessee would pay interest at the rate of 14% per annum on the outstanding balance. In case assessee failed to make such payment, the contract would be terminated and as per clause (10) of the agreement, the seller would forfeit a sum of Rs.90,00,000/- out of the payment already made by the assessee. This clause (10) of the agreement reads as under;

“10. It is expressly agreed between the parties that payment terms are the essence of contract. In case of any failure to pay the agreed amount within the agreed time, the party of the FIRST PART has a right to

withdraw / cancel the contract and in such event, the party of the FIRST PART shall be entitled to forfeit an amount of Rs.90 Lacs [Rs. Ninety Lacs Only] and the balance amount, out of total payments received from the party of the SECOND PART, shall be refunded to the party of SECOND PART within one month of withdrawal / cancellation of the contract, with no interest / other costs. The party of the FIRST PART may condone any delay in the payments made by the party of the SECOND PART and in that case, the party of the SECOND PART shall pay to the party of the FIRST PART interest @ 14 % p.a. on the amount paid after the due date for the period for which the payment is delayed.”

8. Other relevant terms of the said agreement are as follows;

“14. The party of the SECOND PART will bear the stamp duty expenses as well as all other expenses related to the transfer of the project.

15. The party of the FIRST PART shall sign all the documents required to transfer The Project in the name of the party of the SECOND PART on receipt of the initial payment of 30 Lacs as mentioned above.

16. *The party of the FIRST PART shall hand over all the original documents in his possession related to The Project to the party of the SECOND PART on receipt of the full and final payment.*

17. *The party of the FIRST PART shall, on receipt of the final payment, put the party of the SECOND PART in possession of The Project and the party of the SECOND PART shall acknowledge having received the possession of The Project from the party of the FIRST PART.”*

9. The analysis of these terms would suggest that title of the property in question, was not to pass to the assessee till full payment. As per clause (14), the assessee would bear the stamp duty expenses and other related expenses for transfer of the project. In terms of clause (16), the first party would hand over all original documents relating to the project to the assessee 'on receipt of full and final payment'. As per the clause (17), the seller on receipt of such final payment, put the assessee in possession of the project and the assessee would acknowledge having received the possession from the seller. Thus, all these clauses envisaged the transfer of the title only

upon the full payment of the sale consideration as per the MOU. Even otherwise, title in the immovable property would not pass otherwise than under a registered document which is compulsorily registerable. It may be that the assessee was put in possession at the time of execution of the agreement and allowed the use of the project also. Clause (17) reiterates that the seller would put the assessee in possession upon payment of the final installment. This clause necessarily refers to the possession with ownership. Till then, the assessee can at best be seen as a permissive user.

10. Under such circumstances we are not required to consider the alternative scenario presented before us by the learned Counsel for the assessee, as to what will be the position if the title in the asset had passed on to the assessee. Even then, one would briefly comment on such hypothetical situation. In this case, in order to claim depreciation, the assessee must establish basic facts. Any such claim is necessarily based on facts and law. Whether the original owner in the meantime claimed

depreciation, when was the asset installed, when was the asset put to use are some of the factual aspects needed to be gathered before the claim of depreciation could have been granted. Such a claim is raised for the first time before us. The assessee cannot raise such a contention for the first time before the High Court, when no factual foundation was laid before the authorities below.

11. Proceeding now on the basis of our conclusion that the title in the property had never passed on to the assessee under the MOU, the question to be answered is whether the sum of Rs.90,00,000/- retained or forfeited by the seller can be treated as lease rental. The question has to be answered in the negative. Clause (10) of the agreement provides that in case of any failure to pay the agreed amount within the agreed time on the part of the assessee, the seller would withdraw or cancel the contract and in such event, the seller would be entitled to forfeit an amount of Rs.90,00,000/- and return the balance out of the sum already paid. The salient feature of this clause is that the sum of Rs.90,00,000/- to be retained by the seller is fixed irrespective of which installment the assessee failed to pay, for how long the

possession and use of the asset is retained by the assessee and under what circumstances the payment could not be made. Linking of sum of Rs.90,00,000/- to be retained by seller on account of default of payment by the assessee, to the lease rental charges, would be opposed to the forfeiture clause having no relation to the period for which such asset was put to use by the assessee. In a given case, the asset may remain with the assessee for only one month before the forfeiture clause may kick in and in a given case, the assessee may default in the last installment and till then continue to use the asset for generation of power. In either case, the forfeiture of the amount would remain the same i.e. Rs.90,00,000/-. Quite apart from this, clause (10) refers to forfeiture of the amount and not a lease rental, nor such intention can be gathered from any other clause contained in the MOU. The MOU was one integrated contract for sale of the asset and permissive user of the asset till payment of full installments. The lease rental if at all was embedded in the contract terms. There was no separate lease rental envisaged, none can be culled out from the terms of the contract.

12. The decision of this Court in case of *I. B. M. World Trace Corporation* (supra) was rendered in the background of the fact where the assessee had attempted to acquire a property on lease and in the process suffered loss. It was in this background the Court had held that the loss was of revenue nature. The Court was of the opinion that the lease for a particular period would not amount to advantage of enduring nature and even if it results into any advantage of enduring nature, same would not always result in capital outlay. This judgment is therefore clearly distinguishable. The decision of Rajasthan High Court in case of *Anjani Kumar Co. Ltd.* (supra) records brief reasons for dismissing the revenue's appeal against Income Tax Appellate Tribunal. It does not lay down any proposition in law, which can be applied in the present case. In any case, we have given our detailed reasons for arriving at our conclusions in law.

13. In the result, the Income Tax Appeal is dismissed.

(SARANG V. KOTWAL, J.)

(AKIL KURESHI, J.)