

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

Date of decision : 14.11.2019

1. ITA No.408 of 2006 (O&M)

Commissioner of Income Tax-I, Ludhiana

..... Appellant

versus

M/s Mukerian Papers Ltd., G.T. Road,
Dhandari Kalan, Ludhiana

..... Respondent

2. ITA No.301 of 2005 (O&M)

Commissioner of Income Tax-I, Ludhiana

..... Appellant

versus

M/s Mukerian Papers Ltd., GT Road,
Dhandari Kalan, Ludhiana

..... Respondent

**CORAM : HON'BLE MR.JUSTICE AJAY TEWARI
HON'BLE MRS.JUSTICE ALKA SARIN**

Present : Mr. Rajesh Katoch, Sr. Standing Counsel with
Ms. Pridhi Jaswinder Sandhu, Jr. Standing Counsel
for the appellant.

None for the respondent.

AJAY TEWARI, J. (Oral)

1. This order shall dispose of two appeals bearing ITA No.408 of 2006 (for the assessment year 1995-96) and ITA No.301 of 2005 (for the assessment year 1997-98), as according to learned counsel for the revenue, identical issues are involved therein.

2. In ITA No.408 of 2006 for the assessment year 1995-96, the Revenue raised the following substantial questions of law :-

(i) Whether on the facts and in the circumstances of the case, the Hon'ble Income Tax Appellate Tribunal was justified in deleting the addition of Rs.3,70,98,415/- on account of interest on borrowed funds paid for pre-operative period used for purchase of machinery by ignoring explanation 8 of section 43(1) ?

(ii) Whether on the facts and in the circumstances of the case, the Hon'ble Income Tax Appellate Tribunal was justified in allowing expenditure relating to the public issue of debentures u/s 37(1) of the I.T.Act by ignoring the fact that such expenditure is covered u/s 35D of the I.T.Act ?

3. In ITA No.301 of 2005 for the assessment year 1997-98, substantial questions of law, raised by the Revenue are as under :-

(i) Whether on the facts and in the circumstances of the case, the Hon'ble Income Tax Appellate Tribunal was justified in deleting the addition of Rs.2,43,90,432/- on account of interest on borrowed funds paid for pre-operative period used for purchase of machinery by ignoring explanation 8 of section 43(1) ?

(ii) Whether on the facts and in the circumstances of the case, the Hon'ble Income Tax Appellate Tribunal was justified in allowing expenditure relating to the public issue of debentures u/s 37(1) of the I.T.Act by ignoring the fact that such expenditure is covered u/s 35D of the I.T.Act ?

4. The first substantial question of law in both the above mentioned appeals has already been concluded by this Court on 06.08.2008 against the revenue in view of the judgment of Hon'ble Supreme Court in Deputy Commissioner of Income Tax Vs. Core Healthcare Ltd., and both the appeals were admitted in respect of the

second substantial question of law.

5. For brevity, the facts are being extracted from ITA No.408 of 2006 pertaining to the assessment year 1995-96. Briefly stated, the assessee company incurred an expenditure of Rs.1.65 crore on account of public issue of equity shares accompanied with the public issue of debentures. The assessee apportioned the total expenditure of Rs.1.65 crores between equity issue and debenture issue in proportion of the value. While the expenses in proportion to the equity capital were charged u/s 35D of the Income Tax Act, 1961 and only 10% of such expenditure was claimed during the year, the entire expenses of Rs.78.88 lacs, relating to debenture issue, were claimed as revenue expenditure during the year. The Assessing Officer held that the expenses relating to the issue of debentures will also be governed by the provisions of section 35D of the Income Tax Act, 1961 (in short “the Act”) and only 10% of such expenses would be allowed during the year. Therefore out of the expenditure of Rs.78,88,250/- relating to the debenture issue , 10% amounting to Rs.7,88,825/- was allowed under the provisions of section 35D of the Act and the balance amount of Rs.70,99,425/- was disallowed by the Assessing Officer.

6. Feeling aggrieved by the order of the Assessing Officer, the assessee filed appeal before the Commissioner of Income Tax(Appeals), who in view of the judgment of the Hon’ble Supreme Court in India Cements Ltd. Vs. CIT (60 ITR 52) and one C.B.D.T’s Circular No.56, held that the expenditure relatable to the public issues of non-convertible debentures qualifies for deduction u/s 37 of the Act and the Assessing Officer was directed to allow such deduction. The Commissioner of

Income Tax(Appeals) further held that the deduction u/s 37 of the Act should be allowed only in respect of such expenditure which is clearly related to the issue of non-convertible debentures and for the specific purpose of examining this, the issue was restored to the file of the A.O. for reconsideration.

7. Feeling aggrieved by the order of the CIT(A), the revenue filed appeal before the Income Tax Appellate Tribunal, challenging the order of the CIT(A) wherein it was held that the expenditure on public issue of non-convertible debentures is admissible u/s 37 of the Act as against the order of the AO considering such expenditure to be allowable u/s 35D of the Act. The assessee also challenged the order of the CIT(A) of restoring the issue to the AO with direction to verify the claim. However, the order of the CIT(A), of restoring the matter to the AO for limited purpose of verifying the assessee's claim of expenses relating to the debentures issue, was set aside by the ITAT holding that there was no dispute regarding the quantum of expenditure pertaining to non-convertible debentures and the issue was only with regard to the allowability of the expenditure under section 37 of the I.T.Act, 1961 against under section 35 of the Act as allowed by the AO.

8. As regards the finding of the CIT(A) that the expenditure relatable to public issue of non-convertible debentures is to be allowed as deduction u/s 37 of the Act, the said finding was upheld by the ITAT. While affirming the finding of the CIT(A), the ITAT, in Para 5 of its order, has recorded as under :-

“5. We have given our careful thoughts to the rival submissions made before us and have perused the orders of

the tax authorities and the material available on record as also various case law cited before us as well as before the CIT(A). In this case, the AO has equated non-convertible debentures with the public issue of equity shares and allowed deduction u/s 35D, whereas the case law relied upon by the assessee in the case of India Cements Ltd. and Modi Industries (supra) specifically covers the issue under consideration, as the apex court in India Cement vs. CIT has held that obtaining capital by issue of shares is different from obtaining loan by debentures and the Delhi High Court in the case of Modi Industries (supra) has also held that the expenditure for debentures issue for raising funds was to be allowed as revenue expenditure as unity of control was with the same management and the new unit was the expansion/extension of the business and not a new business. Apart from this, we have also paid our attention to the Board's circular No.56 which also supports the plea of the assessee. We therefore, considering the case law and the circular of the Board are of the view that the expenditure relatable to public issue of non-convertible debentures is to be allowed as a deduction u/s 37 as the same is clearly laid down for the purpose of business and the CIT(A) was justified in deleting the findings of the AO in this regard and, therefore, do not find any merit in the ground of revenue for both the assessment years, i.e., 1995-96 and 1996-97 in this regard and reject the same."

9. We have heard counsel for the revenue, whose contention is that the judgments of the Hon'ble Supreme Court in India Cements Ltd. Vs. Commissioner of Income Tax, [(1966) 60 ITR 0052] and of Commissioner of Income Tax Vs. Modi Industries, [(1993) 200 ITR 0341] pertain to the assessment years 1950-51 and 1965-66, respectively whereas section 35D was inserted in the Income Tax Act, 1961 with

effect from 01.04.1971 and was applicable from assessment year 1971-72 onwards and therefore had rightly been applied by the AO in the present case which pertained to assessment year 1995-96. The Ld. Counsel for the revenue further argued that the expenses which come under the ambit of specific provisions of section 35D of the Act cannot be allowed under the residuary provisions of section 37 of the Act. But the counsel for the revenue was unable to point out any perversity in the Central Board of Direct Taxes's Circular No.56 dated 19.03.1971, (date inadvertently mentioned as 19.03.1997 by the CIT(A) and ITAT) which was relied upon by the CIT(A) and the ITAT, and contains Explanatory Notes on various sections of Income Tax Act, 1961, including section 35D of the Act. Para 45 of the Circular, clearly addresses the issue, as under :-

“ 45. It may be noted that the provisions for amortization is not intended to supersede any other provision in the income-tax law under which the expenditure is allowable as a deduction against profits. For instance, where a company which is already in business, incurs expenditure on issue of debentures, and such expenditure is admissible as a deduction against profits of the year in which it is incurred by virtue of the decision of the Supreme Court in the case of India Cements Ltd. V. CIT (SC) [1966] 60 ITR 52, s. 35D will not have the effect of bringing that expenditure within the scope of the expenditure to be amortized against profits over a 10-year period. As a corollary to this, where any expenditure has been included for the purpose of amortization under s. 35D on a claim being made by the assessee in that behalf, such expenditure will not qualify for deduction under any other provision of the Act for the same or any other assessment year vide sub-s. (6) of s. 35D.”

10. The Ld. Counsel for the revenue could not point out any illegality or perversity in the above mentioned C.B.D.T's Circular and the reliance thereon by the appellate authorities below, which may warrant interference by this Court. No question of law much less a substantial question of law arises in these appeals.

11. Consequently, finding no merit in the appeals, the same are hereby dismissed.

12. Since the main cases have been decided, the pending Civil Misc. Applications, if any, also stand disposed of.

(AJAY TEWARI)
JUDGE

(ALKA SARIN)
JUDGE

14.11.2019

pooja sharma-I

Whether speaking/reasoned

Yes/No

Whether Reportable :

Yes/No